Ms Anne Pearson
Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

22 May 2017

Lodged online

Dear Ms Pearson,

RE: RPR0006 - Review of regulatory arrangements for embedded networks

SACOSS and the signatories thank the AEMC for their consultation paper for the review of regulatory arrangements for embedded networks.

We note that the consultation paper poses a number of questions related to the current regulatory framework. Prior to outlining in more detail our response to these questions (Attachment 1), we would like to make high level comment on the overarching question of whether the overall regulatory framework for embedded networks is fit for purpose.

As SACOSS and the signatories have identified through past research and consultation, the current regulatory arrangements has some flaws that adversely impact on customers. In addressing these flaws, as well as taking account of recent technological and market developments, we believe that there are two valid options for the reform of regulatory arrangements for embedded networks:

1. Retain the existing two tired framework enabling registration/authorisation or exemption, with some modifications; or
2. Replace the existing framework.

SACOSS and the signatories consider that the existing framework has provided a high degree of flexibility and competition in products and services for embedded networks which has led to some valuable innovation and benefits to consumers – however, as the market has transformed the consumer protections are not currently balanced adequately with the competitive drivers. There are also significant residual issues with access to retail competition for significant portions of the market.

This submission builds on the SACOSS 2015 research report, *The Retail and Network Exemption Framework: Emerging Issues for Consumers* (Attachment 2)[1]. This report focussed on the growing concern with consumer protection arrangements for consumers in residential and caravan parks. Informed by this report, and further analysis of more recent trends, this submission largely considers how the existing framework could be modified to better protect the interests of customers (reform option 1) in response to a number of the questions raised in the consultation paper.

However, through further consultation in the course of preparing this submission, we have also developed our thinking about whether it may be necessary to consider replacing the existing framework, rather than simply modifying it to address the issues identified. For reform option 2, SACOSS and the signatories have considered the views of a range of consumer advocates including the Alternative Technology Association, St Vincent de Paul and the Public Interest Advocacy Centre to posit the question of whether the NERL should be transformed from regulating the selling of energy to a person for premises to regulating continuous supply of energy.[2] We believe this is an important consideration for the Commission as part of the review of regulatory arrangements for embedded networks.

A key consideration is how the current framework can be applied to the new and emerging technologies, many of which were not envisaged at the time the framework was developed and which may be utilised in an embedded network. SACOSS and the signatories strongly believe that the emerging technologies call for a holistic and integrated approach to the question of whether the current framework is fit for purpose. As per the Commission's own comments, we support the view "that the consideration of energy specific consumer protections required in the context of market developments must take a broad view of the products and services offered in the electricity market."[3]

SACOSS and the signatories believe that reform option 2 is a necessary consideration given the extensive transformation occurring in the energy market. In particular, we agree with a number of our consumer colleagues in their genuine concerns about how for example embedded generation, microgrids and peer to peer trading will impact on the nature of protections that consumers in these situations will be able to access and whether these will be adequate. We also note the comments of St Vincent de Paul that it may be important to reconsider the definition of an embedded network and whether all consumers in these types of situations will be defined as exempt or not, given the technology transformation which is occurring.

SACOSS and the signatories concur with the Commission in its position on the requirement for development of an overall framework before determining the appropriate suite of consumer protections. As the Commission has explained, the question of whether the existing consumer protection framework continues to meet its objectives should be "irrespective of whether consumers receive their electricity supply behind the meter, an interconnected electricity system or via stand-alone systems…With combinations of distributed generation, storage and other technologies there may be no one identifiable "primary" supplier and no retailer."[4]

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[1] Please note that while the signatories to this submission endorse the submission in full (Attachment 1), they do not necessarily endorse the content of the two attached SACOSS reports in full (Attachment 2 & 3).

[2] See for example Alternative Technology Association (2016) Submission to COAG Energy Council Behind the Meter Consultation at http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Alternative%20Technologies%20Association%20-%20Response%20to%20consultation%20on%20behind%20the%20meter%20consumer%20protections.pdf

[3] AEMC (2016) Submission to COAG Energy Council Behind the Meter Consultation at http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Australian%20Energy%20Market%20Commission%20-%20Response%20to%20consultation%20on%20behind%20the%20meter%20consumer%20protections.pdf: p.1

[4] AEMC (2016) p. 2&5.

SACOSS and the signatories are keen to further explore these issues with the Commission through the consultation processes surrounding this review. Our representatives attended the Public Forum organised by the Commission, and we are keen for the Commission to consult further with consumer organisations in developing options for consideration in progressing the review.

Whichever reform option is adopted, SACOSS and the signatories believe that the guiding principles for consumer protections should include:

- The regulatory arrangements for exempt sellers should not necessarily diverge from those applying to authorised retailers;
- Exempt customers should, as far as practicable, be afforded the right to a choice of retailer in the same way as comparable retail customers in the same jurisdiction have that right;
- Exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under the Law and Rules;
- All EN consumers should have access to a free, independent and impartial dispute settlement mechanism;
- The relevant regulators have an ongoing responsibility to monitor, report and enforce compliance with the requirements of the AER, including the conditions of exemption; and
- The safety and security of supply to consumers in an EN must be a paramount consideration of the AER in granting an exemption.

Beneath these principles, a minimum level of consumer protections should apply to all small customers. These include:

- Explicit Informed Consent
- Access to concessions and payment difficulties measures
- Appropriate marketing rules and restrictions
- Availability of relevant and accessible communication
- Protection from harmful products.

We thank you in advance for consideration of our comments. If you have any questions relating to the submission, please contact Jo De Silva via jo@sacoss.org.au or 08 8305 4211.

Yours sincerely,

Ross Womersley
Chief Executive Officer

Gavin Dufty
Manager, Policy and Research
St Vincent de Paul Society Victoria

Iain Maitland
Energy Advocate
Ethnic Communities' Council of NSW

Gerard Brody
Chief Executive Officer
Consumer Action Law Centre

SACOSS and the signatories response to consultation paper questions[5]

Question 1: Does the two tiered framework of requiring either registration/authorisation or exemption remain fit for purpose?

The two tired framework has some benefits, but also some gaps in meeting consumer need in a changing energy landscape

In drawing this conclusion SACOSS and the signatories start from the position that the overall regulatory framework must be consistent with the national objectives, specifically the national electricity objective (NEO) and the National Energy Retail Objective (NERO). Both objectives emphasise that the regulatory framework must promote efficient operation and use of energy services in the long term interests of electricity (NEO) or energy consumers with respect to price, quality, safety, reliability and security of the supply of electricity/energy supply.

It is clear that the two national objectives apply to all energy consumers; they do not apply to just some, or a majority – they apply to all consumers. In addition, the Australian Energy Market Commission (AEMC) is specifically tasked under the National Energy Retail Law (NERL) to consider the application of consumer protections to small energy consumers and this too clearly applies to all small energy consumers. Simply because an energy consumer receives its energy supply from an on-seller and an embedded network operator (ENO), should not diminish the responsibility of the AEMC to ensure this requirement in the NERL is satisfied.

However, the NEO and NERO all point to fact that a decision by the AEMC, or the Australian Energy Regulator (AER), is always one of developing or applying regulation in a manner that is 'fit' for its purpose and balances between sometimes competing outcomes. For example, consideration of prices must be balanced with consideration of quality, safety, reliability and security of supply of energy (and vice versa). The benefits of regulation must be weighed against the cost of that regulation, including the costs of enforcing the regulation.

Importantly, with respect to the National Energy Retail Rules (NERR), and as highlighted by the AEMC in the Consultation Paper, the AEMC must, where relevant, be satisfied that a Rule in the National Energy Retail Rules (NERR):[6]

> …is compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers.

The AEMC further emphasises the importance of considering the compatibility of any recommendation with the application and development of consumer protections. In a recent publication on the interpretation of the energy objectives, the AEMC states:[7]

[5] Please note, in responding to these questions, we have cited examples from recent applications to the AER for an exemption. We have made a judgement that it is not appropriate to provide the details of the relevant applicants and third party service providers in this public submission but will provide those references separately to the AEMC on request.

[6] National Energy Retail Law section 236(2)(b). The relevance criteria refers to situations where the AEMC review or rule change relates to 'small customers' as defined in the Law and rules and jurisdictional regulations. In general, 'small customers' refers to residential customers and small business customers.

[7] AEMC, *Applying the energy objectives, a guide for stakeholders*, December, 2016, p. 8.

> For any changes to the NERR, understanding the compatibility of the recommendation with the application and development of consumer protections is just as important as establishing the implications for efficiency of the rule change. Consumer protections are an important factor in promoting and maintaining customer confidence in retail energy markets. Where consumers have confidence in a market they are more likely to engage in that market, which promotes efficient outcomes.

The AER is subject to a similar general obligation under the NERL. Section 205 states:

> The AER must, in performing or exercising an AER regulatory function or power, perform or exercise that function or power in a manner that will or is likely to contribute to the achievement of the national energy retail objective and where relevant, in a manner that is compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers.

It is reasonable, therefore, to assume that this interpretation also applies to the AEMC's assessment of the rules in the NERR that relate to on-selling in embedded networks. Similarly, the AEMC's interpretation is relevant to the AER including the Exempt Selling Guidelines that must be published by the AER[8] and that includes enforceable exemption conditions that apply to each individual or class of exemptions.[9]

The NERR requirements also suggest that the balance of efficiency and consumer protections may change over time as circumstances change and the risks of detriment to consumers arising from embedded network (EN) arrangements increases or decreases.

The licencing authorisation and exemption arrangements in the NERL (and NER) are one such matter.

Ten years ago, the two-tiered licencing arrangement of authorisation and exemption from authorisation (with set conditions) may have provided a satisfactory balance between the costs and complexity of the regulation of authorised retailers and the protection of energy consumers supplied in an EN.

The two-tiered licencing arrangement was also recognition of the historical fact that there were many relatively small long-established sites where the on-sale of energy was very much a secondary activity to the provision of services such as accommodation. On-selling provided a relatively low cost and convenient way of providing energy services to energy consumers that were located 'behind the parent meter'.

Since that time, however, there have been major changes in the energy market activity as highlighted in the AEMC's consultation paper. The number and size of on-seller activity has grown rapidly, particularly in the last few years with many more energy consumers impacted by the EN processes.

New business models have emerged including conversion of existing sites to embedded networks, the expansion of district/community level power purchase arrangements (PPAs) associated with new technologies (e.g. solar and batteries), and commercial arrangements established by large organisations such as owners/operators of multi-site retirement villages, shopping centres, and apartment complexes.

New parties have also entered the embedded network market, such as authorised retailers seeking exemptions, and third party service providers. These third party providers may not hold the exemption but

[8] NERL, s. 118 (1).
[9] NERL, s 112 (3) states that: "The AER may deal with a breach of a condition imposed under this section as if it were a breach of the Rules. "

receive their income from providing EN owners/body corporates and the like with metering, billing, collection and other related services. SACOSS and the signatories see evidence of increasing activity by these parties to promote their services, including promoting the conversion of multi-occupant apartments from their current individual arrangements with authorised retailers to an EN arrangement with bulk purchasing from an authorised retailer.

In the light of the rapid growth and structural changes in the EN market, the gap between the energy services and the consumer protections provided to EN small customers under the exemption framework, and those provided to small customers of authorised retailers, has become too significant to ignore (for more detail on the consumer protections provided to customers of authorised retailers see the SACOSS' report at Attachment 3).

There is also a growing policy imperative to expand competition throughout the energy supply chain in order to ensure provision of efficient services that are responsive to consumer needs. ENs challenge this imperative to the extent that they limit energy consumers access to the competitive retail market and the potential price and service options that a competitive market can deliver.

The AEMC's amendments to the NER delivered a framework that (from 1 December 2017) would, in theory, enable EN consumers to access the competitive retail market. However, the AEMC correctly recognised that reform of the NER was a necessary but not sufficient condition to achieve its competition objectives. Nor was it sufficient to address the consumer protection issues set out in the NERL and NERR and the issues confronting consumers located within community PPAs, and other new energy supply models.

Given these developments, this current broad review of the NERL, NER and related instruments is both timely and necessary.

In making our assessment, SACOSS and the signatories draw on our experience and deep concern with the current EN arrangements as they impact on vulnerable customers. These concerns were set out in SACOSS' 2015 report[10] on the experience of EN consumers in long-stay caravan parks.[11] While the study was limited in scope to caravan park residents, SACOSS and the signatories consider that many of the observations are relevant to the broader community of vulnerable customers located in an EN (particularly those with little or no choice in their accommodation arrangements).

Feedback from other consumer representative organisations indicates that many share similar concerns. The representatives have highlighted how vulnerable customers subject to housing affordability challenges and fixed incomes, are increasingly exposed to exploitation without effective consumer protection, despite the conditions set out in the current EN arrangements.

At the same time as highlighting the deficiencies in the current arrangements, SACOSS and the signatories also acknowledge that ENs have the potential to deliver benefit in terms of reduced costs of supply to

[10] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

[11] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

individual EN consumers, as well as the flexibility to adapt to new market options such as district energy supply options.[12]

SACOSS and the signatories believe it is therefore important, to achieve a regulatory outcome that ensures all consumers are treated equally, particularly with respect to consumer protections for small customers and effective access to retail competition, while still allowing for the benefits of belonging to an EN to be delivered where appropriate protections are in place

Benefits of the current framework

SACOSS and the signatories observe the following benefits – or potential benefits[13] - of the two-tiered regulatory framework for embedded networks:

- Lower cost and regulatory simplicity for on-sellers when selling energy is not their primary business, particularly providers of low cost housing arrangements;
- Potential cost savings for EN consumers, given that savings that can be made through bulk purchase arrangements, where these savings are passed through to consumers;
- Provides greater flexibility to the AER to adapt and apply the conditions in the guidelines to reflect the diverse and changing EN market;[14]
- Protects the wholesale energy market and distribution companies from the risks of default by small-scale sellers; [15]and
- Arguably, an active EN market creates a de facto competitive energy supply source for consumers that can put pricing pressure on authorised retailers (although it may also 'crowd out' smaller authorised retailers given the 'unequal' regulatory burden placed on them).

Gaps in the current framework in meeting consumer need

As mentioned above, it is apparent that gaps exist in meeting consumer need within the two-tiered framework. As the size and structure of the EN market expands, they are becoming more prominent and important. The gaps that SACOSS and the signatories have observed to date include a number of issues already identified in the SACOSS 2015 report[16], as well as other developments that SACOSS and the signatories have observed in the EN market including some preliminary analysis of recent exemption applications.

SACOSS and the signatories acknowledges that the AER has made significant improvements to the AER's Exempt Selling Guidelines[17] and in its examination of applications for exemption. These improvements have addressed in part some of the issues described below. However, the AER's scope to do so is still limited by the current framework as discussed in later sections of this submission.

[12] By district energy options, SACOSS is referring to the emergence of grid supply to a specified district or community alongside or as a back up to supply from a central renewable energy source, such as a centralised district solar/battery system

[13] As discussed in this submission, a concern is that the potential benefits may not be realised in practice due to the lack of regulatory oversight and enforcement.

[14] The AER's flexibility is subject to the NERL and NERR requirements such as the requirement for the AER to perform its functions in accordance with the policy principles, the exempt seller related factors, and the customer related factors (see NERL, s. 114) (1)(2). However, the AER may give such weight to these policy principles and factors as it considers appropriate (NERL, s. 114 (3)) which allows significant flexibility to the AER within the NERL framework..

[15] Authorised retailers are required to be registered with AEMO as market participants and to have an agreement with the relevant local distribution service provider along with the appropriate financial guarantees.

[16] SACOSS, The Retail and Network Exemption Framework: Emerging Issues for Consumers, December 2015

[17] AER, Exempt Selling Guideline, Version 4, March 2016

In summary, SACOSS and the signatories have identified the following gaps in the **current** two-tiered model:

- **There are different standards of service and consumer protection arrangements** for small customers under the exemption conditions, even when the exempt seller is selling to essentially the same type of small customer as the authorised retailer.
- **There is limited or no access to an effective, low cost unbiased dispute settlement process** in many instances. This gap is particularly problematic given the power imbalances between the seller and the EN customer that can occur in many situations, including renters.
- **The lack of information on EN arrangements and the conditions** associated with various exemptions for EN consumers to make informed decisions.
- **There is no requirement under the NERL for the AER to monitor or audit compliance with conditions of exemption or to publish performance reports**. Nor is there a requirement under the NERL for exempt sellers to establish monitoring and reporting systems, to provide information to the AER about their compliance with the exemption conditions or for the exempt seller to provide other relevant information to the AER.[18]
- **The apparent expansion of the role of third party service providers,** who are not a direct party to the exemption**,** in promoting embedded network models to various EN owners and body corporates. This raises new questions around the capacities of theses third parties, and the systems and processes they have in place to ensure compliance with exemption conditions. This includes compliance by the third party services provider with respect to their dispute management policies and hardship policies, disconnection procedures and so on.[19] SACOSS is seeking further information on the current performance of these third party service providers for vulnerable customers.[20]
- **There is also a potential conflict of interest** if a third party, whose income derives from the provision of EN services, also becomes the Embedded Network Manager (ENM) from 1 December 2017 responsible for facilitating customers who choose to transfer to an authorised retailer;
- **A related concern is the potential growth in 'brownfield conversions'** where consumers move from having direct relationships with an authorised retailer and access to the competitive retail market, to an EN situation. In particular, having converted to an off-market EN arrangement, there are substantial regulatory, financial and practical barriers to an EN consumer later seeking to revert to an on-market arrangement (outlined more below).[21] Brownfield conversions raise important questions such as:
    - To what extent has there been explicit informed consent (EIC) to the conversion to an EN? EIC is particularly important given these consumers may be giving up important consumer protections including comfort that their supplier's performance is being monitored by the regulatory authorities and the on-seller is passing on savings to EN customers;

[18] The NERL sets out these obligations compliance, reporting and auditing obligations for the AER with respect to 'regulated entities' and for these regulated entities to report to the AER. Regulated entities only include 'a retailer', or 'a distributor' or 'any other person identified in the Rules as a regulated entity.

[19] For example, in a recent application for exemption, the applicant noted, and considered sufficient compliance, that they relied on the dispute resolution process that was developed and operated by their 'nominated billing agent'. The billing agent will also 'facilitate access to hardship arrangements' (such as those available from the Queensland Government), but does not refer to a hardship policy.

[20] An on-line search (dated 15 May 2017) revealed a review of the nominated billing company that suggested receiving a notice that disconnection for non/delayed payment would be made in 3 days. There is no independent confirmation of the full circumstances of this complaint. However, it does point to the potential gap between conditions and practice, and the difficulties of tracing the policies and procedures of third parties and their compliance with the conditions. It also highlights the information asymmetry and the AER's difficulty under the current arrangements in ensuring compliance with the conditions in the absence of an ongoing reporting framework.

[21] For example, recent brownfield exemption applications suggest that an EN consumer wishing to revert back to an on-market EN customer would face costs of some $25,000 or more.

  - What happens for customers who choose not to be part of the newly created EN; will they face additional charges from the owner/body corporate?
  - How are the interests of tenants, who will have been on competitive on-market retail contracts, protected (noting that they may not benefit from any stated savings)?
  - There are no energy specific minimum contract terms establishing a contract between the on-seller and the EN consumer, unlike the requirements set out in the NERR for authorised retailers. For this reason, any proposed benefits such as price savings may not necessarily be sustained over time. As these customers will have, in practice, little opportunity to revert to an on-market contract, they cannot switch retailers as a response to any future price increases.[22]
  - Will the broader policy intent of developing competitive retail markets be placed at risk if the new EN business models expand further?
  - Will small authorised retailers be deterred from entering the market if a significant portion of the potential target market of small customers are 'locked' into EN arrangements?
- **Major property developers, owners and managers have received individual exemptions from authorisation.** These on-sellers have multiple customers and generally, conduct the same business model over multiple sites. In aggregate, these large scale on-sellers may have as many or more customers than a small authorised retailer without the same costs and obligations. Similarly, operators of multiple retirement villages such as Australian Unity and Lend Lease, have multiple sites that in total cover a substantial number of customers. Many of these organisations have, or are establishing, embedded networks for the supply of electricity and gas to their village occupants.
- **Authorised retailers may sell to embedded network customers under a market contract without applying for an exemption** and are therefore not subject to the conditions of exemption, and in particular, are not constrained to the exemption limitation that prices to EN customers must be no more than the standard retail price published by the area retailer.

SACOSS and the signatories are concerned that the likely impetus for many third party providers, body corporates and major property owners/managers seeking an exemption is likely to be the opportunity to profit directly or indirectly[23] from providing an EN service.[24] Should this be the main motivation, an EN may not prove to be in the long term interests of consumers, unless counterbalancing consumer protections are in place.

A number of modifications could be made to the current two-tiered regulatory framework to address the gaps in meeting consumer need

The two-tiered framework was not designed to cope with these new business models and new exempt service providers (including third party service providers). Despite the AER's capacity to modify the conditions of exemptions and the recent evidence that it is requiring more information and assurances from

[22] SACOSS is aware that the conditions limit the on-seller to charging no more than the standard price charged by the local area authorised retailer. However, the standard prices are significantly above most market prices and prior to the conversion to an EN, the customer would have the opportunity to take up these better market offers. For example, one exemption proposal suggests savings of some 25% - 35% compared to the "very best costs savings offered from retailers…". However, there is no commitment to future prices other than the claim that the price will "always ' be better than a retailer can offer.

[23] For instance, a property developer may consider it adds to the value of the property and/or reduces the costs of construction.

[24] SACOSS notes that in Queensland, body corporates are restricted from making a profit out of the provision of energy and water services. However, this does not seem to restrict the body corporate from using some of the value of bulk billing for provision of facilities to the site, which may be in the interests of owners but not renters. We are seeking clarification of this matter but note the comment from one Queensland applicant for exemption that "Body Corporates are not permitted to conduct a business enterprise for profit under the Body Corporate and Community Management Act (Qld).

applicants for exemption, SACOSS and the signatories believe at minimum there is substantial opportunity for further reform of the existing two-tiered framework to ensure it is more consistent with the intent of the NERO.

Recommendation 1[25]: The AEMC/AER investigate the option to establish a new category of exemption that would apply to exempt on-sellers (and embedded network operators) that have a substantial number of customers and/or a substantial number of sites in total. The underlying principle here is that the exempt seller has a customer base equivalent to a small retailer and should therefore be subject to the same obligations and consumer protection conditions as a retailer. Specifically:

- The new category of exemption would, therefore, go beyond the current individual exemption conditions and provide mandatory conditions that replicate the supply contract minimum terms, customer protection and performance reporting obligations that apply to authorised retailers. There would also be a requirement for ongoing transparency and accessibility of key compliance requirements such as the exempt sellers published hardship policy and dispute resolution process.
- However, the AER would still retain the authority to vary these conditions or add to them if individual circumstances warranted such a change. SACOSS and the signatories continue to value the flexibility inherent in the exemption framework and believe that this is a simpler approach than adopting a new category of retail authorisation. For instance, it is not appropriate that these large-scale exempt sellers are also required to be registered market participants or have direct contractual relationships with the local distribution service provider as part of the triangular relationship between authorised retailers, distribution businesses and the consumer.
- The new category of 'large scale exempt seller' could require:[26]
    a. A market retail contract be provided to exempt customers with terms that are modelled on the minimum requirements for a market retail contract under the NERL and NERR;[27]
    b. A standard term contract equivalent could be provided in jurisdictions which explicitly restrict access to retail competition;
    c. The relevant exempt sellers be given an explicit obligation to develop, publish and communicate to all existing and incoming participants a hardship plan that is approved by the AER - this obligation cannot be outsourced to a third party;
    d. The establishment of a performance and compliance monitoring and reporting system across all sites with an obligation for the large scale exempt sellers to provide a publically available report annually (or as determined by the AER) in a format similar to that required by authorised retailers;
    e. Large scale exempt sellers to have an obligation to provide further information on request by the AER on compliance with conditions and provide for audits conducted by the AER, similar to the obligations in the NERL for authorised retailers;
    f. Large scale exempt sellers to publish formal dispute resolution procedures equivalent to that required by an authorised retailer – this obligation cannot be outsourced to a third party;[28]

[25] A summary of all recommendations made in this submission is found on pages 33-35

[26] SACOSS recognizes that some of the market contract and standard contract terms would not be relevant, however, the detailed assessment of this is not possible within the current timeframes.

[27] Specifically, NERL,Division 4 s.34 and the corresponding elements in the NERR (e.g. Divisions 2,4,6,7, 8 and 9).

[28] As cited previously, SACOSS has noted that in a recent application for exemption, the applicant states that the dispute resolution procedures are provided by the third party service providers. This procedure is not public and it is not clear how the EN consumer or consumer advocate would be aware of the availability, cost and other elements of the process.

g. The disconnection (de-energisation) procedures in Part 6, Division 2 of the NERR to generally apply to exempt sellers and small customers, including disconnection warning notices, protected periods, reminder notices and the like;[29]
h. Where allowed, exempt sellers to become members of the jurisdictional ombudsman scheme. This is likely to require a special membership category under the various ombudsman schemes. If restricted to this particular new exemption category, the number of such members is unlikely to be overwhelming.

Recommendation 2: The NERL/NERR be amended to require the AER to collect information and produce an annual performance report for this new proposed category of large scale exempt sellers and include summary information on other relevant developments in the EN market. This will increase transparency and facilitate consumers becoming more aware of their rights and obligations, as well as improving incentives for compliance with the conditions of exemption.

Recommendation 3: The AER consider developing a reporting framework that provides both the AER and consumers with ongoing information on compliance with conditions by EN operators and exempt sellers, including 'spot' audits of compliance and public reporting of outcomes. This will also facilitate consumers becoming more aware of their rights and obligations. Associated with this, we encourage the AER to make more transparent access to information on approved exemptions and the conditions attached to these approvals.

Recommendation 4: The AEMC consider the policy implications of brownfield conversions and whether such conversions should be subject to more stringent conditions by the AER given the queries around EIC, the potential detriment, restriction of competition and long term constraints on reverting to an on-market consumer within an EN. SACOSS and its signatories note the particular issue in Queensland where following a brownfield conversion, the estimated cost of reverting to an on-market customer was approximately $25,000 per customer due to the rewiring requirements.

Recommendation 5: The AEMC, in conjunction with the AER, investigate the implications of the rapid development of third party service providers who are actively promoting the benefits of EN and their services to body corporates and the like. These third party providers are offering end-to-end services including provision of metering, meter reading, billing, management of complaints and information provision to the EN customers. While there are potential benefits in these arrangements, there are also risks around accountability for compliance and lack of transparency in processes, systems, disconnection policies, privacy controls and the like.

Recommendation 6: The AEMC consider the competition implications of a third party service provider becoming an embedded network manager given the possible conflict of interest between the two roles.

Recommendation 7: The AEMC/AER also consider establishing more formal requirements for the registrable class of EN sellers and EN operators in order that there is greater transparency for customers and regulators on the ongoing compliance with the conditions of exemption. This could include some low cost and standardised form of annual reporting to the AER and the publication of these reports on the AER's web-site. Penalties would apply for failure to report or false reporting.

[29] The current conditions require only limited notice before disconnection (6 days). This may be appropriate in small EN settings given the cash flow implications of outstanding debt but where large scale embedded networks and sellers are seeking exemptions, then disconnection procedures that apply to authorized retailers are more appropriate.

Recommendation 8: The AEMC investigate whether additional rule changes are required to address the emerging gap where authorised retailers can sell to EN or 'behind the meter' customers, without the constraints imposed by the exemption framework on the maximum price charged. Note: SACOSS and the signatories have only recently become aware of this issue and would welcome further discussion with the AER and AEMC on this matter.

Finally, SACOSS and the signatories note that in making these recommendations, we have not investigated the detailed amendments to the NERL and NER that would be required to implement them. However, it is clear that it would involve changes to the NERL and the NEL as, for instance, both these instruments set out the exemption categories for retail exemptions and for network service provider exemptions. There would be consequential amendments to the NERR and NER that also flow from these changes in categories and AER reporting requirements.

Question 2: Does the exemption framework remain fit for purpose?

There is a risk within the current exemption framework that customers may not receive the benefits of being in an embedded network, while still carrying the costs of reduced consumer protections and limited access to retail competition

The intent of the exemption categories was to provide a relatively low cost registration and compliance process for on-sellers and EN operators, while requiring a minimum standard of consumer protections. Thus, the framework provided an opportunity for both exempt suppliers and exempt customers to enjoy savings in infrastructure and energy costs while reducing the risks for consumers of being outside the 'standard' regulatory requirements. Recent changes to the NER around metering and the requirement to appoint an ENM (and the associated obligations set out by AEMO for an ENM) may change the allocation of risks in this relationship. However, they also (at least in theory) reduce the risk for the EN customers by providing greater access to the competitive retail market.

As SACOSS and the signatories have highlighted above, with the right regulatory arrangements in place consumers may continue to both benefit from a two tired regulatory framework, without losing key consumer protections. However, under the current arrangements, there is a very real and growing risk that many EN consumers may not reap the full benefits of potential savings in energy prices by being a consumer in an EN. Instead, SACOSS and the signatories are concerned that there is a growing trend for exempt sellers and EN operators to see the EN market as an opportunity for additional profit, albeit selling energy is still not their 'primary' business.

This largely stems from the fact that the exemption conditions only require the exempt seller to charge no more than the standard retail price published by the local area retailer. Under this arrangement, there is significant opportunity for the exempt seller to capture the difference between the negotiated bulk purchase price and the price it sells to the EN customer. Moreover, in the case of brownfield conversions at least, these EN customers may well have had to pay for the cost of conversion through various fees or body corporate charges.

This may result in a significant net loss in efficiency as consumers experience both a reduction in their consumer protections and incur the additional costs (through fees/charges) of implementing an EN, while not receiving the counter balancing benefits of lower energy prices compared to retail market offers.

Further, while there may be significant cost savings to the EN customer at one point in time (such as the beginning of the arrangement), there is no guarantee that this saving relative to retail market offers will be sustained. Rather the price may creep up over time to the cap of the retail standard price, usually considerably higher than the available market prices. If this was to occur the customer would be left without both the costs savings associated with being part of an EN, and the consumer protections and access to competitive retail market that a retail offer would provide. Given that it may be difficult for a customer to simply revert back to a retail offer (see response to consultation questions 4 & 5), there may be little incentive for the EN owner/operator to keep prices lower than the standard price over the longer term. The absence of standardised energy supply contract terms (similar to the minimum terms set out in the NERR) between the exempt seller and the EN consumer exacerbates this risk to the consumer.

The discussions above illustrate that there is a significant increase in the overall exposure of EN customers to risks, particularly as the market extends to entities that are more likely to be driven by profit maximising motives. Other concerning risks that SACOSS and the signatories have identified include:

- The AER has no formal requirements to actively monitor the performance of exempt sellers and EN operators, nor do the exempt sellers and EN operators have formal requirements to monitor and report to the AER on performance and compliance with the conditions of exemption. Without these requirements, the AER has very limited enforcement capacities even though there are civil penalties attached to non-compliance with the conditions of exemption. This may reduce confidence of consumers in the market over the longer term.
- The information provision requirements placed on exempt sellers are also not as significant as those placed on authorised retailers. This limits the ability for consumers to compare their embedded network energy arrangements with retail offers, as well as their ability to achieve explicit informed consent in making changes to their arrangements.
- More generally, the multiple barriers to accessing retail competition allow for inefficient monopoly behaviour to emerge by the on-sellers, exacerbated by the information asymmetry and the relative gaps in the commercial power between the on-seller and the exempt customers. Vulnerable EN customers (financial/housing /medical) are in a particularly difficult position. Vulnerable customers often have little negotiating power in the relationship and limited information on how to identify and remedy issues of non-compliance. They are, therefore, at even greater risk of being poorly serviced by either the exempt seller or the third party service provider. Renters may also be exposed to greater risks as they are not party to the agreements between the overall site owner/body corporate and the owners of the individual apartment.
- In the absence of a formal and transparent dispute settlement process (including access to an Ombudsman Scheme), and given relative asymmetry of information between the exempt seller and the EN customers, the risks of non-compliance by the exempt seller fall largely on the EN customer.
- The growth in the EN market itself increases the risk of 'crowding out' the opportunity for entry of authorised retailers into the energy market leading to a diminution of retail competition generally. It is notable that larger retailers are taking a position in this exempt market further challenging the overarching principle of enhancing efficiency through retail market competition.
- There is a significant potential risk for EN customers that 'costs' are recovered by the exempt seller or the EN operator in other ways, for example, through general lease charges, 'facility charges' or 'fixed (unspecified) charges. While the NER states that internal network charges are 'generally not permitted' there remains the potential for the suppliers to recover these costs in other charges that are not transparently linked to energy use (see SACOSS 2015 report at Attachment 2).
- In a growing number of sites, the metering, meter reading, billing, disconnection, hardship and dispute handling policies are controlled by third party service providers, unseen and unregulated by the regulator. The lack of transparency in these arrangements and the lack of clarity on the contractual chain may add further risks to EN customers.
- There is minimal incentive for an exempt seller or an embedded network operator to innovate in terms of products, services or infrastructure (such as metering). There is an open question, for instance, as to whether an on-seller would introduce cost-reflective pricing structures (TOU, peak demand) even if they

are charged at the parent meter, as this would require investment in interval type meters and more complex billing arrangements.

- Further consideration is required as to whether the EN framework encourages or hinders efficiency improvements and the installation of PV systems, battery storage and the like.

Modifications to the current exemption framework have the potential to address many of the risks to consumer within the current framework

As discussed in response to consultation Q1, the exemption framework provides a number of potential benefits to EN consumers including lower energy prices for these customers. It also provides more flexibility than the retail authorisation process and allows the AER to adapt the exemption conditions to the particular circumstances. As such, we have suggested that there may be value in continuing the overall two-tiered framework but with some modification to address the flaws and risks identified in a changing energy landscape. Potential modifications include:

- The inclusion of a new category of large scale exempt sellers/EN operators. For this new category of exemption, the customer protection obligations and the monitoring and reporting obligations would be closely aligned with those imposed on authorised retailers. This will ensure that a significant number of exempt customers are more fully protected under the exemption framework in line with the objectives of providing equivalent consumer protections.
- Modified consumer protection and reporting obligations could be extended to other categories of exemption (individual and registrable exemption categories) as determined by the AER, taking into account the costs and benefits of these requirements. With respect to this assessment, SACOSS and the signatories note again that the NERL and NERR require that the AER and AEMC must act in a manner that is 'compatible with the development and application of consumer protections for small customers'. The preferences of exempt sellers for simple low cost arrangements should not trump this obligation.
- The removal of the 'deemed exemption" category. We question the need for the exemption framework to continue to include this category at least in its current form and believe there may be better ways to manage embedded customer risks than including this category as part of the licencing framework arrangements. SACOSS and the signatories have some concern that the 'deemed' category of network and retail exemptions serves little practical purpose. The exempt service providers not only 'self select', they have no obligation to register with the AER, and the AER has no knowledge of where these places are and how many sellers and consumers may be included in this category. As such, issues of compliance with the conditions of exemption will only arise if an exempt customer has sufficient knowledge to raise questions with the AER. The AER's role is, therefore, purely reactive rather than proactive and it is not clear what actions the AER could take even if it became aware of some action of non-compliance with the conditions of a deemed exemption. Can it revoke an exemption for a party that is not registered with it; can it impose penalties on the party? Absent further clarification on these issues, SACOSS and the signatories consider that this category of exempt supplier customer may be better managed through other regulatory arrangements, such as expanded obligations under existing Tenancy Law, Retirement Village Law, Permanent caravan park law (as relevant to each state).

In making these and possibly other modifications, SACOSS and the signatories emphasise that the framework should seek to meet a number of objectives:

- Ensure that EN customers have access to the range of consumer protections available to customers of authorised retailers. This is a fundamental objective that is reflected in the NERL and NERR and is essential to retaining the confidence of consumers in the market. The larger the scale of the exempt seller's operation (s), the more important it is that the consumer protection obligations reflect the consumer protection obligations set out in the laws and rules for authorised retailers.
- Improving access to retail competition also remains a valid objective as the 'threat' of competition provides a discipline on exempt sellers to continue to maintain lower prices and improve the quality and relevance of their services to the consumer. The AER's assessment of applications for brownfield conversions must take particular note of this objective as the potential exempt customers are in practice giving up a 'right' of ready access to competitive offers and improved service packages.
- Ensure ongoing compliance by the EN operator or exempt seller with the exemption conditions set by the AER. At this stage, the AER does not have the necessary resources or powers to establish an effective monitoring, reporting and penalty regime for exempt EN operators and exempt sellers. Until it does, the EN consumers will continue to be at risk relative to customers of authorised retailers (see above).Ensuring compliance with the conditions in turn requires some form of obligations on both the AER and the exempt seller (and the EN operator) to monitor and report on compliance with conditions and to promote greater transparency and enhanced information provision to EN consumers on both the exemption conditions and the performance outcomes of exempt sellers.

Recommendation 9: The AEMC investigate whether there is any benefit in continuing with the 'deemed' category of exemption given that the AER has no way of knowing if, where and how many sites fall within that category. The customer protection obligations may be more effectively captured in other regulatory instruments.

Recommendation 10: The AEMC include a new objective for the exemption framework, namely the objective of ensuring compliance with the conditions of exemption through an effective monitoring and reporting framework and consistent application of the civil penalty regime for non-compliance with conditions.

The AER has not been provided with the appropriate powers and functions in relation to the granting of exemptions

SACOSS and the signatories conclude that the AER has not been provided with the appropriate powers and functions in relation to the granting of exemptions, particularly for embedded network exemptions approved under the NEL. The NEL does not provide the AER with the power to impose civil penalties for non-compliance with conditions and does not set out the principles and factors that guide the AER in approving an exemption.

Another key gap that applies to both the NEL and the NERL is the absence of any obligations on either the AER or the exempt EN operators or exempt seller to develop and maintain performance monitoring and reporting systems. There is also no explicit power provided to the AER to require exempt operators and sellers to provide the AER with relevant information.

SACOSS and the signatories have highlighted above, a number of areas where we consider that the AER requires additional powers and functions to ensure that the potential benefits of EN are realised, while the detriments to the customer protections and access to retail competition for small customers are minimised.

Our examination of the AER's recent responses to applicants for exemption indicates that the AER is using the guideline framework to obtain more information from applicants on issues such as evidence of obtaining explicit informed consent (for brownfield conversions), evidence of suitable hardship and dispute management policies, accountability for compliance between the exempt party and third party service providers, and so on. This is a significant development by the AER and is strongly supported by SACOSS and the signatories.

More specific comments are set out below. SACOSS and the signatories emphasise that these are preliminary observations and we look forward to further discussions on these issues over the course of the AEMC's review.

The NEL sets out very high level requirements for issuing an exemption for an EN operator. The NEL does not set out principles to guide the AER in granting an exemption to a network operator. Nor does the NEL provide for the AER to impose civil penalties for non-compliance with the exemption conditions. Thus, although the AER's Network Exemption Guideline includes exemption conditions that parallel obligations of a network service provider, there is little capacity for the AER to monitor or enforce these conditions other than revocation of the exemption. For example, the NEL does not provide for the AER to issue civil penalties to an exempt network operator for non-compliance with the conditions of the exemptions. Nor does the NEL require the EN operator to provide ongoing information or performance data to the AER, irrespective of the size of the EN operator or the number of sites it operates at.

The NERL provides more specific direction to the AER. That is, the NERL sets out some basic policy principles that the AER must take into account in exercising its power in relation to its exempt selling regulatory function.[30] The NERL also sets out a number of 'exempt seller related factors'[31] and 'consumer related factors'[32] that the AER may take into account in approving an application for a retail exemption. The NERL empowers the AER to prepare a Guideline and to apply a range of civil penalties for non-compliance with the conditions of the exemption.

However, the NERL does not authorise the AER to audit exempt sellers or to monitor and report on their performance. Nor does it place an obligation on exempt sellers to develop and maintain performance data and to provide relevant performance and compliance data to the AER. These are all important requirements with respect to authorised retailers. The absence of such obligations in the exempt seller legislation is a major gap in the effective protection of current and future EN customers.

While the AER has the power to revoke an exempt seller's exemption and an EN operator's exemption, it is not clear under the current legislative framework what happens to the EN consumers following a revocation. SACOSS and the signatories consider that as this exemption market expands some consideration should be given to how these EN customers are guaranteed continuation of supply. A similar situation may arise if the EN operator or the exempt seller defaults on their payments to an authorised retailer and is disconnected from supply by the retailer. A possible solution is that the authorised retailer becomes the default exempt seller and/or EN operator; however, this raises further questions on allocation of costs and the legal nature of the relationship between the authorised retailer and the EN customer.

[30] NERL, s. 114 (1) .
[31] NERL, s.s. 114(2)(a) and 115
[32] NERL, s.s. 114(2)(b) and 116.

Overall, therefore, SACOSS and the signatories consider it is appropriate that the NEL is amended to better align with the NERL in terms of setting out policy principles that the AER must take into account in granting an exemption, and the exempt seller and consumer factors that may also influence the AER's decisions. Similarly, the NEL/NER should be amended to provide for the AER to impose civil penalties for non-compliance with the exemption conditions in an embedded network exemption.

In addition, it is essential for ongoing compliance, and for the continued confidence of EN customers that a monitoring and reporting framework is developed, and that this framework applies to both exempt networks and retailers. It is appropriate that the AER develop this framework and that the framework includes some degree of flexibility so that the AER can adapt the reporting requirements to the particular circumstances and customer types.

Given the growth in the EN market, it is also appropriate that the AEMC/AER consider what options are available in the event of default or non-compliance and revocation of exemption by the exempt seller or EN operator. The existing Retailer of last Resort (RoLR) in the energy laws does not seem appropriate to manage such a situation or to allocate responsibilities and possible costs.

The AEMC and AER will also need to consider whether this framework should include reporting requirements for third party service providers and for embedded network managers (post 1 December 2017). However, we note that AEMO has quite extensive powers with respect to the ENM under its accreditation and registration procedures.

Recommendation 11: The AER develop and implement a cost efficient monitoring, reporting and enforcement regime for both exempt sellers and EN operators to ensure consistent compliance with its exemption conditions and greater transparency for EN customers and their advocates.

Recommendation 12: The NEL (or NER) and the NERL is amended to include an obligation on all exempt network operators and exempt sellers to monitor and report on compliance with the conditions of exemption, the format and timing of which is at the discretion of the AER**.**

Recommendation 13: The AER be provided with the resources and legislative authority to conduct mandatory audits from time to time and acquire information from the exempt networks and retailers to ensure better compliance with the conditions of exemption and provide assurance to EN consumers.

Recommendation 14: The NEL and/or the NER be amended to include a set of policy principles that the AER must take into account when issuing an EN exemption. The NEL and/or the NER also include a range of 'exempt seller factors' and 'exempt consumer factors' (similar to those set out in the NERL) to guide the AER in granting an exemption.

Recommendation 15: The NEL is amended to allow the AER to impose civil penalties on EN operators that do not comply with the network exemption conditions and that parallel the penalty regime in the NERL.

Recommendation 16: The AEMC or AER investigate whether more formal registration requirements should be placed on third parties providing customer services on behalf of the registered exempt parties and, more generally, whether these third parties should be subject to civil penalties for non-compliance, or only the exempt seller or embedded network operator registered directly with the AER.

Recommendation 17: There is a need to develop more specific rules or procedures relating to the management of EN customers in the event that the EN operator or exempt seller has its exemption revoked and/or can no longer provide the services to these EN customers.

Recommendation 18: The AER be provided with the resources to develop an accessible data base that includes not only the list of exempt sellers and EN operators, but also the details of the relevant exemption conditions. This will provide greater transparency to the EN consumers on their rights and the exempt sellers or EN operator's obligations.

In addition to the above recommendations, SACOSS and the signatories note that from 1 December, the role of the ENM will become central to facilitating access by EN customers to retail competition. At this stage, SACOSS is aware of, but has not been party to, the development of AEMO's accreditation and registration procedures or AEMO's enforcement responsibilities. The ENM will over time have a central role in achieving the objectives of the exemption process and we would welcome further insights into these requirements.

Question 4: Can access to retail competition be improved?

Question 5: Issues for embedded network customers that are on-market or wishing to go on-market?

A number of barriers impede embedded network customers going on-market

SACOSS' 2015 study[33] found that for electricity consumers in long-stay caravan and residential parks, "retail competition is most unlikely to be a practical or cost effective option… [and] there is minimal competitive price and service pressure on the on-seller and embedded network operators". Informed by this study and further research and consultation, SACOSS and the signatories have identified a number of barriers for embedded networks customers going on market that may apply more broadly than just caravan and residential parks. These barriers are outlined below.

Upfront costs may provide a disincentive for EN customers going on-market

Upfront costs may provide a disincentive for many customers in smaller embedded networks going on-market. The SACOSS 2015[34] study identified that ENs in long stay caravan and residential parks tend to have aging infrastructure that are likely to require upgrades to enable customers to access market offers. For example market offers are likely to require the installation of a market-ready meter capable of reading half hourly interval consumption data. Should this be the case in any EN, upgrade costs will either have to be borne by the customer wishing to go on- market (or their landlord if they are renting), the retailer providing the market offer or the embedded network owner/operator (and possibly in turn shared by all residents in the EN). This is likely to provide a strong disincentive for all parties unless it can be clearly and confidently demonstrated that they will reap longer term benefits that outweigh the initial upfront costs. Yet as will be outlined in more detail below, SACOSS and the signatories believe that under current arrangements it is very difficult to assess whether the long term cost savings from a retail offer will in fact outweigh the initial infrastructure upgrade costs. Therefore without the ability to confidently and accurately make this comparison, any upfront costs are likely to provide a disincentive for embedded network customers seeking to go on-market.

Even where an EN customer may be confident that they will receive costs savings over time, they may not have the resources available to pay the upfront costs. As SACOSS highlighted in its 2015 report[35], EN customers in caravan and residential parks, are often on low incomes, and do not have the available resources to spend on infrastructure upgrades. Further many EN customers are tenants and as such are reliant on their landlord to agree to make the upgrade and pay the costs. While there may be benefits for owner occupier customers through long term cost savings, or for retailers through a growing customer base,

[33] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

[34] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

[35] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

there are unlikely to be benefits for landlords or EN owner/operators for paying for the upgrade. As such, SACOSS and the signatories believe that there are many EN customers for which the upfront costs will provide a real or perceived barrier to going on market.

A *lack of transparency about energy arrangements for EN customers will make it difficult to assess whether they will benefit from going on-market*

A very strong practical barrier for many EN customers going on-market is the lack of information provided to them about their energy pricing arrangements, the customer protections they are entitled to, and their rights to access retail offers (in jurisdictions where this right exists). As highlighted in the SACOSS 2015[36] Report, a key characteristic of embedded networks is that the customer's energy seller is also likely to be their landlord, body corporate or have some other relationship that is primarily tied to the occupancy of their home or business. In these circumstances the information provided to EN customers about their energy arrangements is usually subsumed within a larger body of information about their tenancy or occupancy of their home or business. Further as was observed in SACOSS' 2015 study[37], for tenants, energy bills are often also rolled into one tenancy bill, with little information provided to distinguish energy costs from other general tenancy costs. As such in practice, many EN customers have little awareness of their energy arrangements, particularly the nature of their costs as well as their rights and consumer protections. This has significant implications for EN customers' ability to assess whether they would be better off under a retail offer compared to their EN arrangements.

While it is the case that the AER's Exempt Selling Guideline[38] requires that information about customers energy arrangements must be provided by the exempt person at any time on request by the exempt customer or the AER, and so in theory EN customers should be able to access at any time the information they need to make an informed assessment of any retail offers, in practice the SACOSS 2015 study[39] found that most exempt consumers felt that they were not kept adequately informed about their bills, rights and protections, and when they requested park management for more information, they were effectively "brushed off". For example one SACOSS case study noted that:

> "Communication from the park owner is perceived as problematic for residents. There is a lack of transparency on charges, including the supply charges the park owner is paying; residents are not always notified when arrangements change and there is no transparency if formal reductions (i.e. abolition of the carbon tax) are being passed on to residents. There is also no consumer knowledge of any information/formal processes for new residents moving into the park. "[40]

[36] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

[37] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

[38] AER, Exempt Selling Guideline, Version 4, March 2016

[39] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

[40] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

Common EN customer experiences cited across the parks investigated in the study include:

- A lack of explanation from EN owner/operators when energy prices change;
- Fixed energy charges ranging from $10 per fortnight to approximately $40 per month. There did not seem to be any reasonable basis for the amount charged, and the exempt seller was not open to explaining the charge;
- The view that the exempt seller was being charged lower, market based prices than the standard prices from the authorised electricity retailer at the 'gate' meter, and this market benefit was not passed onto the exempt consumers; and
- Savings benefits from installation of solar PV on common park buildings not being passed on to the exempt consumers.

SACOSS and the signatories are also aware from research and consultation conducted by the Ethnic Communities' Council of NSW, that many small businesses in retail shopping centres are also experiencing similar issues obtaining clear, accurate and consistent information from their EN owner/operators. As such these issues are not just limited to caravan and residential parks but are likely being experienced across many forms of ENs.

While the SACOSS 2015 study[41] found that many EN customers in long stay caravan and residential parks felt that park management were disinterested in providing energy related information, SACOSS and the signatories also note that a lack of compliance with information provision requirements is not always intentional, rather sometimes it is also due to a lack of awareness on the part of EN owner/operators about their legal requirements. It's important to remember that this role is usually secondary to their primary role as park/village manager, landlord or body corporate and may require one person, or a small number of people to wear multiple hats at one time. Lack of awareness appears to be a particular issue for smaller embedded networks, where the owner/operator may not have access to sufficient legal or administrative resources or possess the required literacy/experience to help them understand the complex array of regulations found in the AER Exempt Selling Guidelines[42], as well as jurisdictional specific tenancy and other legislation. In many cases the establishment of embedded networks in caravan parks, retirement villages, community housing complexes or smaller apartment blocks pre-date the introduction of the AER's guidelines and as such, management has never "caught up" with the new requirements placed on them by the AER guidelines. Putting aside questions around intention, as will be outlined in more detail below, a light touch regulatory regimes means that there has been little prompting or incentive for pre-existing ENs to self-identify and comply with the AER's guidelines.

Even where EN owners/operators are complying with their obligations to provide information about energy arrangements to their EN customers, the level of detail required by some classes of exempt sellers is insufficient for customers to make an informed judgement as to whether they are better off under a retail offer. Under the National Energy Consumer Framework, a retailer is required to provide a great degree of transparency about the offers they make available to consumers, including an accessible presentation of standing and market offer prices on their website, and to produce an 'Energy Price Fact Sheet' for each offer that includes unit price of energy, daily supply charge, and any other applicable charges, discounts and rebates. In contrast the AER's Exempt Seller Guideline does not require all exempt sellers to supply the same

[41] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

[42] AER, Exempt Selling Guideline, Version 4, March 2016

degree of detailed pricing information. Nor does it require the exempt seller to provide information about the basis of the prices and other charges and how these prices and charges might vary over time. For retail competition to be effective and explicit informed consent to be achieved, an exempt customer will need to have information about the basis for current prices, as well about any likely changes to prices in the future in order to compare their current EN pricing arrangements with an alternative retail market offer. Further the customer will need explicit information on any additional charges that the exempt seller/network operator might pursue in the event the customer takes up a retail market offer, such as a charge for the use of the internal network or for changes to the internal network. Without this level of detail about current and future energy arrangements, it will be difficult for EN customers to assess whether they will be better off overall under a retail offer.

Further this will have implications for whether a retailer and the regulator can be confident that where a customer may have made a judgement that they will be better off, that the explicit informed consent test has actually been met in coming to this conclusion. SACOSS and the signatories are concerned that unless clear and transparent information about current and future retail and network energy arrangements within the embedded network is provided to EN customers, retailers and regulators, that even in circumstances where all parties are on board with a customer taking up a retail offer, there is no clear way of any party knowing whether in fact the customer will be better off. This places EN customers at risk of ending up worse off over the long term. More troublingly it also potentially provides an opportunity for dodgy retailers or third party billing agents to intentionally exploit this lack of clarity by marketing products that appear to be in the customer's best interests, but may in reality not be. Further, without full transparency over pricing and customer protections, the regulators, or other independent parties may find it difficult to assess what is and what isn't a fair and competitive offer, and in turn combat this type of dodgy practice.

The power imbalance between EN owner/operators and their customers can provide a barrier to customers seeking to go on-market

The cost and transparency barriers outlined above are made more difficult to overcome in smaller embedded networks because of the power imbalance between the owners/operators of the EN and their customers. As indicated above, the owner/operator of an EN may also be the landlord or body corporate for the EN customer or have some other relationship that is tied primarily to the customer's occupancy of their home or business. This gives the EN owner/operator far more power and influence over the lives of their customers than is the case in a typical retailer/customer energy relationship. While in theory, energy related issues in an embedded network should not have any tangible impact on a customer's broader residential arrangements, in practice these lines can and are easily blurred. The SACOSS 2015 study[43] found that in long-stay caravan and residential parks, there is widespread fear and frustration among residents that if they raise energy related issues with their EN owner/operator (who is usually also their park manager and/or landlord) that they will be labelled trouble makers and that this in turn may create difficulties for their ongoing tenancy, or simply make living in the park unpleasant. Given that residents of these types of embedded networks are often low income, asset poor and vulnerable, SACOSS found that they were extremely reluctant to risk their living arrangements by raising concerns with management. So much so, SACOSS had to meet with residents in secret locations and be very careful about not identifying in any way

[43] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

the parks referred to in our report. SACOSS and the signatories also expect that this power imbalance may also be particularly acute in retirement villages, where elderly people are more vulnerable to the care of their village managers and staff, and tenants in apartments who are vulnerable to the actions of their landlords who are likely to be part of the body corporate that owns or operates the embedded network.

Due to this power imbalance, SACOSS found caravan and residential park residents felt extremely disempowered, and were unable to negotiate on equal terms with their EN owner/operator. Without the capacity to confidently and securely negotiate about things such as accessing more transparent and detailed pricing information, upgrades to aging infrastructure and access to retail offers, it is highly unlikely that customers of smaller ENs, particularly where there is a tenant/landlord relationship, are going to pursue retail offers. Certainly, in our 2015 study[44] we did not find any EN customers that were actively seeking access to market offers. While customers were generally aware that there were cheaper retail market prices available and would like to have access to these savings, they did not particularly want access via the path of retail competition. Rather their preference was for regulation by government to force EN owners/operators to share the savings that they are making from access to market offers through bulk purchasing arrangements. Going it alone so to speak to access these savings through the market, was seen as too risky and too complicated to achieve their desired outcomes.

If both the EN customer and the owner/operator believe that is too difficult, costly or troublesome for customers to go on-market, then the reality is that this perception will provide a powerful barrier in itself to EN customers going on-market. In turn the threat of competition will continue to be minimal for EN owner/operators, and as such they will continue to have little practical incentive to make changes to their practice that is in the interests of their customers.

The embedded network manager rule change is unlikely to practically reduce barriers for embedded network customers going on-market

In December 2015, the AEMC made its final determination on an embedded network rule change[45] to promote competition by giving more embedded network customers a choice between services from retailers or from their EN operators. This rule change, due to come fully into effect in December this year, created the new role of Embedded Network Manager (ENM) to link EN customers with retailers of their choice. By making it easier for EN customers to access retail offers, the rule change, at least in theory, is intended to also provide EN operators with a greater incentive to compete with retailers, and thus also benefit those customers who stay within the bulk purchasing energy arrangements of their embedded network.

While SACOSS and the signatories are generally supportive of the intent of the rule change, and believes that it may achieve its intended outcomes for larger embedded networks, for smaller embedded networks we note the devil is in the detail. The AER's latest version of its Electricity Network Service Provider-Registration Exemption Guideline[46] sets out the specific requirements for the ENM position, and here it becomes clear that not all embedded networks will be required to appoint an ENM manger and thus reap the benefits intended by the rule change. For example small ENs with under 30 customers are not required to appoint an

[44] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers
[45] National Electricity Amendment (Embedded Networks) Rule 2015, 17 December 2015
[46] AER, Electricity Network Service Provider - Registration Exemption Guideline Version 51, December 2016

ENM, while ENs within activity classes ND2, NR2, NR3, and NR4 (including caravan park, holiday park, residential land lease, manufactured home site and retirement communities and other groups of a similar nature participating in a group purchasing scheme whereby the benefits of bulk purchasing are shared across all members of the community) are provided with a mechanism to not engage an ENM if there is insufficient demand among EN customers to appoint one [47]. For embedded networks where an ENM is not appointed, SACOSS and the signatories are not confident that the rule change will have any impact on reducing the barriers outlined above.

Even where in theory ND2, NR2, NR3, and NR4 classes of ENs may appoint an ENM, in practice the mechanism to decide whether to appoint a ENM may prove to be too much of a time, cost and administrative burden for EN customers and owners/operators to pursue. In short the mechanism involves a requisite number of EN customers requesting a poll of all EN customers within the EN to decide whether to appoint an ENM. Following the poll, the EN owner/operator is required to abide by the decision of a two-thirds majority of the customers[48]. If the decision is taken that an ENM be appointed, a further decision must be made as to whether the costs to appoint an ENM are to be shared among all the EN customers within the EN (irrespective of whether they themselves intend to take up a market offer), or borne by only those that take up a retail offer and thereby choose to leave the bulk purchasing agreement.

While SACOSS and the signatories assessment of this process cannot be tested until the rule change comes into effect, we are confident based on our past research and consultation that the nature of this process will deter many EN customers from attempting to go on market using this process. As outlined above, EN customers in smaller embedded networks, particularly where there is a tenant/landlord relationship and/or where customers are vulnerable and disadvantaged, already feel very nervous about "rocking the boat" by challenging the status quo arrangements with their EN owner/operator. SACOSS and the signatories believe it is extremely unlikely that these customers, already feeling the impacts of the power imbalance outlined above, will seek to instigate a potentially complex administrative process that may provoke a backlash from their owner/operator, especially given as stated by the AER they must also "factor in the added costs of ENM services to their decision"[49].

Further SACOSS and the signatories have concerns that the majority rule decision making process to appoint an ENM and distribute the costs of doing so, may introduce additional power imbalances and points of conflict between EN customers (in effect between neighbours). Again we cannot test this concern until the rule change comes into effect, however we feel the process raises a number of significant questions that should be addressed:

- How will it impact residential harmony in what are often small residential communities? Will residents divide into groupings for and against going on market? How will this impact on more vulnerable residents, including for example elderly residents of retirement villages that may make decisions in conjunction with or have decisions made by their non-resident partner or children?
- How will the power imbalances be addressed? Who will monitor the fairness of the decision making process and protect the interests of the "one third minority" who don't get the outcome they believe is in their best interests? Who will ensure there are no social or tenancy repercussions for those on "the other side" of the owner/operator's wishes?

[47] AER, Electricity Network Service Provider - Registration Exemption Guideline Version 51, December 2016, p63
[48] AER, Electricity Network Service Provider - Registration Exemption Guideline Version 51, December 2016, p64
[49] Reasons for Decision - Amended Network Exemption Guideline -Version 5, December 2016, p28

In considering these questions and the broader power balances in play, it may simply not be worth the social and financial risks for many embedded network customers to pursue the appointment of an ENM and access a retail offer, despite the possibility of better prices and customer protections under a retail offer.

Strengthened regulation may reduce some of the barriers to embedded network customers going on-market, as well as ameliorate some of the risks for customers who remain off-market

As SACOSS and the signatories have outlined above, there are a number of significant barriers to customers of ENs going on market, and these barriers are unlikely to be reduced by (and may even be exacerbated by) the new ENM rule. SACOSS and the signatories believe that strengthened regulation can play a role in reducing some of the barriers identified, as well as ameliorating the risks for EN customers who stay off-market, particularly where there are limits to the extent in which retail competition alone can address all the issues experienced be EN customers.

Require greater transparency of information about EN energy arrangements for EN customers

As indicated above the lack of transparency around energy arrangements in embedded networks makes it difficult for customers (as well as retailers interested in making appropriate offers and regulators and advocates looking to monitor fairness) to assess whether they would be better off overall leaving their bulk purchases EN energy arrangement to take up a retail offer. Currently the level of detail a EN owner/operator is required to provide to a customer is far more limited than that required by an authorised retailer, making it hard for customers to compare like for like. SACOSS and the signatories note that there are understandable reasons for this lower burden given the smaller size of ENs and more limited capacity for EN owners/operators to provide this level of detail. Nonetheless to achieve the outcomes of effective retail competition and explicit informed consent for customers, more detailed pricing and consumer protection information will need to be provided to EN customers.

Recommendation 19: Require exempt sellers to provide customers with more detail information on:

- the basis for current prices, in particular fixed charges,
- the basis for any changes in prices and charges and the likely future timing of such changes, and
- any additional charges that the exempt seller/network operator might pursue in the event the customer takes up a retail market offer, such as a charge for the use of the internal network or for changes to the internal network.

Require EN owner/operators to pass on to their customers any ongoing savings they may be making from bulk purchase energy arrangements with retailers and from communal renewable energy generation and storage

While it would ideal that access to retail competition alone drives price savings and better service and protections for EN customers, both on and off-market, the reality as outlined above is that because of a number of reasons (power imbalances and cohort vulnerability, lack of clarity around prices, questions around cost effectiveness and the complicated and burdensome administrative process to access retail competition) going on-market may not be desirable or realistic for all EN customers. As identified above,

SACOSS' 2015 study[50] did not find any customers that were actively seeking access to market offers. What these customers did expect, however, was a 'fair deal'. For example, they expected that the benefits to the exempt seller of lower retail market prices compared to the standard offer price of the local retailers would be shared with the exempt customers in the embedded network. Similarly, they considered that the benefits of on-site solar generation should also be shared. The exempt customers in the study, however, did not look to retail competition as a way of improving the services and energy prices provided by their exempt seller. Instead, they looked to the various regulatory authorities to provide this pressure on the suppliers.

In this context if EN customers do not seek to use market pressure to achieve their desired outcomes, then it is highly likely that the status quo of potentially higher costs and lower protections will continue because EN owners/operators, believing that their customers are unlikely to pursue a market offer, will have little incentive to change current practice. As such, SACOSS and the signatories believe it is vitally important that options be considered to the strengthen the ability of the regulator to prevent EN owners/operators from "profiting" from the on selling on electricity to their EN customers by charging the standard offer, but receiving the lower market offer price (which can be as much as 20% lower[51]) or not passing on savings generated by communal renewable energy generation and storage. SACOSS and the signatories understand that in Queensland there is tenancy and body corporate legislation that applies constraints on the prices charged to tenants and occupiers of units, over and above the AER pricing conditions, that in effect prevent body corporates from profiting from the on selling of electricity. SACOSS and the signatories would like to see similar energy provisions in energy regulations to ensure all EN customers are protected in this way, and can be confident that even if they are unable to seek or obtain a retail offer, that they are at least receiving a fair deal from their EN owner/operator.

Recommendation 20: The AEMC/AER investigate options to enforce sharing of savings obtained by the exempt seller through lower market offer prices, and government supported efficiency schemes or solar PV generation.

Introduce monitoring and enforcement of ENs to incentivise compliance with all legal requirements

As identified in the SACOSS 2015 report[52], and earlier in this submission, even where regulations are in place to require EN owners/operators to provide information to EN customers and have in place consumer protections, on the ground there is evidence that EN owner/operators are not always complying with these requirements. Sometimes this is because of malicious intent, while other times it is more to do with lack of awareness or a sense that things should be done as they always have been. Irrespective of the reason, where non-compliance occurs, EN customers are missing out on their legal protections and potentially much needed savings.

SACOSS and the signatories are concerned that the current light touch regulatory approach does little to monitor and enforce EN compliance. For example under current arrangements, either ENs are either deemed to be exempt without any application process or are required to self-identify for registration. Once

[50] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

[51] AEMC, Consultation Paper: Review of regulatory arrangements for embedded networks, April 2017

[52] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

deemed or registered, they are not monitored for their compliance with their exemption requirements. In practice this means that the AER has little visibility of whether an EN exists, let alone whether they are complying with their legal requirements. As such, the AER are effectively flying blind, and must take on faith that ENs are largely doing the right thing. The fact that few EN customers can currently access free, user friendly external dispute resolution processes, and noting the power imbalances identified above, it is highly unlikely that most minor or even serious non-compliances will ever been uncovered and rectified, particularly in smaller ENs. While SACOSS and the signatories acknowledge that it is a significant task to develop procedures for monitoring, reporting and enforcement in this market given the special features of this market and will likely require additional resources to be allocated to the AER, without it many of the barriers to retail competition will remain in place, and customers will continue to miss out on protections and the opportunity for saving they are be entitled to.

Recommendation 21: The AER develop and implement over time a cost efficient monitoring, reporting and enforcement regime to support its statutory powers and to encourage compliance with the conditions of exemption. The AER should be provided with the resources to undertake regular 'sample' investigations of compliance with the registration process and the associated conditions of exemption.

Question 6: What consumer protections, in relation to the sale of energy, are appropriate for off-market embedded network customers?

The objective of providing comparable consumer protections to exempt customers and customers of authorised retailers is not being achieved in practice

There are two elements that underpin this conclusion. The first is that the conditions of the exemption are not adequate to provide comparable consumer protections. For example there are significant gaps in key areas such as access to effective dispute mechanisms, hardship and payment difficulty programs and relevant information. These gaps have a particularly severe impact on vulnerable customers who are often not in a position to dispute the actual conditions and services provided by the exempt seller or embedded network operator. These gaps are discussed in more detail below.

The second element is the evidence of non- compliance by some EN owners/operators with the conditions of their exemptions. In making this statement, SACOSS and the signatories are also aware that there are a wide range of practices by EN operators and exempt sellers and it is likely that many operators and sellers are complying with their exemption conditions. SACOSS found some evidence of this in its 2015 qualitative study[53], however, the difficulty – and it is a substantial difficulty – is that we simply do not know to what extent EN operators are compliant with the conditions in practice and over time.

It is likely that the regulatory authorities and Ombudsmen are aware of only the most egregious of non-compliance activity. This is why SACOSS and the signatories have stressed in previous sections of this submission the importance of the AER developing a monitoring and reporting framework that will provide both transparency around the current market and consistency in future assessments of the market. It is also why SACOSS and the signatories have recommended that the NEL/NER be amended to include civil penalties for non-compliance with conditions, similar to those that apply in the NERL/NERR.

SACOSS and the signatories acknowledge that establishing a 'fit for purpose' monitoring and reporting framework and an extended penalty regime, and maintaining this over time represents a significant additional regulatory burden, necessitating additional resources for the AER. However, given the growing size and complexity of the exemption market and the consequent increase in risks for EN consumers, it is appropriate for the AER to commence this process as soon as possible.

SACOSS and the signatories have also suggested that as a starting point, the creation of a new category of exemption, the 'large scale individual exemption', with extended consumer protection requirements, would allow the AER to focus initially on monitoring and reporting in this key growth sector of the market. Moreover, it is reasonable for the AER to seek some cost recovery from these large scale operators and sellers who are in the main intending to make profits from the embedded network/exempt selling business model.

[53] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

There are a number of gaps in the customer protection framework and consequential risks to EN consumers

As noted above, SACOSS's 2015 report[54] identified a number of gaps in the customer protection framework that have a significant impact on small consumers, particularly vulnerable consumers.

Since that time, we have identified further gaps in the framework many of which have been discussed in previous sections of this submission. In summary therefore, we consider that the most important gaps include the following:

- Lack of an effective low cost energy specific and independent dispute handling mechanism equivalent to the Ombudsman services available to the customers of authorised retailers;
- The absence of any compliance monitoring and reporting system along with gaps in the enforcement regime particularly for EN operators;
- Restricted access in practice to competitive retail market offers and innovative products even following the appointment of the ENM;
- Limited information available to EN customers from either the regulators or the exempt sellers and EN operators on the EN customers rights, and the exemption conditions that apply to their particular site;
- Lack of any clear and standardised contractual relationships between the exempt seller or EN operator and the EN customer that provides at least the minimum standards and ongoing price certainty available to customers of authorised retailers;
- The absence of an obligation on exempt sellers (or their agents) to provide access to Centrepay. In addition, the various requirements for accessing concessions in different jurisdictions is a challenge for these customers not withstanding that the AER's retail exemption guideline requires the exempt seller to ensure that EN customers have information on and can access their concessions;
- Customers experiencing payment difficulties or in hardship have limited ability to make payment plans as there is no equivalent to the AER's Hardship Policy requirements that apply to authorised retailers;
- There is a gap in the regulatory framework to ensure continuing supply to EN customers in the event of default or non-compliance by the exempt seller or EN operator or revocation of exemption by the AER;
- Lack of clarity on the ongoing responsibilities of EN operators to maintain a safe and secure network and accurate metering along with emergency arrangements in the event of loss of supply;
- The use of third party service providers by exempt sellers to provide key customer services such as metering, meter reading, billing, debt collection, payment options and hardship customer and dispute management services. The AER has no monitoring or enforcement capacity to ensure these third parties are providing adequate and compliant services.

SACOSS and the signatories would add to this list the general issue that the diversity of jurisdictional and local government arrangements that encompass embedded networks and exempt sellers compounds the difficulties for EN customers in knowing what their overall rights are and where they can take their concerns.

The existing principles in the NERL should be supplemented with a number of new guiding principles that should, in turn, drive the extension of the consumer protection framework

[54] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

In its 2015 report on embedded networks[55], SACOSS identified a number of gaps in the exemption framework that in practice mean that the objective of comparable consumer protections has not been achieved. It was indicated in that report a particular concern with the impact of these gaps on vulnerable customers who do not necessarily have the wherewithal to challenge the exempt seller or network operator (usually the same entity) or have knowledge of and capacity to pursue their fundamental rights for a safe, reliable and affordable energy supply.

The report indicated that the existing principles in the NERL should be supplemented with a number of new principles that should, in turn, drive the extension of the consumer protection framework. Overall, SACOSS advocated the following principles be included in the NERL, noting that the first three principles are derived from the NERL. The remaining principles are suggested by SACOSS and the signatories as being also necessary to ensure adequate protection of EN consumers.

The growth in the sectors of the exempt market outlined earlier in this submission, adds to SACOSS and the signatories concern and to the need for a priority to be placed on applying the principles and addressing the gaps.

Recommendation 22: Six guiding policy principles should be addressed by the AER when approving an exemption application. They are:

- The regulatory arrangements for exempt sellers should not necessarily diverge from those applying to authorised retailers;
- Exempt customers should, as far as practicable, be afforded the right to a choice of retailer in the same way as comparable retail customers in the same jurisdiction have that right;
- Exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under the Law and Rules;
- All EN consumers should have access to a free, independent and impartial dispute settlement mechanism;
- The relevant regulators have an ongoing responsibility to monitor, report and enforce compliance with the requirements of the AER, including the conditions of exemption; and
- The safety and security of supply to consumers in an EN must be a paramount consideration of the AER in granting an exemption.

As discussed in previous sections of this report, adopting these principles will require consequential changes to a range of regulatory instruments including the NEL, NER, NERL, NERR and the AER's Guidelines.

[55] SACOSS, The retail and network exemption Framework: Emerging Issues for Consumers: Report on the growing concern with consumer protection arrangements for exempt consumers, December 2015, p 64 https://www.sacoss.org.au/retail-and-exemption-framework-emerging-issues-consumers

Summary of recommendations in response to the consultation paper questions

Question 1: Does the two tiered framework of requiring either registration/authorisation or exemption remain fit for purpose?

Recommendation 1: The AEMC/AER investigate the option to establish a new category of exemption that would apply to exempt on-sellers (and embedded network operators) that have a substantial number of customers and/or a substantial number of sites in total. The underlying principle here is that the exempt seller has a customer base equivalent to a small retailer and should therefore be subject to the same obligations and consumer protection conditions as a retailer.

Recommendation 2: The NERL/NERR be amended to require the AER to collect information and produce an annual performance report for this new proposed category of large scale exempt sellers and include summary information on other relevant developments in the EN market. This will increase transparency and facilitate consumers becoming more aware of their rights and obligations as well as improving incentives for compliance with the conditions of exemption.

Recommendation 3: The AER consider developing a reporting framework that provides both the AER and consumers with ongoing information on compliance with conditions by EN operators and exempt sellers, including 'spot' audits of compliance and public reporting of outcomes. This will also facilitate consumers becoming more aware of their rights and obligations. Associated with this, we encourage the AER to make more transparent access to information on approved exemptions and the conditions attached to these approvals.

Recommendation 4: The AEMC consider the policy implications of brownfield conversions and whether such conversions should be subject to more stringent conditions by the AER given the queries around EIC, the potential detriment, restriction of competition and long term constraints on reverting to an on-market consumer within an EN. SACOSS and its signatories note the particular issue in Queensland where following a brownfield conversion, the estimated cost of reverting to an on-market customer was approximately $25,000 per customer due to the rewiring requirements.

Recommendation 5: The AEMC, in conjunction with the AER, investigate the implications of the rapid development of third party service providers who are actively promoting the benefits of EN and their services to body corporates and the like. These third party providers are offering end-to-end services including provision of metering, meter reading, billing, management of complaints and information provision to the EN customers. While there are potential benefits in these arrangements, there are also risks around accountability for compliance and lack of transparency in processes, systems, disconnection policies, privacy controls and the like.

Recommendation 6: The AEMC consider the competition implications of a third party service provider becoming an embedded network manager given the possible conflict of interest between the two roles.

Recommendation 7: The AEMC/AER consider establishing more formal requirements for the registrable class of EN sellers and EN operators in order that there is greater transparency for customers and regulators on the ongoing compliance with the conditions of exemption. This could include some low cost and standardised form of annual reporting to the AER and the publication of these reports on the AER's web-site. Penalties would apply for failure to report or false reporting.

Recommendation 8: The AEMC investigate whether additional rule changes are required to address the emerging gap where authorised retailers can sell to EN or 'behind the meter' customers, without the constraints imposed by the exemption framework on the maximum price charged. Note: SACOSS and the signatories have only recently become aware of this issue and would welcome further discussion with the AER and AEMC on this matter.

Question 2: Does the exemption framework remain fit for purpose?

Recommendation 9: The AEMC investigate whether there is any benefit in continuing with the 'deemed' category of exemption given that the AER has no way of knowing if, where and how many sites fall within that category. The customer protection obligations may be more effectively captured in other regulatory instruments.

Recommendation 10: The AEMC include a new objective for the exemption framework, namely the objective of ensuring compliance with the conditions of exemption through an effective monitoring and reporting framework and consistent application of the civil penalty regime for non-compliance with conditions.

Recommendation 11: The AER develop and implement a cost efficient monitoring, reporting and enforcement regime for both exempt sellers and EN operators to ensure consistent compliance with its exemption conditions and greater transparency for EN customers and their advocates.

Recommendation 12: The NEL (or NER) and the NERL is amended to include an obligation on all exempt network operators and exempt sellers to monitor and report on compliance with the conditions of exemption, the format and timing of which is at the discretion of the AER**.**

Recommendation 13: The AER be provided with the resources and legislative authority to conduct mandatory audits from time to time and acquire information from the exempt networks and retailers to ensure better compliance with the conditions of exemption and provide assurance to EN consumers.

Recommendation 14: The NEL and/or the NER be amended to include a set of policy principles that the AER must take into account when issuing an EN exemption. The NEL and/or the NER also include a range of 'exempt seller factors' and 'exempt consumer factors' (similar to those set out in the NERL) to guide the AER in granting an exemption.

Recommendation 15: The NEL is amended to allow the AER to impose civil penalties on EN operators that do not comply with the network exemption conditions and that parallel the penalty regime in the NERL.

Recommendation 16: The AEMC or AER investigate whether more formal registration requirements should be placed on third parties providing customer services on behalf of the registered exempt parties and, more generally, whether these third parties should be subject to civil penalties for non-compliance or only the exempt seller or embedded network operator registered directly with the AER.

Recommendation 17: There is a need to develop more specific rules or procedures relating to the management of EN customers in the event that the EN operator or exempt seller has its exemption revoked and/or can no longer provide the services to these EN customers.

Recommendation 18: The AER be provided with the resources to develop an accessible data base that includes not only the list of exempt sellers and EN operators but also the details of the relevant exemption

conditions. This will provide greater transparency to the EN consumers on their rights and the exempt sellers or EN operator's obligations.

Question 4: Can access to retail competition be improved?

Question 5: Issues for embedded network customers that are on-market or wishing to go on-market?

Recommendation 19: Require exempt sellers to provide customers with more detail information on:

- the basis for current prices, in particular fixed charges,
- the basis for any changes in prices and charges and the likely future timing of such changes, and
- any additional charges that the exempt seller/network operator might pursue in the event the customer takes up a retail market offer, such as a charge for the use of the internal network or for changes to the internal network.

Recommendation 20: The AEMC/AER investigate options to enforce sharing of savings obtained by the exempt seller through lower market offer prices, and government supported efficiency schemes or solar PV generation.

Recommendation 21: The AER develop and implement over time a cost efficient monitoring, reporting and enforcement regime to support its statutory powers and to encourage compliance with the conditions of exemption. The AER should be provided with the resources to undertake regular 'sample' investigations of compliance with the registration process and the associated conditions of exemption.

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- The regulatory arrangements for exempt sellers should not necessarily diverge from those applying to authorised retailers;
- Exempt customers should, as far as practicable, be afforded the right to a choice of retailer in the same way as comparable retail customers in the same jurisdiction have that right;
- Exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under the Law and Rules;
- All EN consumers should have access to a free, independent and impartial dispute settlement mechanism;
- The relevant regulators have an ongoing responsibility to monitor, report and enforce compliance with the requirements of the AER, including the conditions of exemption; and
- The safety and security of supply to consumers in an EN must be a paramount consideration of the AER in granting an exemption.

The Retail and Network Exemption Framework: Emerging Issues for Consumers

Report on the growing concern with consumer protection arrangements for exempt consumers

December 2015

SACOSS
South Australian Council of Social Service

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47 King William Road
Unley, SA 5061 Australia

p (08) 8305 4222

f (08) 8272 9500

e sacoss@sacoss.org.au

www.sacoss.org.au

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Executive Summary and Recommendations

Overview

This report focusses on the retail and network exemption framework. On-sellers and embedded network operators (who are usually one and the same person) are granted an exemption by the Australian Energy Regulator (AER) from obtaining a retailer authorisation, and (separately) an exemption from registration with the Australian Energy Market Operator (AEMO) as a distribution business. Thus, there are three key participants in the exemption process:[1]

- the exempt consumer;
- the exempt seller; and,
- the exempt network service operator.

The origin of allowing exemption from authorisation as a retailer and/or a registered distribution business was to provide a more cost effective and flexible regulatory process for small-scale energy suppliers, particularly where the supply of energy was incidental to their primary business.

The main purpose of this SACOSS study is to develop a preliminary view on the efficacy of the customer protection mechanisms for one of the more vulnerable segments of exempt customers, the occupants of permanent caravan and residential parks. However, the findings of the study will have broader implications for other exempt small consumers such as consumers located in retirement villages, strata title apartments and small business consumers in shopping centres.

Principles

SACOSS notes and generally endorses the principles that underpin the national exemption regime as set out in the National Energy Retail Law (NERL). The policy principles include:

- the regulatory arrangements for exempt sellers should not necessarily diverge from those applying to retailers;
- exempt customers should, as far as practicable, be afforded the right to a choice of retailer in the same way as comparable retail customers in the same jurisdiction have that right; and,
- exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under this Law and Rules.

However, we have a somewhat different perspective in assessing the current exemption regime. For example, SACOSS considers that the starting point for any discussion on consumer protection is the fundamental principle that all consumers in our society have a right to **access a safe, reliable and affordable electricity supply**.

To whit, SACOSS also considers that all consumers should, as far as practical, have the same level of customer protection regardless of who supplies the electricity. However, given the characteristics of small consumers such as the ones included in this study, SACOSS places less importance on access to retail competition and more on the structure of the regulatory framework. Therefore we would add to the principles in the NERL as follows:

- all consumers should have access to a free, independent and impartial dispute settlement mechanism;
- the relevant regulators have an ongoing responsibility to monitor, report and enforce compliance with the regulatory requirements of registration with the AER (if applicable) and the conditions of exemption; and,
- the safety and security of supply to consumers in an embedded network must be a paramount feature of the AER's approval of exemption for an embedded network and should be clearly stated by the AER in its Network Exemption Guideline, including standards for metering and connection from the meter to the customers' premises.

Regulation

The AER has recognised that small exempt consumers require a greater standard of oversight than larger exempt customers. For this reason exemptions relating to all retirement villages and all permanent caravan and residential parks selling metered energy are categorised as registrable ("R3" and "R4" respectively) in the AER's Exempt Selling Guideline and in the AER's Network Exemption Guideline ("NR3" and "NR4" respectively). These customers are provided with the full suite of customer protections set out in the AER's two Guidelines. Similarly, all residential sites with ten or more customers ("R2" and "NR2") are provided with the full suite of customer protections in the Guidelines.[2]

SACOSS acknowledges that the AER has undertaken considerable improvements to the Exempt Selling Guideline and the Exempt Network Guideline over the last few years. These improvements have clarified the obligations on the exempt seller and network operator in terms of registration requirements, information provision, and customer protection arrangements.

[1] There are various names used for these categories. For convenience, this report will use the nominated terms.

[2] Residential sites with less than 10 customers are categorised as 'deemed', but should in principle be provided with the same protections.

SACOSS further notes that the AER has clearly indicated that the exempt customers in caravan and residential parks are entitled to a broad range of consumer protections that go some way to replicating the protections available to the customers of authorised retailers.

In theory, therefore, the exempt consumers in the SACOSS study should have access to a range of consumer protections including network supply security and rights to access a competitive market offer from an authorised retailer (except for the ACT, Queensland and Tasmania where jurisdictional law trumps the National Energy Customer Framework [NECF] and the policy intent therein).

However, this does not mean that in practice exempt suppliers comply with the range of exemption conditions set out in the Guidelines. Nor does it mean that these exemption conditions are adequate or the protections and service standards for exempt small customers are as substantive as the standards that apply to customers of authorised retailers.

To fully understand the adequacy of the existing customer protection framework in its totality, the study would need to have taken account of all the complex web of national and state regulations governing this sector. This is well beyond the scope of our current study and SACOSS notes the limits to the extent to which we can capture the overall consumer protections available to this sector.

Despite these limitations, we can have some confidence in the study findings and the generality of the recommendations given that the issues identified in this study and previous studies of the exemption regime in various jurisdictions are quite similar. Indeed, it is notable that many of the issues have not changed over the last five years despite the introduction of national retail regulation in the NECF and despite the efforts of regulators such as the AER to introduce greater consistency in the exemption definitions and processes.

Findings

The overall impression arising from this research is that the exempt consumers in caravan and residential parks feel both frustrated and disempowered. These exempt customers may not be aware of the full suite of protections available to them under the AER's conditions of exemptions for R4 and NR4 category consumers. However, they make strong claims that they do not get adequate information from the park operator, that their concerns are not being addressed and, more generally, they are not being offered a "fair deal" in terms of their electricity supply.

Moreover, the exempt customers in the study do not know where, and to whom, they can safely turn in order to resolve their complaints in an effective and impartial manner. While some recognised they could approach the Tenants' Tribunal in their state (or equivalent state body), they were also very concerned about possible repercussions. It was not only their energy supply at stake, but also their accommodation security and risk of other repercussions.

The exempt customers in our study, however, did not look to retail competition as a way of improving the services and energy prices provided by their exempt seller. Instead, the exempt customers in our study looked to the various regulatory authorities to provide this pressure on the suppliers.

It is important to highlight that these are preliminary observations and are based on the views of consumers rather than the exempt sellers or operators. Nevertheless, in summary, on the basis of this preliminary study, SACOSS is concerned that relative to the general retail market:

- consumers' comments to SACOSS suggest there may be some degree of non-compliance by the exempt sellers and exempt network operators with the AER's conditions of exemption;
- the AER has very little visibility of the actual compliance of the exempt sellers and network service operators with the conditions of their exemption;
- there was limited awareness by the exempt customers of the customer protection framework under the NECF and the National Electricity Law; and,
- the gaps in the consumer protection framework for exempt customers include areas that are of significant importance to the exempt consumers such as billing, complaint handling and metering accuracy.

This outcome is hardly surprising given the regulatory issues discussed above. However, it is a deeply unsatisfactory outcome that belies the fundamental principle of equal access to customer protection and a safe and reliable electricity supply for all electricity users.

Conclusions

While we are cautious about overgeneralising the findings of this preliminary study, there is strong evidence of two broad areas in the exemption framework that need to be addressed by the AER and other regulatory and government bodies. They are:

- There appears to be a gap between the AER's requirements for registration and the conditions of exemption and the actual practice of exempt sellers and network operators (as reported by exempt consumers). The reasons for this cannot be discerned from the current study but may reflect the complexity

of the overall governance of the sector, a lack of relevant information by all stakeholders or the absence of an effective monitoring, reporting and enforcement regime by the AER.

- The level of consumer protections is lower for exempt customers despite the higher levels on average of social and economic vulnerability in this sector. The gaps in the level of consumer protection between the exempt customers and the customers of authorised areas include areas that are clearly important to exempt consumers and this should be considered in the 'cost benefit analysis' of the optimal level of regulation.

We draw these conclusions while conscious of the fact that small exempt consumers represent a very diverse and divergent sector of the market and one that is subject to an overlay of jurisdictional energy and tenancy regulations.

Nevertheless, we are dealing with a particularly vulnerable sector of the community and SACOSS considers this warrants additional regulatory commitment to the principles of equity for all electricity users whether serviced by authorised retailer and distributors or by exempt sellers and embedded network operators.

Without an independent complaints handling mechanism and an effective monitoring, reporting and enforcement regime for the exempt customer sector, reforms to the consumer protection conditions in the AER's Guidelines may not lead to much improvement in the lived experience of exempt customers. Nor will it adequately align outcomes with the policy objectives set out in the NERL.

RECOMMENDATIONS

The following provides a consolidated list of recommendations contained in this report.

Chapter 1: Consumer Protection in the National Electricity Market

1.1

The COAG Energy Council, the AER and the regulatory bodies in each state renew efforts to introduce greater consistency and clarity in the regulation of exempt sellers and embedded network operators. A simpler, fairer and less costly process will better serve the interests of exempt suppliers and, more particularly, provide a more cohesive consumer protection framework for small customers[3] of on-sellers and embedded network operators.

Chapter 2: Major Issues for Residents in Caravan and Residential Parks

2.1

The AER's conditions of exemption should clarify the conditions associated with pricing and, in particular, the constraints on the fixed supply charge. There seems to be some ambiguity over whether a fixed charge is constrained by the pricing rule and what is included in the fixed charge.

2.2

The AER and the AEMC investigate if there are viable options to enforce some sharing of savings obtained by the exempt seller through lower market offer prices, and government supported efficiency schemes or solar PV generation.

[3] Small consumers are defined as consumers using less than 100 MWh per annum (ACT, Queensland and Victoria) and 160 MWh per annum in South Australia.

2.3

The AER and jurisdictional governments or regulators further investigate options for a low cost independent dispute settlement mechanism that includes a range of services to exempt customers such as conciliation, investigation and legal capacity to give directions.

2.4

The AER investigate ways in which it can improve its communication with both the exempt suppliers and the exempt consumers so that both parties are clear about the AER's conditions of exemptions. The AER's communication must address both new and established on-sellers and embedded network operators, as exemption arrangements in the past were generally less prescriptive in their registration and consumer protection conditions.

2.5

The AER should collect additional data on typical fixed fees charged to small customers in embedded networks to assess what component of these fixed charges reflects energy supply fixed costs, what component reflects fixed costs of access to the embedded networks and if these fees are consistent with the NERR and the policy intent.

2.6

The AER is reviewing the conditions in its Exempt Selling Guideline relating to payment options. The feedback from customers in this study suggests that current practices are unacceptable and the Guideline needs to be more prescriptive about payment options, particularly access to Centrepay for customers in hardship.

2.7

In assessing the costs and benefits of consumer protection regulation for exempt consumers, the AER take more account of the relative vulnerability of many of these customers, particularly when retail competition is not generally a practical option.

2.8

The AER develop and implement over time a cost efficient monitoring, reporting and enforcement regime to support its statutory powers and to encourage compliance with the conditions of exemption. The AER should be provided with the resources to undertake regular 'sample' investigations of compliance with the registration process and the associated conditions of exemption.

2.9

The AER develop a more comprehensive and accessible data base of exemptions by category and class; the data base can be used to cross-check if all relevant on-sellers and embedded network operators have applied for exemption or are listed in the correct exemption category.

Chapter 3: Other Policy Issues

3.1

The AER work with the relevant jurisdictional bodies to develop an effective, low cost, energy specific dispute settlement and complaint handling procedure for exempt small customers.

3.2

The conditions of exemption for exempt sellers to small customers should include a requirement that customers are advised in advance (i.e. at the time of signing a tenancy agreement) of the basis for any changes in prices and charges and the likely timing of such changes.

3.3

The AER develop a comprehensive atlas of the current national and jurisdictional regulatory instruments that govern the safety and reliability of the embedded network infrastructure, including requirements for small customer metering in exempt networks that was installed pre 1 January 2013.

3.4

The AER, together with jurisdictional regulators and technical/safety regulators (as the case may be) review these standards to establish a consistent set of minimum standards for embedded network operators and their customers.

These standards for existing and new infrastructure should be clearly set out in the AER's Network Exemption Guideline and some monitoring and enforcement procedures established.

3.5

The AER consider the inclusion of more specific conditions with respect to maintenance and testing of customer meters, and meter reading data recording exempt customers.

Introduction

The purpose of the Study

The growing concern with consumer protection arrangements for exempt consumers

Over the past decade, general consumer protection mechanisms for electricity and gas consumers have matured. However, there has been a growing concern with the situation facing customers of electricity on-sellers and embedded network operators and whether the governance of this sector has adequately adapted to the changing market conditions.

This change includes both rapid growths in the on-selling and embedded network market as a whole and significant expansion of the number and type of new energy products such as power purchase agreements (PPA) between a seller and a customer. As stated by the Energy & Water Ombudsman NSW (EWON):[4]

> *Exempt Selling is a rapidly evolving in many new developments; it is becoming the norm rather than the exception and is therefore capturing increasing numbers of energy users. It is vitally important that regulation keeps pace with the emerging market and, given the time which it takes to achieve regulatory change, endeavours to foresee potential consumer detriment. A proactive rather than reactive regulatory approach needs to be taken to address the emergence of potential negative impacts of disruptive change.*

SACOSS strongly supports these comments by EWON.

A number of organisations have responded to the challenge by conducting studies of the adequacy of the regulatory framework and by identifying emerging issues with the regulation of re-selling and embedded network arrangements.

For example, the Consumer Utilities Advocacy Centre (CUAC) published a major report in 2012 that identified growing gaps in the consumer protection regime for customers of energy resellers.[5] In subsequent reports and submissions, CUAC has further reiterated the issues and recommendations identified in its initial 2012 report. CUAC concluded that the most significant issues for consumers subject to exempt selling arrangements are:[6]

- the practical barriers to exercising retailer choice;
- no access to non-price benefits of smart meters;
- no access to the Energy and Water Ombudsman (EWOV in Victoria);
- no requirement for hardship programs; and,
- high fees/charges.

CUAC's research reports have mainly focussed on the Victorian regulatory framework for on-sellers and embedded networks. The Victorian exemption framework is somewhat different to the national exemption framework that applies in all other jurisdictions in the National Energy Market (NEM). Nevertheless, SACOSS considers that the issues identified by CUAC are quite similar to the findings in our study and we conclude that CUAC's recommendations have general relevance to the customers of on-sellers and embedded network operators throughout the NEM.

The AEMC (Australian Energy Market Commission) has also recently completed its review of the National Electricity Rules (NER) with the objective of facilitating greater access to retail market offers for customers in embedded networks.[7] The review was driven at least in part by concerns about the price and quality of services provided to customers in embedded networks. It is expected that, faced with greater competition, exempt sellers will strive to improve their price and service offerings.

Customer Protection for the Most Vulnerable Customers of On-sellers

The purpose of this current study by SACOSS is to further explore the issues facing consumers in embedded networks. Retail competition is not always a cost effective solution to the issues facing customers in embedded networks and SACOSS believes it is essential that there is continued focus on the specific customer protection framework of these customers.

This report's primary focus is on the effectiveness of the national regulation of on-sellers and embedded networks and the impact this has on the more vulnerable sectors of the on-selling/embedded network market. It is not within the scope of this report to examine in detail jurisdictional regulation of the on-seller/embedded network market. However, we recognise that

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4. Energy & Water Ombudsman NSW, ***Submission to the AER re the Draft AER (Retail) Exempt Selling Guideline***, September 2015. https://www.aer.gov.au/system/files/EWON%20submission%20to%20review%20of%20Retail%20Exempt%20Selling%20Guideline%202015%20-%2018%20November%202015.pdf

5. Consumer Utilities Advocacy Centre (2012), ***Growing Gaps: Consumer Protections and Energy Resellers, A CUAC Research Report***, December 2012. http://www.cuac.org.au/research/cuac-research

6. Consumer Utilities Advocacy Centre (2015), ***CUAC Regulatory Review: A critical review of Key Consumer Protections in Victoria, A CUAC Research Report***, Volume 1, May 2015, p 24.

7. AEMC 2015, ***Embedded Networks, Rule Determination***, 17 December 2015. http://www.aemc.gov.au/getattachment/3ec818f7-38ae-412e-8d7b-b404ee8d7858/Final-rule-determination.aspx.

jurisdictional differences are also important in terms of the overall customer protection framework and highlight a number of these areas for further examination.

SACOSS is particularly concerned with the challenges facing electricity consumers in long-stay caravan and residential parks.[8] For these consumers, retail competition is most unlikely to be a practical or cost effective option, nor is it obvious that these consumers are looking to retail competition as a means to address their issues. As a result, there is minimal competitive price and service pressure on the on-seller and embedded network operators.

However, the consumers residing in caravan and residential parks include some of the most vulnerable electricity consumers in our community. In addition, there can be higher reliance on electricity for both heating and cooling given the relatively poor thermal insulation of the typical caravans and other residential dwellings in the parks. The recent period of steep increases in electricity prices across the NEM states further adds to the costs for these households.

As a consequence, these consumers face a greater risk of experiencing financial hardship than the population at large, but they do so too often without the same protections offered to the customers of authorised retailers.

Overall, SACOSS considers that effective and strong consumer protection regulation, rather than the 'threat' of competition, must remain the primary mechanism for ensuring a standard of consumer protection that will meet the policy principles of equity in access to an essential service.

This current study is, therefore, designed to provide a preliminary assessment of the effectiveness of the current electricity consumer protection framework for these particular consumers. However, SACOSS considers that the study findings will have more general import for residents of retirement villages and small residential and commercial customers in apartments or shopping centres.

Fundamental Principles

SACOSS notes and generally endorses the principles that underpin the national exemption regime as set out in the NERL (see Overview).

However, we have a somewhat different perspective in assessing the current exemption regime. For example, SACOSS considers that the starting point for any discussion on consumer protection is the fundamental principle that all consumers in our society have a right to **access a safe, reliable and affordable electricity supply**.

To whit, SACOSS also considers that all consumers should, as far as practical, have the same level of customer protection regardless of who supplies the electricity. However, given the characteristics of small consumers such as the ones included in this study, SACOSS places less importance on access to retail competition and more on the structure of the regulatory framework. Therefore we would add to the principles in the NERL as follows:

- all consumers should have access to a free, independent and impartial dispute settlement mechanism;
- the relevant regulators have an ongoing responsibility to monitor, report and enforce compliance with the regulatory requirements of registration with the AER (if applicable) and the conditions of exemption; and,
- the safety and security of supply to consumers in an embedded network must be a paramount feature of the AER's approval of exemption for an embedded network and should be clearly stated by the AER in its Network Exemption Guideline, including standards for metering and connection from the meter to the customers' premises.

In making these recommendations, however, SACOSS recognises that this market has a number of special characteristics that will influence the ultimate decisions on how best to achieve an effective customer protection regime for this segment in line with the exemption principles set out above.

In particular, permanent caravan and residential park arrangements are both diverse and dispersed. For example, parks vary considerably in size, length of stay of the occupants, and access to infrastructure generally. Some parks include a mix of customers in premises with older electricity supply arrangements and customers in new freestanding premises – access to the retail market is very difficult in the first instance and relatively easy in the second.

Designing a cost effective consumer protection regime for such a diverse range of situations is not an easy task! Nor is providing an effective framework for retail competition. In many cases, the costs and benefits of contestability of supply are questionable. Certainly, we did not find any customers in our study that were actively seeking access to market offers.

What these customers did expect, however, was a 'fair deal'. For example, they expected that the benefits to the exempt seller of lower retail market prices[9] compared to the standard offer price of the local retailers would be shared with the exempt customers in the embedded

[8] For the purposes of this paper a residential park is a defined as a site with multiple permanent dwellings where residents own the home but not the land.

[9] That is, market prices that are lower than the standard offer prices offered by the local area retailer. The standing offer price is the maximum that an exempt seller can charge an exempt consumer.

network. Similarly, they considered that the benefits of on-site solar generation should be shared. In some instances, the threat of competition will provide an incentive to the exempt seller to share price savings.

In other instances, such as caravan and residential parks, the threat of competition is minimal (in practice if not in law). Savings to the exempt seller, which may be significant (some 20%) compared to the standard prices, are not shared with the downstream customers in the embedded network.

As noted above, such diversity and geographic dispersion also makes the process of identifying and surveying customers more difficult and SACOSS is conscious of the need for care in extrapolating the findings of this study too broadly.

Nevertheless, we consider that the study highlights some important issues of practice and principle that should be further considered by the relevant regulators. The findings from the SACOSS study are summarised below.

Research Methodology

The market sector of electricity consumers that includes customers of on-sellers and embedded network operators is a complex and diverse market. It can include large industrial consumers co-located on a common industrial site, shopping centre complexes with large and small commercial businesses and large residential apartment complexes. On the other hand, the sector can include single person households located in small retirement villages or permanent caravan and residential parks.

Given this complexity and diversity, it was decided to focus this initial study on the permanent residents of caravan and residential parks. As discussed previously, SACOSS considered this sector was a priority because of the overall financial and social vulnerability of many permanent residents in these parks. As we were seeking to examine the question of equity in the consumer protection framework between customers of authorised retailers and customers of on-sellers and embedded network operators, this seemed a good place to start.

Given this background, SACOSS has identified three key questions to be investigated in the report, namely:

1. What is the regulatory exemption process and what conditions are attached to these exemptions?

2. What is the customer experience in terms of the operator's compliance with these conditions?

3. Are the regulatory obligations for on-sellers and embedded network operators adequate for the task of protecting consumers in this vulnerable situation?

Participants in the Study

Participants in this study were recruited by phone calls and using information from SACOSS' networks and data base. Consent to participate in the research was verbally gained from all participants (see Appendix D: Research Participant Consent Information).

It quickly became apparent that it was going to be quite difficult to obtain a comprehensive cross-section of individuals from this segment of the market who were willing to take part in this study, particularly given the time and resources available for recruitment to this preliminary study.

We understand that other regulators and organisations that have attempted to research various groups within the market of on-sellers and embedded networks have found similar difficulties in recruiting participants.[10] Moreover, those people who did agree to participate generally expressed high levels of concern around the confidentiality of their comments.

As noted above, the consumers in permanent caravan and residential parks feel particularly vulnerable to a charge by park management that they were "causing trouble" by participating in the research. They therefore required assurances from SACOSS that the names of participants, the site location and size of the park and other identifying material would not be revealed in the final study report.

For instance, SACOSS observed that consumers in this sector felt very vulnerable and were most concerned that they would be seen as 'causing trouble' by the operators of the caravan and residential parks. They also thought that this may create difficulties for their ongoing tenancy at the park. The NSW Energy Ombudsman reported a similar finding:[11]

> *In EWON's experience, permanent residents of Residential Parks are among the most vulnerable in the community... Customers with genuine concerns about some aspect of their electricity supply are often reluctant to raise these with the park operator for fear of retaliation. Any ill-feeling between the park operator and a resident can have a profound effect on the day-to-day living conditions of the resident and this can act as a deterrent to pursuing genuine*

[10] For example, the Essential Services Commission of South Australia (ESCOSA) commenced a research program in 2009-10. ESCOSA indicated to SACOSS that obtaining an adequate sample for quantitative analysis was extremely difficult. (see also Appendix E herein).

[11] Energy & Water Ombudsman NSW, Letter to the AER dated 30 July 2010, in response to the AER's Issues Paper, ***AER approach to retail exemptions***, June 2010, p 2. http://www.ewon.com.au/ewon/assets/File/Submissions/2010/EWON_AER_RetailExemptions_July2010.pdf.

complaints. As a result, when customers approach EWON, they often ask to remain anonymous.

EWON made these observations to the AER in 2010 and our findings suggest that despite various changes in the regulations, this sense of vulnerability continues and was ultimately a major consideration by SACOSS in the final research design.

The final sample of participants in the study included residents of long-stay caravan and residential parks in South Eastern Australia and North Eastern Australia. These locations provided an opportunity to also consider some of the state specific issues.

Research Stages

The research was conducted over the period August to November 2015. The methodology for this preliminary study included the following research stages:

- Desk top review of the current regulatory arrangements in the national regulatory framework (NECF) and in the various NEM jurisdictions;
- Face-to-face and phone interviews with representatives of key regulatory bodies and consumer organisations (see Appendix E);
- Detailed face-to-face interviews, telephone interviews and workshops were conducted with electricity users in permanent caravan and residential parks. These interviews were conducted in October 2015 using a semi-structured interview format and explanatory material (see Appendix B);
- Assessment of the issues raised by caravan and residential park users in the context of the conditions of exemption that are set out in the AER's Exempt Selling Guideline and the AER's Network Exemption Guideline; and,
- Assessment of the AER's two Guidelines in the context of the customer protection framework (including safe and reliable supply) set out in the National Electricity Retail Law and Rules (NERL and NERR).

We believe the research approach set out above enabled SACOSS to address the concerns of the study participants with the confidentiality of their responses. However, this has inevitably affected the level of detail that can be provided in some sections of this report and the qualitative nature of the research.

Throughout this report we are also careful to qualify our observations by the fact that the sample of participants who took part in the empirical sections of this report are not necessarily representative of the population of persons residing in caravan and residential parks.

For instance, it would be inappropriate to draw any quantitative conclusions based on this preliminary qualitative research. However, we are reassured that many of the issues identified in this report are consistent with the findings of other researchers and do provide some insight into the day to day challenges faced by this sector with respect to their electricity supply.

Structure of the Report

Section 1 provides a more detailed description of the regulatory framework for on-sellers and embedded network operators. We considered it important to shed some light onto what is a confusing maze of overlapping consumer protection legislation. While our focus is on the national regulatory framework, we are cognisant of the importance of understanding this broader context.

Section 2 provides more detail analysis of the findings of the research with exempt customers and compares these findings with the AER's conditions of exemption for on-sellers and embedded network operators. In effect, this section identifies issues with the compliance of exempt sellers and network operators with the AER's conditions of exemptions for that class of customers.

Section 3 concludes the report by comparing the customer protection framework as set out in the AER's conditions of exemption and the customer protection available to customers of authorised retailers and network service providers. That is, the section considers whether the AER's conditions of exemption are sufficient to achieve the fundamental policy objective in the NECF that, as far as practicable, exempt customers should have comparable customer protections to those afforded to retail customers.

Appendix A to D includes the interview schedules and other material used in the research. Appendix E summarises the meetings between SACOSS and a number of the regulatory authorities and lead consumer organisations.

It is important to emphasise that this study does not address all the complex technical, regulatory and customer protection issues associated with the exemption processes for both on-selling and embedded network operations. Nor does it attempt to examine the detailed jurisdictional regulations that impact on overall consumer protections. For example, some consumer protections for residents of caravan and residential parks are contained in Tenancy, Fair Trading and similar legislation. We have not examined these issues other than to note its impact on consumers' access to dispute resolution processes.

1. Background to Consumer Protection in the National Electricity Market (NEM)

1.1 The national consumer protection framework for small consumers

Electricity is an essential service in our community and SACOSS is committed to the principle that households across Australia should have access to a reliable, safe, secure and affordable electricity supply, whatever their financial circumstances. One of the important factors underpinning this outcome is the implementation of an industry specific, robust and transparent consumer protection framework.

A major stage in the development of this consumer protection framework was the progressive introduction from 2013 of the National Energy Customer Framework (NECF) by most states in the National Electricity Market (NEM). The NECF provides the overarching regulatory framework that covers the supply of both electricity and natural gas. The NECF includes the following regulatory instruments:

- National Energy Retail Law (NERL);
- National Energy Retail Rules (NERR); and,
- National Energy Retail Regulations.

Note: In this report a reference to the NECF includes a reference to the NERL, NERR and related national regulations.

The NECF builds on the energy consumer protection frameworks developed by each of the NEM jurisdictions in the previous decades. Various parts of these original jurisdictional laws, regulations and codes continue to operate in parallel to the NECF to reflect the specific concerns of consumers in each state.

Victoria has not yet signed up to the NECF. However, the Victorian Government and the Victorian energy regulator, the Victorian Essential Services Commission (ESC), have progressively aligned much of its consumer protection framework in the Victorian Energy Retail Code with the NECF.[12]

The National Electricity Law (NEL) and the National Electricity Rules (NER) also regulate specific aspects of the electricity supply industry. Although all states in the NEM have signed up to the NEL and NER, different jurisdictions retain certain derogations from the NEL and NER and specify certain performance requirements in their industry codes or regulations (such as state based Distribution Codes). The NER includes economic regulation and regulation of the more technical aspects of the electricity supply chain such as customer connection and metering policies and standards. These too, are relevant to the overall consumer protection framework.

This report, however, will focus largely on the operation and effectiveness of the national regulatory instruments.

Figure 1 overleaf illustrates the complex regulatory framework that underpins the overall consumer protection framework. While the NECF sits at the centre of the regulatory framework, it is complemented by various jurisdictionally specific laws and regulations as well as national consumer law.

However, not all aspects of the consumer protection framework for customers of on-sellers and embedded network operators are captured in the chart. These customers face the added complication that the on-sellers are exempt from holding a retail authorisation. Similarly, the embedded network operators are exempt from registration with the Australian Energy Market Operator (AEMO) and from certain obligations in the NER.

Instead, both the on-seller and the embedded network operator (who are usually the same person) must each be registered with the AER and are subject to the conditions of exemption set out by the AER in two separate guidelines.

Amongst other matters, this means that on-sellers and embedded network operators are not automatically members of a jurisdictional energy ombudsman scheme. The NERL only requires authorised retailers and distributors to be members of the scheme.[13] Nor does the energy ombudsman have any jurisdiction over the on-sellers and embedded network operators except for some limited jurisdiction in NSW.[14]

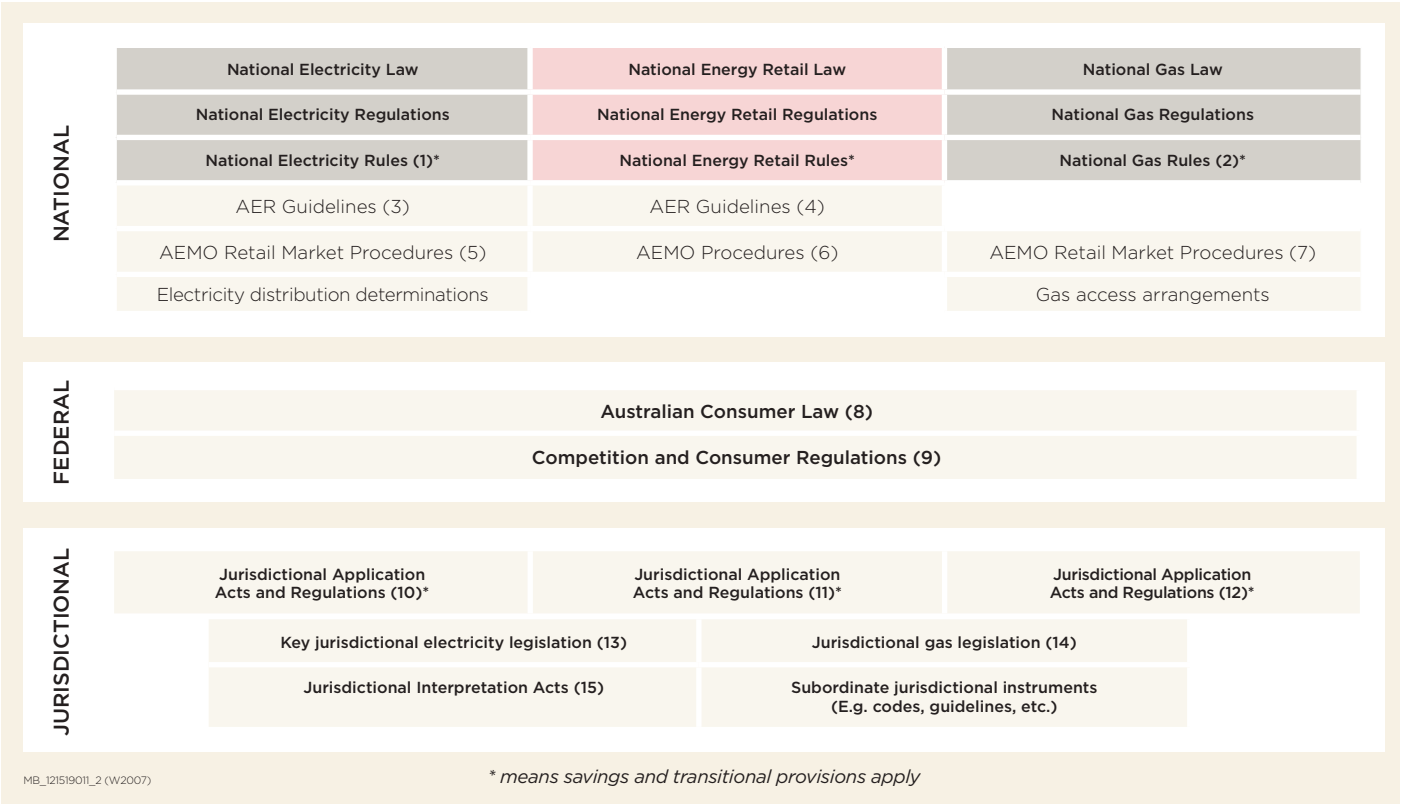
In addition, some aspects of the consumer protection framework for electricity supply to residents of caravan and residential parks are captured in various jurisdictional instruments that regulate the rights and obligations of tenants and landlords and park operators, rather than in the energy laws and regulations of the state. For instance, the NSW government has published minimum customer service standards for the supply of electricity to permanent residents by the owners of residential

[12] In October 2014, the ESC published Version 11 of the Victorian Energy Retail Code (updated in January 2015). An important objective of the revised Energy Retail Code was to: "harmonise the Energy Retail Code with the National Energy Consumer Framework to the extent possible". *Energy Retail Code Version 11*, page 2. http://www.esc.vic.gov.au/getattachment/bd6bae17-f639-4c68-a5dc-a4de803a48ae/Energy-Retail-Code-Version-11-January-2015.pdf

[13] NERL, section 86 (1) & (2) respectively.

[14] In NSW, exempt sellers are not members of the NSW Energy and Water Ombudsman (EWON) Scheme. However, EWON does have jurisdiction to hear complaints by customers of exempt retailers and to give directions to the exempt seller. This does not extend to the embedded network operator.

Figure 1: Interaction between National Customer Framework and jurisdictional statutory instruments for ACT, NSW, Queensland, SA and Tasmania (as at 1 July 2015).



Source: AEMC, Guide to the application of the NECF, Summary of interactions, July 2015. http://www.aemc.gov.au/Energy-Rules/Retail-energy-rules/Guide-to-application-of-the-NECF/Summary-of-interaction

parks (Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks).[15]

Where this occurs, the jurisdictional tenancy regulation appears to have some primacy. For example, in the Exempt Selling Guideline the AER states:[16]

> *We have also considered the requirements of state or territory tenancy and equivalent legislation in developing exemption classes and conditions … Exemption conditions are intended to supplement jurisdictional legislation which on its own does not provide energy-specific protections for exempt customers.* [Emphasis added]

In addition, any dispute that a consumer has with the park management over their energy supply will generally need to be taken to a body such as a jurisdictional Tenancy Tribunal or a Civil and Administrative Tribunal (or equivalent) in each state for resolution rather than to a dedicated energy ombudsman.[17]

It is not within the scope of this report to examine the relevant tenancy regulation in each jurisdiction. Nevertheless, we will come back to the issue of dispute resolution in later sections of this report.

It is clear, however, that any consumer wishing to understand their rights with respect to energy supply will need to consider both national and jurisdictional regulation. In the case of customers of on-sellers, they will also need to consider the links between the national and jurisdictional regulation and the general regulation in each jurisdiction that relates to tenancy and landlord rights and responsibilities and/or the management of residential parks.

It is little wonder that most of these consumers find that the difficulties of seeking independent resolution of a dispute with the park management are too great, despite the significant grievances that can arise in some parks.

15. NSW Government Fair Trading, *Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks*, August 2006, Revised July 2014. The document applies as prescribed in the Residential Parks Regulation 2006 as specified in section 37 (6)(b) of the NSW Residential Parks Act 1998. http://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/customer_service_standards_for_the_supply_of_electricity_to_permanent_residents_of_residential_parks_-_revised_july_2014.pdf

16. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, p 26. https://www.aer.gov.au/retail-markets/retail-guidelines/retail-exempt-selling-guideline-april-2015

17. With the exception of NSW, see footnote 25.

1.2 The Exemption Framework (ACT, NSW, Qld, SA)

1.2.1 Overview

The regulatory arrangements for the exemption of on-sellers and embedded network operators are complex and despite the developments in the national energy market generally, the market is subject to a confusing array of national and jurisdictional regulation as highlighted previously.

However, notwithstanding this complexity there are many common themes. While the focus of SACOSS' study is on the issues facing a sub-set of exempt supply customers (permanent residents in caravan parks and residential parks), it is clear that the many of the issues identified in this study are quite similar to those identified previously by, for instance, CUAC and the AEMC.

Nevertheless, there are also a number of unique issues facing residents of caravan and residential parks and these issues are exacerbated by the overriding sense of vulnerability that the residents in caravan and residential parks experience. Of particular concern to SACOSS are the apparent gaps in information provision (including pricing information), additional fixed charges, billing, access to dispute settlement and hardship programs and the state of the physical infrastructure including the customer metering. These gaps are discussed in more detail in Sections 2 and 3 of this report.

SACOSS is aware that progress has been made to address these gaps in the national regulation of on-sellers and embedded network operators, including the recently concluded review of the NER by the AEMC. However, this study confirms the views of CUAC and others that the consumer protection and supply security arrangements for these most vulnerable customers remain inadequate. Their very 'invisibility' to the regulator compounds the difficulty of ensuring that the regulatory protections are adequate – in practice – as well as on paper.

To understand these gaps the following sections will provide an overview of the current regulatory arrangements at the national level. There will also be a brief assessment of the Victorian arrangements as Victoria is not yet part of the national regulation under the NECF.

1.2.2 Who are exempt sellers and exempt embedded network operators?

The exempt selling and exempt embedded network sectors cover a wide range of situations. An exempt seller or an embedded network operator may be supplying a number of large industrial premises co-located within a single large industrial site. Or they could be providing electricity to large and small tenants in a shopping complex or multi-story missed usage (residential and small commercial) building. At the other end of the scale, the exempt seller/embedded network operator may be supplying electricity to a small retirement village or a permanent/long-stay caravan or residential park.

Together with the multi-layers of regulation, this large variation in the types of premises and types of customers significantly complicates the task of efficiently regulating and monitoring the exempt market. Yet the observed growth in the exempt customer market increases the need for some form of effective regulation to protect customers many of whom are unlikely to realistically have a choice of retailer.

A major issue is that in many cases the exempt seller/embedded network operator 'self-identifies'. That is, it is the on-seller or embedded network operator that nominates himself or herself as (for example) a registrable exempt seller. Therefore, the AER is unlikely to know about many of these places until and unless the relevant person 'puts up their hand', or there are complaints raised by customers directly to the AER. The lack of visibility of this market in turn vastly complicates the AER's regulatory task.

1.2.3 Regulation of Exemptions

The NERL sets out an exemption framework for on-sellers. The NERL states that a person must not engage in the activity of selling energy (electricity or gas) to a person for premises unless:[18]

- The seller is the holder of a current retailer authorisation; or,
- The seller is an exempt seller.

Similarly, the National Electricity Law (NEL) and National Electricity Rules (NER) state that anyone who engages in an electricity distribution activity must either be:

- Registered with the Australian Energy Market Operator (AEMO) as an electricity network service provider (NSP)[19]; or,
- Must gain an exemption from the requirement to be a registered NSP with AEMO.[20] [i.e. become an exempt

[18] NERL, section 88.

[19] NEL, section 11(2)(a) and NER, clause 2.5.1(a).

[20] NEL, section 11(2)(b) and NER, clause 2.5.1(d).

embedded network operator]. The exemption can also relieve the operator of requirements to comply with various sections of the NER.[21]

NSW, Queensland and South Australia have adopted the exempt selling framework in the NECF (i.e. the NERL/NERR, but with some jurisdictional derogations). Tasmania has adopted the NECF, however, Tasmania has excluded via derogation, the application of the NECF for on-sellers in embedded networks.[22] Victoria has not adopted the NECF and has its own exemption framework.

All states, including Victoria, are signatories to the NEL and therefore come under the NEL's requirements for registration with AEMO or exemption from registration with AEMO.

Just as the AER is responsible for authorising energy retailers and distribution service providers, the AER is also responsible for granting exemptions from retail authorisation and from registration with AEMO as an NSP.

The AER publishes two guidelines that set out the exemption policy principles, the classes and subclasses of exemption and the "conditions" required for granting exemptions for each class and sub-class. The AER's two current exemption guidelines are:

- AER, (Retail) Exempt Selling Guideline, Version 3, April 2015 ["Exempt Selling Guideline"]; and,
- AER, Electricity Network Service Provider Registration Exemption Guideline, Version 3, 27 August 2013 ["Network Exemption Guideline"].

Underpinning the AER's exemption guidelines are a number of policy principles outlined in the NERL, namely:

- Regulatory arrangements for exempt sellers should not unnecessarily diverge from those applying to retailers;[23]
- Exempt customers should, as far as practicable, be afforded the right to a choice of retailer in the same way as comparable retailer customers in the same jurisdiction have that right[24]; and,
- Exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under this Law and the Rules.[25]

Thus, the exemption framework provides more flexibility and lower costs, particularly for small-scale businesses where the sale and/or distribution of energy is not their primary business. However, the AER is seeking to apply the framework in a way that ensures customers of the exempt sellers and network operators have access to adequate protections and are not disadvantaged compared to other energy users.

SACOSS considers there is a gap between the AER's intent and the actual outcome (discussed in sections 2 and 3 of this report). Nevertheless, SACOSS supports these three important policy principles and has considered the findings of this study in the light of these principles. We also recognise, however, that the AER faces a difficult task to balance these principles with the practical issues of electricity supply in some embedded networks and the potential costs to consumers and exempt sellers of stricter regulation of the sector.

There have been a number of revisions to the AER's two Guidelines to improve consistency between the Guidelines and to better reflect these policy principles. The AER is currently reviewing the Exempt Selling Guideline and a draft of Version 4 is available on the AER's website.[26] The AER intends to further revise both Guidelines in 2016 in response to the recent decision by the AEMC to amend the NER in order to: "reduce the barriers to embedded network customers accessing retail market offers".[27] The AEMC's amended rules for embedded networks will come into effect in 1 December 2017.

1.2.4 Exempt Sellers

An exempt seller is a person or entity that sells electricity to consumers, however, the sale of electricity is secondary to the main purpose of the business. For example, a caravan park operator may on-sell electricity to caravan park residents, but this is secondary activity to the main purpose of the business. In these circumstances, the exempt seller should seek an exemption from the AER from the obligation to hold a retail authorisation (or a retail licence) under the NERL.

21. Specifically, the exemption for the embedded network operator includes exemption from the technical requirements in Chapter 5 of the NER and/or the obligation to provide other network suppliers and other registered participants in the NEM with access to its network and other obligations which exist under the NEM. AER, *Electricity Network Service Provider Registration Exemption Guideline*, Version 3, 27 August 2013. https://www.aer.gov.au/system/files/AER%20electricity%20NSP%20registration%20exemption%20guideline%20-%2027%20August%202013_0.PDF

22. *National Energy Retail Law (Tasmania) Act 2012*, section 17 which states that the SA Energy Retail Law only applies in Tasmania to the sale or supply of electricity to customers who premises are connected to the interconnected national electricity system (as defined in the NEL).

23. NERL, section 114 (1)(a).

24. NERL, section 114 (1)(b).

25. NERL, section 114 (1)(c).

26. AER 2015, *Review of Retail Exempt Selling Guideline*, http://www.aer.gov.au/retail-markets/retail-guidelines/review-of-retail-exempt-selling-guideline-2015.

27. AEMC 2015, *Embedded Networks Rule Determination*, 17 December 2015. http://www.aemc.gov.au/Rule-Changes/Embedded-Networks

Categories of exemption

The NERL prescribes that all exemptions from retail authorisation will be categorised into one of three categories, viz.:[28]

- Individual Exemption;
- Deemed Exemption; and,
- Registrable Exemption.

These three categories of exemptions are also adopted in the relevant sections of the NERR[29] and further defined in the AER's Exempt Selling Guideline. SACOSS' study is focused on the *registrable exemptions*. In brief:

- **Deemed exemption:** A deemed exemption applies automatically to certain classes of people. A person covered by a deemed exemption does not need to either apply or register with the AER. The deemed category generally applies to very small embedded network sites (less than 10 residential or business premises).[30]
- **Registrable exemption:** A registrable exemption must be registered with the AER. The exemption only applies to a particular individual or entity for a particular site, and is subject to specified conditions depending on the class of registration. The registrable category generally applies to sites where the AER considers "greater transparency and regulatory oversight is required"[31] either because the scale of activities is larger (e.g. 10 or more premises) or the impact on the market is greater. All caravan and residential parks and retirement villages are categorised as 'registrable', irrespective of their size, reflecting a recognition by the AER of the need for greater regulatory oversight.[32]
- **Individual exemption:** Individual exemptions are intended for more unusual or one-off arrangements that do not meet the criteria for deemed or registrable exemptions. The conditions set by the AER are tailored to the specific situation of the person or business seeking the exemptions and intended to balance the needs and rights of customers and the regulatory burden of meeting these requirements[33].

The core of the obligations ("conditions") placed on exempt sellers is based on the retailer customer protections established under the NERL. However, the details of these obligations will vary according to the specifics of an on-seller's operations. They include obligations with respect to:[34]

- obligation to supply;
- provision of key information;
- billing and payment arrangements;
- disconnection and reconnection; and,
- concessions and rebates.

Exemption classes and conditions of exemption (deemed and registrable exemptions)

For deemed and registrable exemptions, the AER has defined a number of classes of exemption. For example, an on-seller of electricity to premises in a caravan or residential park is classified as registrable exemption "class R4". An on-seller to an apartment block with 10 or more premises is categorised as "class R2", an on-seller to premises in a retirement village is classified as registrable exemption class "R3".

Although the category of deemed exemptions includes various classes of exemption ("D1", "D2" etc), there is no obligation to register with the AER and the AER has little knowledge of the number and location of premises in this category or their compliance with the Guideline conditions of exemption for deemed exempt on-sellers.

In the case of registrable exemptions, including R4 class of exemptions, the on-seller does not have to apply to the AER for exemption but must complete a registration form and submit to the AER. Once registered with the AER, the registrable exempt seller will then need to abide by the AER's "conditions" for that registrable class (R3, R4 etc.) as set out by the AER in the Exempt Selling Guideline.

Each class has its own set of conditions that the exempt person must comply with. For example, registrable class R4 (exempt on-sellers to caravan and residential parks) has 19 conditions that must be met (out of 19 possible conditions attached to registrable exemptions) as a condition to on-selling. Registrable class R2 and R3 also have 19 conditions attached. However, registrable class R5 (persons selling metered energy to large customers) requires only 7 full, and 1 part, condition of exemption.[35]

28. NERL, section 110 (2).
29. NERR, rule 149, 150 & 151.
30. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, p 12.
31. Ibid, p 13.
32. Ibid.
33. Ibid.
34. Summarised from AER, *Draft (Retail) Exempt Selling Guideline, Version 4*, September 2015, p 6. http://www.aer.gov.au/system/files/Draft%20AER%20%28Retail%29%20Exempt%20Selling%20Guideline%20%E2%80%93%20September%202015.PDF
35. AER, *(Retail) Exempt Selling Guideline – Version 3*, April 2015, Table 2, Appendix A-3, pp 51-52. In its draft Version 4, the AER is proposing to reduce the number of conditions of exemption even further for R5 exempt customers.

According to our interpretation of NERR rules 150-153, SACOSS believes that the AER may also amend, revoke or impose additional conditions of exemptions,[36] including amending these during the currency of the determination.[37]

This mechanism enables the AER to tailor the conditions of exemption to the circumstances of a specific class of on-sellers; an important feature given the diversity of the types of persons or parties applying for an exemption. However, SACOSS considers that the AER has very limited capacity and resources to monitor compliance of exempt sellers with the conditions defined in the Guideline for registrable exemptions.

For example, if erstwhile exempt sellers do not nominate themselves for registration, the AER has limited capacity to identify the relevant party, determine if it should be registered with the AER (or is a deemed exempt seller) and then monitor its compliance with the requirements of the Retail Exemption Guideline.

The situation for the participants in SACOSS study is also made more difficult as the arrangements with tenants in permanent caravan and residential parks are often long-standing arrangements put in place well before the AER's Exempt Selling Guideline came into place. This makes these sites even less visible to the AER and increases the costs and risks of compliance to both the park manager and the residents in the park, particularly if significant changes in the park policies and procedures are required in order to achieve compliance with the AER's conditions.

SACOSS is concerned that there may be a real gap in the process of transitioning from old jurisdictional arrangements (where many such sites were effectively "deemed" exempt), to the new arrangements where exempt sites such as caravan and residential parks should be registered with the AER.

A similar situation applies to the exemption of an embedded network operator as discussed below.

1.2.5 Exempt Embedded Network Operators (electricity)

Exempt embedded network operators (sometimes called 'private network operators' or 'exempt network operators') refers to the operators (owners or managers as the case may be) of physical assets that deliver electricity to another person or party. The assets include privately owned wires, switches, meters, transformers or other electrical equipment owned, operated or controlled by the operator.[38]

Under the NEL and NER, the AER can grant an exemption from the requirement to be registered with AEMO as an electricity network service provider, subject to certain conditions set by the AER.[39] Registration with AEMO can be a complex and expensive process and the NEL recognises that it is appropriate to allow exemptions from the obligation to register with the AEMO subject to the person's agreement to the conditions of exemption set out by the AER in the AER's Network Exemption Guideline.

In addition, the exempt operator does not have to comply with the technical requirements in Chapter 5 of the NER (including various connection, metering and access requirements)[40] and the obligation to provide third party access to the embedded network. The exempt embedded network operator is also not subject to economic regulation by the AER under Chapter 6 of the NER.

The AER's NSP Exemption Guideline also sets out specific conditions for each network exemption class and category.

In some states an embedded network operator must also enable its customers to become customers of an authorised retailer. The AER's Guideline states that, where a jurisdiction allows retail competition for embedded network customers, then:[41]

> *The right of a customer to access retail competition is absolute. A private network owner or their agent must not impede a customer who has chosen to exercise that right nor may they impose unfair or unreasonable conditions on the customer.*

Currently, this "right" to access a retail market offer is allowed under jurisdictional laws in NSW, SA and Victoria, but is not available to exempt consumers in the ACT, Queensland and Tasmania.

Figure 2 overleaf (from AEMO) illustrates the difference between "on-market customers" in an embedded network who have taken up a retail market offer and "off-market customers" in an embedded network. The off-market 'child' connection points are not recognised in the National Energy Market (NEM) systems. The on-market 'child' connection points are recognised in the NEM as a NEM retailer supplies them. Retail competition cannot be effective if there are barriers to recognition of the customer's meter in the NEM systems.

36. See NERR, rules 150 – 153 for deemed and registrable categories of exemption. Rule 158 for individual exemptions.
37. NERR, rule 153 (2)&(3).
38. AER, *Electricity NSP Registration Exemption Guideline*, 27 August 2013, p 8.
39. NEL, section 11(2)(b) and NER, clause 2.5.1(d).
40. NER, Chapter 5, "Network Connection, Planning and Expansion"; Chapter 5A, "Electricity Connection for Retail Customers".
41. AER, *Electricity NSP Registration Exemption Guideline*, 27 August 2013, p 32.

All the customers in SACOSS' study would be categorised as "off-market customers" as none had a direct relationship with a NEM retailer (authorised retailer).[42] They are not visible to AEMO or to the regulator.

Categories of Exemption

The AER uses the same categories of exemption, namely individual, deemed and registrable exemptions as set out in the AER's Exempt Selling Guideline (see page 20). As far as possible, the AER has also sought to align the classes for deemed and registrable exemptions with the Exempt Selling Guideline, although there are more classes for each exemption category.[43]

For example, registrable class **"NR4"** refers to operators of embedded networks in caravan and residential parks and corresponds to the **R4** exempt seller class.

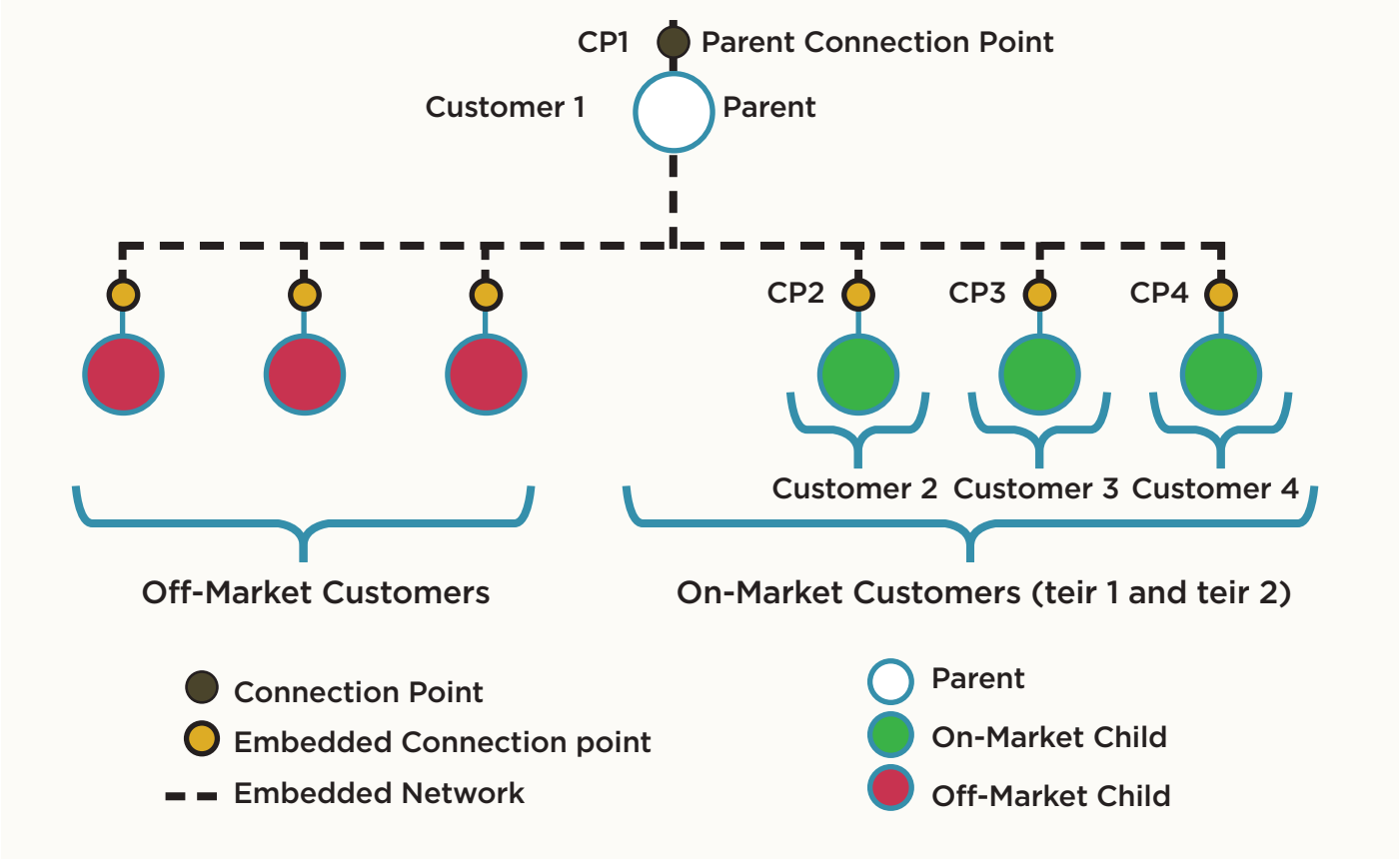
Similarly, an exempt embedded network supplying an apartment block with 10 or more premises is categorised as "NR2", and a network supplying to a retirement village is classified as "registrable exemption class "NR3".

Exemption Classes and Conditions of Exemption (deemed and registrable exemptions)

Each class of exemption has its own set of conditions and these are set out in the AER's NSP Registration Exemption Guideline. Registrable class NR4 has 12 conditions attached including four "basic requirements".

However, irrespective of the category and class of network exemption, the exempt network operator must meet the four basic requirements of an exempt network in addition to the specific conditions to be met for each exemption class. The basic conditions include:[44]

Figure 2: Relationships in Embedded Networks



Source: AEMO, National Electricity Rule Change Request – Embedded Networks, September 2014, p 6. http://www.aemc.gov.au/getattachment/66945de4-6a2d-44be-8327-192963ad2e7a/Rule-change-request.aspx

Note: Tier 1 and tier 2 refer to whether the embedded network customer has a market offer from the local area retailer (Tier 1 retailer) or from another retailer (Tier 2 retailer).

42. At least one participant in the study was a resident in a separate villa unit in the caravan and residential park and was able to choose an authorised retailer. We understand this resident had a direct connection to the local distribution company and was not in a "parent-child" relationship.

43. Ibid, p 8.

44. Ibid, p 9.

- Ensure that their network is safe;
- Have a dispute resolution mechanism;
- Ensure that network pricing is in accordance with strict controls[45]; and,
- Ensure that electricity meters comply with the National Measurement Act 1960 (Cth) requirements for electricity meters installed from 1 January 2013 and other applicable Australian standards.

That is, while an exempt embedded network operator may be relieved from certain technical requirements under the NER, the person is not relieved of the core safety requirements for a distribution business.[46]

Indeed, the obligations under the Guideline for each category of exemption are strong. The AER's NSP Exemption Guideline states:[47]

> *All exempt private networks are subject to conditions. These conditions cover safety, dispute resolution, metering and pricing. Even if your network is in a 'deemed' category, if you fail to observe the relevant conditions your exemption will be invalid. This may expose you legally to a civil penalty (a fine) under the National Electricity Law or other relevant legislation. [emphasis added]*

Compliance with all the relevant conditions of exemption for that class is a mandatory requirement for a network exemption to be valid. Non-compliance may result in civil penalties.[48] This includes the mandatory requirement to allow exempt customers access to retail market offers (where allowed by jurisdictional law), as noted above.

The NEL and NER are the primary regulatory instruments for distribution networks, including embedded networks. However, all NSPs also face a range of jurisdictionally based regulation and codes that govern different aspects of the network such as technical, safety and reliability requirements. The various national regulatory instruments governing the operation of exempt sellers and embedded network operators are also under review, as discussed in section 1.4.

1.2.6 Access to Retail Competition

There is agreed national policy intent expressed in the NERL to promote access to retail competition for exempt customers in order for them to share the potential price and non-price service benefits of competition. The AEMC's proposed amendments to the NER are based largely on the implementation of this policy intent. For example, the AEMC states: "The draft rule determination seeks to make it easier for embedded network customers to choose who they purchase electricity from … while remaining part of the embedded network."[49]

Notwithstanding the policy intent at the national level, jurisdictions have not consistently adopted this policy and removed restrictions on exempt customers. Only Victoria, New South Wales and South Australia allow exempt customers in private networks to exercise a right to choose their electricity retailer. Exempt customers in the ACT, Queensland and Tasmania will normally require a direct connection to the local distribution network to access retail competition.

In the three states that allow retail competition for embedded network customers, the private network operator must not obstruct access to retail competition and must take reasonable steps to facilitate access to an authorised retailer.[50] AEMO has established metrology procedures to facilitate retail competition. At the time an embedded network customer takes up a retail offer, the gate meter is registered as a 'parent' meter while the customer's meter is registered as a 'child' meter. [51 & 52]

Where retail competition for embedded network customers is prohibited, the customer will need to make a direct connection to the local distributor and install individual metering in the normal way. This is likely to also require changes to the wiring in the embedded network that will also be borne by the consumer. This is likely to come at a very high cost, and consumers in the ACT, Queensland and Tasmania face a number of other non-cost barriers to gaining access to retail competition.

45. Ibid, pp 34-37. These regulated pricing controls include controls on the apportionment of external network charges, restricting any application of "internal network charges" and how customers are charged (e.g. a bundled energy tariff (which includes retail costs and is the most common form), actual costs, pro-rata charge, see pp 36-37).
46. AER, *Electricity Network Service Provider Registration Exemption Guideline*, 27 August, 2013, p 3.
47. Ibid, p 7.
48. Ibid, p 9 & NEL, section 11.
49. AEMC 2015, *Draft new arrangements for embedded networks*, Information Sheet, p1. http://www.aemc.gov.au/getattachment/f01b69d1-de81-4c60-baae-8e1373078f6d/Information-sheet.aspx
50. AER, *Electricity NSP Registration Exemption Guideline*, 27 August 2013, p 32.
51. AEMO, *Metrology Procedure Part A National Electricity Market*, Version 5.3, 15 May 2015, pp 36-37.
52. The new retailer will probably have to arrange an upgrade the customer's meter (usually at a cost passed through to the customer) and will need to provide energy billing information to the private network operator so that the remainder of the site can be billed.

1.3 Summary of the National Exemption Framework

Table 1 sets out the principal national regulatory instruments that are relevant to governance of exempt sellers and embedded network operators.

As noted, however, the application of the national regulatory instruments is moderated by specific jurisdictional regulations such as barriers to retail competition for the exempt customers, as discussed previously.

On the other hand, Victoria permits contestability but has not adopted the NERL and NERR. Thus, Victorian exempt sellers are bound by Victorian legislation while Victorian embedded network operators are subject to the requirements in the NER. However, they must also take account of specific Victorian requirements for exemption and consumer protection. Section 1.5 provides more details on the Victorian situation.

Table 1: Summary of regulatory instruments (excluding Victorian retail arrangements)

Regulatory Instrument	"Owner"	Relevant requirements in the regulatory instrument
National Energy Retail Law (NERL)	Parliament of South Australia (on advice from COAG and COAG Energy Council)	• Grants AER power to exempt an entity from requirement to hold a retailer authorisation (s 110 (1)) & to revoke exemption (s 111) • Establishes 3 classes of exemptions (individual, deemed, registrable) (s 110 (2)) • AER may impose conditions on exempt seller (s 112 (1)) & impose civil penalties on breach of conditions. (s 112 (2)) • AER must take account of policy principles (s 114 (1)(a)-(c): - arrangements should not diverge unnecessarily from those applying to retailers - exempt customers should as far as possible be afforded the right to a choice of retailer in same way as other retail customers in the same jurisdictions - exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under the NERL and NERR. - exempt seller related factors (s 115) & customer related factors (s 116) that the AER may consider alongside the policy principles (above). • AER must develop & maintain a Retail Exempt Selling Guideline (s 118) • AER must maintain & publish a Public Register of Exempt Sellers (s 119)
National Energy Retail Rules (NERR)	AEMC in response to requests for rule change from stakeholders including AEMO and the AER.	• Establishes an Exempt Selling Regime (Part 9) Division (2) - provides details on each type of exemption (individual, deemed & registrable) (r. 149 – 151) - AER's right to impose conditions as part of exemption (r. 152) - sets condition on prices; the AER must ensure that these customers are charged no more than the standing offer price of the local retailer (r. 152(4)) – the "Pricing Rule" - includes conditions on installing, maintaining and reading meters of exempt customers (r. 152 (5)) • AER's (Retail) Exempt Selling Guidelines (Division 3) • Provisions relating to individual exemptions (Division 4) • Public Register of Authorised Retailers & Exempt Sellers (Division 5)
National Electricity Rules (NER)	AEMC: in response to request for rule change from stakeholders including AEMO and the AER	The NER in clause 2.5.1 (d) provides for the AER to be able to exempt any person or class of persons from the requirement to register as a network service provider, subject to the AER's conditions and consistent with the national electricity objective. The AEMC's final rule change determination (December 2015) allows for the appointment of an embedded network manager (ENM) and includes the right of the AER to exempt an embedded network operator from this requirement based on the AER's assessment of the costs and benefits to the embedded network consumers of appointing an ERM. The rule change also provides for consequential amendments to other areas of the NER. The new rules will come into effect 1 December 2017.
Network Exemption Guideline	AER	The AER's Network Exemption Guideline was updated in August 2013. It requires all previous holders of exemptions (apart from pre 1 January 2012 individual exemptions) to comply with the Guideline. The Guideline covers safety, dispute resolution, metering and pricing. The Guideline will be updated in 2016 to reflect the changes in the NER (above).
Exempt Selling Guideline	AER	The Exempt Selling Guideline Version 3 was published in April 2015. The AER has proposed to further amend the Guideline (Version 4) and is currently conducting a public consultation process on this.

Note: The comments in this table are based on Version 3 of the AER's Network Exemption Guideline.

1.4 Recent Developments in the National Exemption Framework

Given the growth in the exempt selling and embedded network markets it is perhaps not surprising that there have been various changes to the relevant rules and guidelines. The following sections highlight some of the more recent developments.

1.4.1 The AEMC rule change determination

As indicated above, the AEMC has recently made a final rule determination to amend the NER in order to clarify the regulatory arrangements for embedded networks and reduce the barriers to embedded network customers accessing retail market offers.[53]

The AEMC's rule determination will come into effect on 1 December 2017 and may lead to significant changes in the way embedded network operators currently operate.

The AEMC's rule determination was made in response to a rule change request from AEMO. AEMO had, in turn, been requested to propose a rule change to facilitate competition in the on-selling market by the Standing Council of Energy Ministers (now the Council of Australian Governments Energy Council (COAG Energy Council)).[54]

The AEMC's focus was to put in place a regulatory framework that maximised the opportunity for customers in exempt embedded networks to access retail competition. The AEMC found that the current regulatory arrangements for embedded networks were "unclear" and resulted in barriers to effective retail competition.[55] The AEMC stated that:[56]

- The NER did not allocate responsibility for performing market interface functions required to link embedded network customers to retailers in the NEM;
- The AER's exemption guidelines do not fully facilitate embedded network customers access to retail market offers;
- Jurisdictional regulations are inconsistent and some prevent embedded network customers accessing retail market offers; and,
- The NERR does not provide clear obligations and relationships between authorised retailers, embedded network operators and embedded network customers.

Table 2 below was prepared by the AEMC to illustrate the complexity, gaps and ambiguities in the roles and responsibilities in the current embedded network exemption framework. Again, these complexities create difficulties for embedded network operators, their customers and the regulators who must administer the regulatory framework.

Table 2: Legal instruments and service providers of electricity services

	Off-market embedded network customers		On-market embedded network customers		Customers outside of embedded networks	
Service	**Who provides the service?**	**Under what instrument?**	**Who provides the service?**	**Under what instrument?**	**Who provides the service?**	**Under what instrument?**
Network	Embedded network operator	AER network exemption guideline	Embedded network operator	AER network exemption guideline	DNSP	NER
Metering	Embedded network operator	AER network exemption guideline	Accredited providers	NER and NERR	Accredited providers	NER and NERR
Market interface	Not required	Not required	No party is responsible	No instrument allocates responsibility	DNSPs	NER and AEMO procedures
Retail (sale of electricity	Embedded network operator	AER exempt selling (retail) guideline	Retailers	NERR	Retailers	NERR

Source: AEMC 2015, *Embedded Networks, Rule Determination*, 17 December 2015, Table 1, p ii.

Note: "Off-market embedded network customers" refers to customers who have not taken up a market offer from an authorised retailer. "On-market embedded network customers" refers to exempt customers who have a market contract with an authorised retailer.

53. AEMC 2015, *Embedded Networks, Rule Determination*, 17 December 2015, p i. http://www.aemc.gov.au/getattachment/3ec818f7-38ae-412e-8d7b-b404ee8d7858/Final-rule-determination.aspx

54. The COAG Energy Council was responding to recommendations from the AEMC in AEMC, *Energy Market Arrangements for Electric and Natural Gas Vehicles*, December 2012 and the AEMC, *Final Report, Power of Choice – Giving Consumers Options in the say they use Electricity*, November 2012.

55. AEMC, *New rules for embedded networks* Information Fact Sheet, 17 December 2015, p 1. http://www.aemc.gov.au/getattachment/04b21dd0-521c-48ca-b575-6fbe6b736a37/Information-sheet.aspx

56. Ibid, pp 1-2.

The central plank of the AEMC's rule change determination is to create a new accredited service provider role, the embedded network manager (ENM). The ENM will perform the market interface functions that link the embedded network customer to the NEM systems. The amendments will:[57]

- Set out the detailed functions, responsibilities and governance arrangements for the ENM; and,
- Specify which embedded network operators are required to appoint an ENM.

With respect to the appointment of the ENM, the new rules require an embedded network operator to appoint an ENM unless:[58]

- The embedded network customers are unable to gain access to a retail market offer in a relevant jurisdiction; or,
- If the **AER determines that the costs of appointing an ENM are likely to outweigh the benefits**. In these cases the AER must require an ENM to be appointed when a customer exercises its right to access a retail market offer. [emphasis added].

In other words, the AER will have the discretion to determine which embedded network operators are required to appoint an embedded network manager taking into account the *costs and benefits* of doing so and unless one or more customers seek access to a market offer.

While it is useful for the AEMC to address some of these gaps through the rule change process, it is also clear that a more holistic approach is required to fundamentally reform this market sector. In particular, improving access to retail competition through the appointment of an ENM will not necessarily address the concerns of (for instance) customers in established caravan and residential parks sector.

In its final determination, the AEMC also highlights the need for a more integrated approach to this difficult and disparate market sector. The AEMC has identified, for instance, that supporting changes will be required in state and territory legislation, the AER's Network Exemption Guideline and the NERR for embedded network customers, if the AEMC's determination is to have full effect on actual market outcomes.[59]

In this sector of small customers in an embedded network, retail competition remains problematic in practice because of the likely costs of appointing an ENM and the costs of installing market ready meters to replace existing metering arrangements. A robust customer protection framework is also required to protect these customers when retail competition is unlikely to take root whether due to costs or other practical and social factors.

This limitation is acknowledged by the AER for instance in the discussion on their proposed amendments to the Guidelines (see below). The AER states its view that: "access to retail competition is the best way to empower electricity consumers..."[60] However, the AER also acknowledges that some customer groups: "do not have access to alternative solutions such as transferring to a cheaper offer from another provider".[61]

SACOSS would therefore go further than the AEMC's promotion of retail competition, important as that may be. We consider that there must be additional reforms that entrench basic customer protection rights for all exempt customers and remove the inconsistencies and overlaps in the current federal and state regulation. This is discussed further in sections 2 and 3.

The AER's proposed amendments to the Exempt Selling Guideline and the Network Exemption Guideline can contribute to this process. The AER's proposed amendments are summarised below.

1.4.2 The AER's amendments to the Guidelines

Over the last few years, the AER has sought to better align the exemption categories and sub-category definitions and conditions between the Network Exemption Guideline and the Exempt Selling Guideline. The Network Exemption Guideline was last updated in 2013 and the Exempt Selling Guideline was last updated in April 2015. These changes have resulted in significant improvements in the clarity and consistency of the Guidelines.

The AER intends to further update the Network Exemption Guideline in 2016 to reflect, inter alia, the AEMC's rule changes described above which will come into force on 1 December 2017.

The AER is currently in the process of amending its Exempt Selling Guideline, issuing a revised Draft for consultation in September 2015.[62] The AER expects that the amended Exempt Selling Guideline (version 4) will be published in the first quarter of 2016.

57. AEMC, *New rules for embedded networks* Information Fact Sheet, 17 December 2015, p 2.

58. AEMC 2015, *Embedded Networks, Rule Determination*, 17 December 2015, p 49.

59. Ibid.

60. AER, *Notice of Draft Instrument: Amendments to the AER (Retail) Exempt Selling Guideline*, September 2015, p 11. https://www.aer.gov.au/system/files/Notice%20of%20draft%20instrument%20%E2%80%93%20Amendments%20to%20AER%20%28Retail%29%20Exempt%20Selling%20Guideline%20%E2%80%93%20September%202015.PDF

61. Ibid, p 14. The AER is referring in particular to customers who are eligible for government rebates, concessions or other forms of assistance. The exempt customers in R4 class are likely to include a high proportion of eligible consumers.

62. See footnote 34.

The AER states that the amendments are designed to make the Guideline clearer, more flexible and to better reflect developments in "alternative energy selling".[63] "Alternative energy selling" in this instance largely refers to Power Purchase Agreements (PPA) and is not within the scope of this study.

The AER's draft (Retail) Exempt Selling Guideline, however, does propose some changes to a number of the conditions of exemption for supply that apply to the category and class of customers considered in this study (**R4**). For example, the AER proposes the following changes to the conditions:[64]

- New requirement on the exempt seller to offer at least two payment methods (add new clause 3(2));
- Delete condition that provides that any jurisdictional pricing requirements will act to exclude the pricing obligations in the Guideline (remove clauses 7(5) and 7(6));
- Delete condition that states that the requirements of condition 10 will not apply where jurisdictional tenancy legislation provides for disconnection of tenants. The AER states that, instead: "Standard legal principles will apply to any conflicting legislation." (Clause 10);[65]
- Remove reference to reconnection "as soon as possible". The AER is seeking views on whether a fixed period should apply in its stead. (Clause 11); and,
- Remove reference to exempt seller using "best endeavours" to claim a rebate or concession on behalf of customers where it can only be claimed by the exempt person. Replace with an absolute obligation on the exempt seller (Clause 12(2)).

Relevantly, the AER also proposes to clarify the definition of a long-term resident in a caravan or residential park to address the issue that some parks restrict the length of time residents can live there. The AER proposes to define customers as long-term residents if the person(s) live there most of the time and/or the person has no other place of residence.[66]

An important change proposed by the AER for revisions to the AER's Exempt Selling Guidelines (version 4) relates to the introduction of an absolute condition of exemption for the seller to claim rebates or concessions when state legislation means that these concessions can only be claimed by the exempt person, not the concession holder. This is a significant issue in Queensland, for instance where a rebate can only be claimed by a resident of a "home park" or "multi-unit residential premises" **if** the owner/proprietor of the premise can claim the rebate on behalf of the customer. The proprietors' participation is voluntary under Queensland legislation.[67] However, the proposed conditions of the Network Exemption Guideline will make it mandatory.

The Queensland Council of Social Service (QCOSS) generally supported the AER's proposed changes to the AER's Exempt Selling Guideline. QCOSS also highlights the need for: "proactive and clear communication of the updated Guideline to exempt sellers and their customers".[68] On the basis of our study, SACOSS supports this recommendation that the AER works closely with stakeholders to ensure the "message" is understood by both the sellers and customers alike.

1.5 Victoria: General Exemption Order (exempt sellers and embedded network operators)

The Essential Service Commission in Victoria is responsible for issuing both retail and distribution licences in Victoria.[69] However, exemption from the obligation to hold a retail or distribution licence (as the case may be) is managed by the Department of Economic Development, Jobs, Transport and Resources (DEDJTR).

More specifically, the Governor of Victoria, under an Order in Council and on the recommendation by DEDJTR, grants an exemption from holding a retail or a distribution licence. Exemptions may be given based on an individual (case-by-case) assessment or under a General Exemption Order (GEO). The GEO provides exemptions for a whole class of electricity service providers. For example, permanent caravan and residential parks, retirement villages and strata title buildings would generally come under the GEO process.

Exempt suppliers (retail and network) under a GEO are not required to register with either the ESC or DEDJTR. The process is one of self-selection and lacks visibility to any of the Victorian regulatory bodies. As DEDJTR

63. AER, *Notice of Draft Instrument: Amendments to the AER (Retail) Exempt Selling Guideline*, September 2015, p 3.

64. Ibid, pp 18-21. The list provided herein is not exhaustive. References in brackets refer to changes relative to Version 3 of the Guideline.

65. Ibid, p 20.

66. Ibid, p 24.

67. Queensland Government, Electricity and reticulated natural gas rebates for residential home parks and multi-unit residential premises, as at 26 February 2015. https://www.qld.gov.au/community/cost-of-living-support/residential-homes-rebates/index.html.

68. QCOSS, Letter to the AER re: *2015 Review of the Australian Energy Regulator (AER) Exempt Selling Guideline*. http://www.aer.gov.au/system/files/Queensland%20Council%20of%20Social%20Service%20submission%20to%20review%20of%20Retail%20Exempt%20Selling%20Guideline%202015%20-%209%20November%202015.pdf.

69. *Electricity Industry Act*, s 18 & *Gas Industry Act*, s 25.

states: "Registration requirements are absent from the GEO, which means that there is very little information on the activities of embedded networks in Victoria".[70]

However, exempt sellers under a GEO have a general obligation to comply with "applicable provisions of the Retail Code".[71] Exempt sellers also have an obligation to advise their customers in writing that they may choose to obtain supply from a licenced retailer.

Similarly, exempt embedded network operators have an obligation to observe all "applicable provisions" of the Victorian Electricity Distribution Code. In this instance, the Distribution Code does define what those "applicable" obligations are.[72]

In addition to the GEO, exempt networks must comply with the AER's electricity service provider registration exemption guideline.

DEDJTR has acknowledged a number of gaps in the current exemption process, particularly with respect to the exempt retailing arrangements. For instance, the GEO and the Energy Retail Code do not specify what consumer protections are "applicable" to customers of the seller in the embedded networks.[73] DEDJTR states that as a result consumers are "confused about their rights when trying to resolve disputes with their embedded network seller".[74]

Given the growth in the market, DEDJTR commenced a review of the GEO. The review by DEDJTR is occurring in parallel to the review by the ESC of Victoria's retail licencing arrangements. Both reviews seek to adapt the Victorian licencing and exemption frameworks to facilitate new technology and innovation, while maintaining consumer protection.

It is not within the scope of this current study to assess whether these reviews do indeed adequately address these issues particularly with respect to consumer protection mechanisms for the very vulnerable customers of exempt sellers and embedded network operators.

For further details of these two reviews please see:

- DEDJTR, Review of the General Exemption Order Issues Paper, 2015[75]; and,
- Essential Services Commission, 2015, Modernising Victoria's Energy Licence Framework – Issues Paper, June 2015[76].

1.6 Summary and Recommendations

The overall regulatory arrangements for on-sellers and embedded network operators remain complex and multilayered. This complexity is a significant barrier to the AER communicating the conditions of exemption with all stakeholders. Similarly, it is a barrier to both exempt sellers and exempt customers understanding their respective rights and obligations. Such complexity is particularly difficult for small customers such as the residents of caravan residential parks, retirement villages and residential apartments.

Notwithstanding the various jurisdictional derogations, SACOSS acknowledges that the NECF and associated NERL and NERR have improved the consistency in the regulation of exempt sellers. In addition, the AER has sought to amend its Exempt Selling Guideline and Exempt Network Guideline to provide greater clarity and better alignment across the two Guidelines in the definition of the exempt categories.

SACOSS welcomes these changes and anticipates that this greater level of consistency will facilitate the AER communicating the conditions of exemption to exempt sellers and exempt embedded network operators (who are usually the same person). However, it is only a start and customers of on-sellers and embedded network operators still need to weave their way through multi-layers of national and jurisdictional regulations in order to understand their rights.

Recommendation 1.1

The COAG Energy Council, the AER and the regulatory bodies in each state renew efforts to introduce greater consistency and clarity in the regulation of exempt sellers and embedded network operators. A simpler, fairer and less costly process will better serve the interests of exempt suppliers and, more particularly, provide a more cohesive consumer protection framework for small customers of on-sellers and embedded network operators.

70. DEDJTR, *Review of the General Exemption Order Issues Paper*, 2015. http://www.energyandresources.vic.gov.au/energy/about/legislation-and-regulation/georeview
71. Ibid, p 5.
72. ESC, *Electricity Distribution Code*, Version 7, May 2012, Clause 1.3.5. http://www.esc.vic.gov.au/Energy/Distribution/Electricity-distribution-code
73. DEDJTR, *Review of the General Exemption Order Issues Paper*, July 2015, p 5.
74. Ibid.
75. http://www.energyandresources.vic.gov.au/energy/about/legislation-and-regulation/georeview
76. http://www.esc.vic.gov.au/Energy/Modernising-Victoria-s-Energy-Licence-Framework

2. Assessment of Consistency with AER Guidelines

The AER's Exempt Selling Guideline and Network Exemption Guideline provide a framework for a qualitative assessment of the "lived" experience of electricity consumers in permanent/long-stay caravan and residential parks.

The Guidelines require that operators of permanent/long-stay caravan and residential parks should be registered with the AER as an exempt seller and, separately, as an exempt embedded network operator even if they are the same person.

In terms of the AER's Guidelines, permanent/long stay caravan and residential parks are a specific category of registrable exempt retailers and/or exempt embedded network service providers. The AER's Guidelines categorises the permanent caravan and residential parks as follows:

- **Exempt Retailing Guideline:** 'R4' - applying to: "Persons selling metered energy in caravan parks, residential parks, and manufactured home estates to residents who principally reside there."[77]
- **Exempt Embedded Network Service Provider Guideline:** 'NR4' - applying to: "Persons selling metered energy in caravan parks, residential parks, and manufactured home estates to residents who principally reside there."[78]

The preliminary findings from the interviews with exempt customers suggest that there may be some important gaps between the AER's requirements and the practice of some owners/operators of long stay/permanent caravan and residential parks.

However, we would highlight that these are **preliminary findings**. The interviews provide qualitative rather than quantitative information and it would be inappropriate to draw conclusions about the whole sector based on this limited sample of exempt consumers. Nevertheless, the study does provide a strong pointer to the AER about potential issues in this sector, particularly with long-established parks whose 'modus operandi' was developed prior to the AER's consolidation of the exempt selling and embedded network Guidelines.

We also note that the findings of this study are relatively consistent with observations made in other studies. The distinctive feature of this study is the very strong sense of vulnerability and frustration that the consumers in the parks felt in their dealings with their embedded network operator.

It is not clear at this stage how much and how successful the AER has been in communicating the changes in the requirements for exempt sellers in particular since 2012. It is possible that prior to 2012, these park operators would have been self-classified as 'deemed' exempt sellers/network operators. As such, while considered to be exempt and subject to the prevailing conditions of exemption, they would not have needed to be registered with the AER.

The following section provides an overview of the main issues we have identified in this preliminary study, along with some examples. Appendix C includes a number of more detailed case studies. The remaining sections of this chapter provide a more detailed assessment of each of the AER's "conditions of exemption" for the exemption classes of R4 and NR4 as set out in the AER's Exempt Seller Guideline and the NSP Registration Exemption Guideline respectively.

Note, the focus of this section 2 is to assess how the AER's conditions of exemption for this class of consumers compare to the reported experiences of the exempt consumers in our study. In other words, Section 2 examines the level of compliance by exempt suppliers with the AER's conditions – as experienced by their exempt customers in this study.[79]

A second question then arises and that is whether the AER's exemption conditions for classes R4 and NR4 are appropriate and adequately align with the protections available to customers of authorised retailers, in line with the policy intent. This question will be addressed in Section 3 of this report.

2.1 Major issues for residents in caravan and residential parks

In this section, the report will focus on the major issues that were raised by the exempt consumers in our study. In some cases, the issues set out below reflect concerns that the consumers have already attempted to raise with the park management. The consumers believed that the management had not provided an adequate response or even an acknowledgement of the issue.

However, despite frustration with the outcome of their discussions with the park management, the exempt consumers felt too vulnerable to pursue these issues further. For instance, in principle the consumers could take their complaint to a Tenants Tribunal (or equivalent)

77. AER, *(Retail) Exempt Selling Guideline, Version 3*. April 2015, Table 2, p 39.

78. AER, *Electricity Network Service Provider Registration Exemption Guideline, Version 3*, August 2013, Table 3, p 20.

79. Again, we emphasizes that SACOSS does not claim that this study provides some quantitative assessment of compliance with the AER's conditions. That is not its purpose and the findings should not be read as such.

in the state. In practice, they were reluctant to take this step out of concerns with the costs and possible repercussions from the park management.

Note:

- In all instances, the exempt seller and the embedded network operator were one and the same person or entity.
- It is not clear if the exempt seller/network operators in the sample were always registered with the AER. The use of the term "exempt consumer" in this report should not therefore be taken to mean that the park owner has necessarily registered with the AER.

2.1.1 Electricity Pricing

The AER's Exempt Selling Guideline specifies that electricity prices to R4 exempt customers should be no more than the standing offer price that would be charged by the relevant local areas retailer for new connections in area.[80]

The assessment of compliance by the exempt seller with this pricing condition was complicated by the fact that generally, the charge for electricity usage was just one component of the overall charges to the customer for rent, facilities and electricity; all encompassed on the one bill.

Nevertheless, SACOSS saw no evidence that the *variable charges* to the customer (c/kWh) were not compliant with the AER's price constraint condition. The bigger issues for customers were:

- the lack of explanation when prices changed;
- the fixed energy charge (fortnightly or monthly) that ranged from $10 per fortnight to approximately $40 per month. There did not seem to be any reasonable basis for the amount charged, and the exempt seller was not open to explaining the charge (see 2.1.2);
- the view that the exempt seller was being charged lower, market based prices than the standard prices from the authorised electricity retailer at the 'gate' meter and this market benefit was not passed onto the exempt consumers; and,
- similarly, savings benefits from installation of solar PV on common park buildings were not passed on to the exempt consumers.

Consumers reported:

Unexplained variations on the amount payable on the bill, even when the resident believes their consumption patterns have not changed;

A lack of transparency on charges … residents are not always notified when arrangements change and there is no transparency if formal reductions (i.e. abolition of the carbon tax) are being passed on to residents;

A strong concern over whether the park owner was profiting from the on selling of electricity to residents; and,

Concern over the site owner's encouragement for residents to install solar panels on their homes. Residents were told it will save them money and they will not be charged for the installation. However residents have not seen any evidence of the implications or benefits of the solar installations on their electricity bills.

2.1.2 Information Provision

The AER's Exempt Selling Guideline specifies that exempt customers must be advised (inter alia) of any rights to purchase electricity from an authorised retailer, the person's rights in the event of a dispute, the conditions attached to the exemption, forms of assistance available, detail of tariffs and charges.[81] The information must be provided at the start of the tenancy and on request from the exempt customer or the AER.[82]

The exempt customers in our sample had generally been at the caravan or residential park for some time and were not able to recall details of the information provided at the start of their residency in the park. Even ***relatively*** recent arrivals at the park could not recall receiving the required information on their energy supply arrangements.

However, there was a strong feeling amongst most exempt consumers that they were not kept adequately informed about their rights and protections under the R4 exemption class. In particular, a number commented that requests to the park management for more information about their energy supply arrangements were effectively "brushed off".

80. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, Condition 7.1, p 43.
81. Ibid, Condition 2 (1), p 41.
82. Ibid, Condition 2 (2), p 42.

As noted in section 2.1.1 above, the park tenants were particularly concerned about information relating to increases in the electricity prices including changes to the 'supply' charge. It was often not made clear to the exempt customers why prices had changed or the basis on which the supply charge was calculated.

Moreover, when park management were asked directly about the reasons for price changes and/or the supply charge, the responses from the park managers to the consumers were not seen to be helpful. The exempt customers suggested they were reluctant to "push" these questions too far.

However, the AER's Guidelines indicate that there is a positive obligation on both exempt sellers and exempt network operators to provide information on request to the customer. As noted above, for instance, the AER's Exempt Selling Guideline requires that the information set out in Condition 2(1): "must be provided by the exempt person at any time on request by the exempt customer or the AER."[83]

The AER's Network Exemption Guideline (Condition 6) requires that the dispute resolution procedures: "must allow a customer to request, and be provided with, written details of all charges applicable to that customer".[84]

This study suggests that the exempt suppliers and/or the exempt customers may not always be aware of the obligations set out in both the AER's Guidelines for R4 and NR4 classes to provide a range of information on the energy supply conditions at the time of taking residence and on request by the exempt consumers.

Consumers reported:

They have asked the park owner who provides the power to the park however the park owner is not willing to disclose this information;

No formal information given to residents when they move in. A resident who moved in within the last five years wasn't given any formal information regarding energy and it was several years before the supply charge was explained;

No access to energy efficiency information from the park owner, this was provided by an unrelated 3rd party;

Concerns over the lack of information on electricity bills, residents are only provided with the total kWh consumed and the total dollar amount due. Consumers expect that meter readings, dates and tariffs should also be provided; and,

Suspicion that meter readings are being estimated. Doubt over the accuracy of consumption and charges has arisen when a resident receives a bill for a period of time where they have been living off-site and the bill has not decreased.

2.1.3 Payment Options

The AER's Exempt Selling Guideline (version 3) does not require the exempt seller to offer a range of payment options. However, the exempt seller "must offer flexible payment options (in relation to the sale of energy) to an exempt customer who has identified themselves as being in financial difficulty".[85]

There is no specific obligation in the Guideline, however, that requires the park manager to offer the Centrepay payment option to customers in financial hardship.

However, there were instances where the exempt customers felt they were being pushed into changing their existing payment preferences and agreeing to a direct debit arrangement from their bank accounts for both their rental and energy charges.

These customers were quite resentful of the pressure placed on them to do this and while some ultimately agreed to the approach, others were adamant that they would continue to pay by cash or other existing payment arrangement.

Consumer Comment:

"I have always paid by cash and I am not going to change now. They will have to accept cash".

2.1.4 Complaints/disputes

The AER's Exempt Selling Guideline requires the exempt seller/network operator to establish a dispute handling procedure that meets the requirements of the AER. The Exempt Selling Guideline also requires the exempt seller to advise the customer about the dispute handling procedures at the commencement of the lease or on request.[86]

83. Ibid, pp 41-42. Condition 2(1) includes: "the energy tariffs and all associated fees and charges that will apply to the exempt customer in relation to the sale of energy" (Condition 2(1)(g)).

84. AER, *Electricity NSP Registration Exemption Guideline, Version 3*, 27 August 2013, p 24.

85. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, Condition 3.2.

86. Ibid, Condition 2.1 (c), p 41. Appendix C, p 56.

Similarly, the AER's Network Exemption Guideline requires the exempt embedded network operator to have in place a dispute resolution mechanism.[87] Exemption Condition 6 states:[88]

> *A private network must have in place dispute resolution procedures which customers can access at no cost or on a fee for service basis … These procedures must allow a customer to request, and be provided with, written details of all charges applicable to that customer.*

It is not clear if the exempt sellers/network operators at some point provided information on their dispute handling procedures to the exempt customers, although none of the customers could recall receiving such information. In any case, there was wide spread dissatisfaction with the way complaints were handled in practice:

- many exempt customers considered that the exempt seller/operator did not listen to their complaints;
- some exempt customers believed there would be adverse repercussions on them for pursing a complaint too long;
- the exempt customers did not generally know who else they could approach to provide independent resolution of their issues;
- the difficulty is compounded by the fact that in all states except NSW, exempt consumers cannot forward their complaints to an independent Energy Ombudsman in their state, as the Ombudsman has no jurisdiction over the exempt seller market. Similarly, the AER is not generally in a position to handle complaints, nor is it resourced to do so.
- some customers were aware that complaints could be raised to the Tenancy Union or the Tenancy Tribunal (or equivalent) in their state. However, there was a view that the Tenancy Union was not particularly helpful and the Tribunal was high cost. Moreover, the vulnerability of these exempt consumers meant that taking a complaint to the Tribunal and facing cross-examination from the owner (or owner's solicitors) was not only too expensive but risked subsequent repercussions.

2.1.5 Electricity billing

Consumer Comment:

"We raised the issue [regarding the prices and supply charge] with the Tenancy Union but they were not helpful in explaining the situation".

The AER's Exempt Selling Guideline sets out in some detail the information that must be included in the electricity bill to the exempt customer (Exemption Condition 3 (4) (a) – (o)). SACOSS's observations of a typical bill suggest that the bills contain only some of the important information required by Condition 3 (4).

Of particular concern was the fact that while the bill set out the kWh consumed in the relevant billing period (which may be a fortnight or month, depending on the rental arrangements), it did not provide the required meter readings to support the consumption figure. That is, the bill did not provide a start and finish meter reading for the period, nor did the bill indicate whether it was an actual or an estimated read. There was also no information on the unit prices.[89] Thus, there was no way for the customer to independently verify the kWh presented on the bill.

This finding was made more significant given that some of the exempt customers expressed their concern about the meter reading process itself (and the condition of the meter – see 2.1.6 below). For instance, some customers reported that "someone from the office" read the customers' meters. Some even commented that the person reading the customers' meters was seen recording a 'reading' in the book, but had hardly stopped to look at the meters. The bill did not indicate if the reading had been estimated or not. In some instances, the exempt customer could not readily read the meter because of the poor condition of the meter and difficulty in accessing the meter.[90]

Thus, without any way to verify the actual meter reading, the exempt consumers also doubted the accuracy of their bills and the reported levels of total consumption for the billing period. Some pointed to instances when they had been away but the bill stated that they had used electricity during that period. In other cases, the bill from one period to another was very similar even though the customer believed they had used very different amounts. The exempt customer had questioned the network operator about this but felt their complaints were dismissed.

The Consumers say:

They [the meters] are just read by someone employed in the park office;

The [person] just opens the door [to the meter box] looks in and walks on. It doesn't look like they are recording the meter reading;

87. AER, *Electricity NSP Registration Exemption Guideline, Version 3*, August 2013, p 9. The AER states that this is a 'basic condition' of exemption for an embedded network operator, and applies to all categories and classes of exemption.

88. Ibid, Condition 6, p 24.

89. However, the average unit price could be derived from the total variable cost and the kWh data. Condition 3 (k) of the AER's Exempt Selling Guideline requires that the bill include the tariffs, fees and charge and Condition 3 (i) requires information on the basis on which the tariffs, fees and charges are calculated.

90. For example, a box holding a number of meters was typically locked and the meter could not be read externally.

There's no explanation of how the charges work. No explanation of the basis for the 'supply' charge; and,

We don't know if he's profiting from the sale of power to us.

2.1.6 Payment Difficulties and Disconnection of Supply

The AER's Exempt Selling Guideline sets out a process that an exempt seller must follow in the event that a customer advises the seller that they are unable to pay the electricity bill due to financial difficulty (Condition 9).

These are in addition to the requirement in Condition 3.2 that an exempt seller must offer flexible payment options to the customer in financial difficulty and to advise the customer of the availability of government and non-government rebates, concessions and relief schemes and other forms of assistance (Condition 2.1 (e)-(f)).

There is also an explicit prohibition on disconnecting supply for specific circumstances, such as if the exempt customer requires life-support equipment, has sought support from government/non-government body or has made a complaint to a body us as the Ombudsman (Condition 10).

The study sample did not include any person reporting that they had payment difficulties. The fact that the electricity bill was just one part of the overall rental payment arrangements makes it generally impractical for the consumer to separate the payment for electricity with the payment for rent.

While this sample of exempt consumers did not report payment difficulties for themselves, they did note that if a person didn't pay their bills over a period of time, then they would be evicted from the park. Thus, there is a very strong incentive to pay the total invoice (including rent and electricity charges). For this reason, issues around payments, evictions and disconnections are also addressed in state tenancy legislation.

Overall, it appeared from the discussions with exempt consumers that they had little awareness that the exempt seller has a number of obligations under the energy regulation with respect to offering more flexible payment terms for electricity supply and the restrictions on who and when disconnections can occur. (Conditions 3.2 and 10).

Consumer Comment:

"If you leave it [payment of electricity] long enough you'll get an 'eviction notice'. ."

2.1.7 Energy Metering and Network Infrastructure

The AER's Network Exemption Guideline requires that any meters used to measure billed electricity must comply with the requirements of the National Measurement Act 1960 (Cth) and regulations made under that Act for electricity meters and sub-meters and with the requirements set out in schedule 7.2 of the NER (Condition 1).

A number of study participants reported that the metering arrangements in their park were "totally dodgy". Some were in a cluster of 4 meters. All were relatively old and exempt customers could not recall any steps taken by the park management to replace the meters or check the meters for accuracy.[91]

2.1.8 Energy Infrastructure

The AER's Network Exemption Guideline requires that the network be kept safe, ensure a reliable supply and respond quickly to questions about the supply arrangements. For example, Condition 1 in the Guideline states:[92]

> *All private networks must, at all times, be installed, operated and maintained in accordance with all applicable requirements (within the jurisdiction in which the network is located) for the safety of persons of property.*

The Guideline also states "there are no exception to these safety requirements".[93]

The exempt consumers in our study could not recall seeing the network operator undertaking any upgrading of the internal network or checking for safety of the network and connections to the premises. However, these same consumers did not appear overly concerned with the internal electricity supply network although some reported that the infrastructure (including the meters) appeared to be very old and not regularly maintained.

Generally, there were few complaints about the overall reliability of supply within the park as a whole. In one South Eastern Australia case, while supply was interrupted on a relatively frequent basis, the customer understood that had more to do with interruptions to supply from the local distributor (the park was located in a more remote rural area exposed to tree falls etc).

On the other hand, there was concern by some with the difficulty in contacting park management and having supply restored if there was an interruption to supply within the embedded network, particularly on the weekend when the 'office' was closed.

91. SACOSS emphasises that we are relying on the reports from customers and these claims have not been independently verified.

92. AER, *Electricity NSP Registration Exemption Guideline, Version 3*, August 2013, Condition 3, p 23.

93. Ibid.

The question arises therefore, whether the caravan and residential parks had 24/7 arrangements to ensure supply interruptions are recorded and supply is restored within the park at an acceptable time frame.

The AER's Exempt Selling Guideline requires that supply be restored "as soon as practicable" following disconnection of supply.[94]

The most frequently reported concerns related to the safety and quality of the electricity supply assets **beyond the meter**, that is, between the meter (which is located away from the premise) and the residence (whether it is a caravan or more fixed building).

These concerns touched on matters such as:

- Wires connecting the meter to the caravans were sometimes hung in dangerous positions. For instance, a customer commented that in their park, the "power leads are just strung up in trees"; and,
- The lack of capacity to the caravan to meet their requirements. For example, some customers reported that if they turned on the air conditioner or heater, they could not boil a kettle without tripping the fuses.

Consumers reported:

They were unclear on the process of who to contact if supply is interrupted. Some thought the process had changed as the park office is now unattended after hours and on the weekends. This leads to delays in responding to loss of supply.

2.1.9 Access to Competition

A common concern of both regulators and community organisations is the difficulty that embedded network customers face in obtaining access to the benefits of the competitive retail market. The view is that in a competitive retail market, consumers will have access to lower priced products than the standard prices and more variety in the type of tariff or other benefits.

This concern is even greater when considering the outcomes for low-income households that typify long-term residents of caravan parks.

In particular, the Pricing Rule requires that embedded network operators charge their customers no more than the regulated or standard retail tariff in their network region.[95] However, there are now very significant price differences between the standard/regulated retail price and market offers.

This means that customers of exempt sellers may face prices that are significantly higher than most customers of authorised retailers while having no capacity to negotiate better prices with their current provider (the exempt seller) or switch to another retail provider.

For example, the AER's Annual Performance Report 2014/15 summarises the differences between the median standard offer price and the median market price for each jurisdiction and network area for residential consumers.

Based on the average residential consumption in each region, the AER has identified savings of around $300 per annum between the local standing offer price and the median market offer, with further savings possible in some regions. Even greater cost savings have been identified in some regions based on the 'cheapest market offer.[96]

A separate study undertaken by Alviss Consulting and St Vincent de Paul Society confirmed the AER's findings of significant differences between the standing offer and the market offer. The study concluded that:[97]

> *...the spread between standing offers and market offers has changed from July 2012 to July 2015 in Victoria, NSW and South Australia. In July 2012 standing offer bills were between 8-12% higher than market offer bills but just three years later this difference has increased to 22% in Victoria and 15% in NSW. In South Australia the current difference (12%) is the same as it was in July 2012 but we note that South Australia deregulated in February 2013 and the incumbent retailer, AGL, introduced a transitional offer that remained in place until 1 July 2015.*

It is particularly noteworthy that the three states with the greatest differences between the retail standing offers and market offers are the three states where the jurisdictional rules do not restrict exempt customers from accessing competitive retail market offers.

Therefore, the exempt customer in these regions is likely to receive the greatest benefit from access to retail competition. However, notwithstanding recent reforms and the AEMC's rule changes (December 2015), in practical terms it is still very difficult and relatively costly for small consumers to get access to a retailer.

94. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, Condition 11.1, p 46.

95. In jurisdictions where there is no longer a regulated retail electricity tariff, such as NSW, Victoria and South Australia, the "host" retailer is obliged to publish a "standard tariff" which is a default tariff available to any customer in the relevant distribution area.

96. AER, *Annual Performance Report, 2014/15*, November 2015, Chapter 3 for a state-by-state breakdown of potential savings between standing offers and competitive market offers. The AER found significant differences between the standing price and median market offer, but also between the 'highest' and 'lowest' market offers. https://www.aer.gov.au/system/files/AER%20Annual%20Report%20on%20the%20Performance%20of%20the%20Retail%20Energy%20Market%20201415_0.PDF

97. St Vincent de Paul Society, Victoria & Alviss Consulting, *The NEM – still winging it, Observations from VInnies' Tariff-Tracking Project*, September 2015, p 26. https://www.vinnies.org.au/icms_docs/228265_National_Energy_Market_-_Still_Winging_It.pdf

There has been some suggestion that the Pricing Rule be amended to include requirement to supply on the basis of the prevailing market offer price. However, this would be extremely difficult to implement given the spread in market offer prices and in the requirements associated with them.

Sections 2.2 and 2.3 below provide a more detailed comparison of the AER's core conditions for R4 and NR4 exemptions and the experience of the exempt customers.

Note, that some core conditions for exempt sellers to the R4 class of consumers relate to factors like the exempt seller's record keeping. This study did not include interviews with park owners and therefore did not obtain information on this type of condition.

In addition, the comments from exempt customers represent only one perspective on the issues. Therefore, throughout this report, we have cautioned against overgeneralising the findings. The findings of this study are pointers to important issues for exempt customers rather than definitive statements about this market segment.

However, SACOSS's overall impression from the interviews with the exempt customers was their deep frustration with current arrangements for electricity supply matched by a real concern about the effectiveness and consequences of complaining to management or formally disputing the arrangements through, for instance, the Tenants Union, Tenants Tribunals or equivalent.

2.2 Registrable Retail Exemptions: Class R4 – Conditions of Exemption

Class R4: "Persons selling metered energy in caravan parks, residential parks, and manufactured home estates to residents who principally reside there."

The table below sets out the AERs' "core exemption conditions" that apply to registrable exempt sellers, including owners of permanent resident caravan parks. The conditions are specified in the Exempt Seller Guideline.[98] The table also includes our observations on whether these conditions have been identified in our research and further commentary on this as applicable.

Table 3: Retail Exemption Conditions for Registrable Class R4.

Core Condition	Obligation summary (full details are available in the AER's Exempt Selling Guideline)	Commentary/findings
(1) Obligation to Supply	1. An exempt person cannot refuse to sell energy to a customer who meets the criteria for this class. 2. An exempt person cannot refuse to sell energy to a customer on the basis that the customer owes the exempt person outstanding amounts.	1. We did not observe any instance of refusal to supply. Customers' greater concern was their general vulnerability as residents of a caravan park to the decisions of the owner/operator. 2. The energy bill formed part of the overall fortnightly or monthly rental payments so the issue was broader than just energy supply.
(2) Information Provision	1. An exempt person must advise in writing at the start of their residency agreement (a) any rights to purchase from an authorised retailer of their choice; (b) the exempt person is not subject to all the obligations of an authorised retailer & customer will not receive same protections; (c) persons rights in relation to dispute resolution (d) the conditions of the exemption (e) availability of rebates (f) forms of assistance available (g) the energy tariffs and associated fees and charges; (h) the flexible payment options available; (i) contact numbers in the event of a gas or electricity fault or emergency. 2. The information in (1) must also be provided on request.	1. Customers in the study expressed significant concerns with the lack of information provided to them about their energy supply. This included information about prices and charges and changes to these prices and charges. Customers were also concerned about the lack of information on arrangements and contacts in the event of failure of supply particularly on weekends and public holidays when the "office" was closed.

98. AER, *(Retail) Exempt Selling Guideline, Version 3*. April 2015, pp 41-48. Similar conditions are included in Draft Version 4 that was published by the AER in September 2015.

Table 3: Retail Exemption Conditions for Registrable Class R4.

Core Condition	Obligation summary (full details are available in the AER's Exempt Selling Guideline)	Commentary/findings
(3) Billing & Payment Arrangements	1. Issue at least once/three months. 2. Must offer flexible payment options for those identified as in financial difficulties. 3. Circumstances when (2) does not apply. 4. Contents of the bill: (a) name; (b) address (c) date of issue (d) meter identifier (e) pay by date (f) date or meter reading or estimate (g) billing period (h) current meter reading or estimate (i) previous meter reading or estimate (which must be stated) (j) amount of energy consumed in kWh (k) tariffs, fees & charges (l) basis on which charges calculated (m) any amount deducted under a rebate (etc) scheme, (n) details of available payment methods (o) contact number for account inquiries & complaints.	(1) Issued fortnightly or monthly as part of the overall rental invoice. (2) No evidence of offering flexible payment terms if person is in financial difficulties. (3) Not applicable. (4) Energy bill is a just a line item on the overall rental invoice. The information is limited to a stated kWh amount, the price per kWh, a fixed charge and the total amount. There are no actual start and end meter readings on the account to validate the reported consumption. (5) Customers report very limited options regarding payment and these change at the discretion of the park owner/operator.
(4) Estimation as basis for bills	1. Best endeavours to ensure meter is read and used as basis for any bill. 2. Cannot rely on an estimated meter read as starting bill for new tenant. 3. Can rely on estimation if the bill cannot be reliably based on a meter reading. 4. Where estimation is used, the estimation should be based on historical metering data or average comparable tenant usage (if historical information not available).	1 - 4. Meters are supposed to be "read" on regular basis but the customers are not always confident that this always occurs in practice or, if it is done, whether it is an accurate reading. The bills do not appear to indicate if the reading is estimated or actual (see 2.1.5).
(5) Pay-by-date	Pay by date for a bill must not be less than 13 business days from the issue date.	Not assessed.
(6) Receipts	1. Customer must be provided with receipt unless payment by direct debit or credit card over phone (require receipt number). 2. Must provide a separate receipt if a payment for energy was made together with a rent payment & not separately identified on rent receipt.	Not assessed.
(7) Pricing	1. Must not charge tariffs higher than standing offer price for new connections from local authorised retailer. 2. Must provide notice to customer of any change in tariff as soon as practicable & no later than next bill. 3. Must not impose any charge that could not be charged by local retailer under standard retail contract. 4. Charges for late payment must be limited to recovery of reasonable costs. 5. Requirements 1 – 4 do not apply if alternative jurisdictional arrangements. 6. Requirement 1 only applies to small commercial customers if choice of retailer is not available or not cost-reflective.	1. The energy rate (c/kWh) appears generally to be at or below the standing offer price (but is likely to be higher than the rate charged to the network operator at the gate meter by the authorised retailer). However, the fixed charges for supply appear to be very high and not consistent with the pricing obligation – consumers do not understand the basis of the fixed charge and the changes to this charge. 2. Consumers were not satisfied that they were adequately informed about changes in prices and charges 3. See (1.) above re: fixed charges. 4. No information on the treatment of late payments – the assessment of this is complicated by having combined rental and energy bill. 5 & 6. Not applicable.
(8) Undercharging & overcharging	1. If customer undercharged, operator can recover the amount subject to conditions (a) if not the customer's fault then recovery limited to 9 months prior (b) cannot charge interest on amount (c) must offer customer instalments & time to pay the amount (up to 12 months). 2. If customer overcharged, the customer must be informed within 10 BD of becoming aware of the overcharge & repay (subject to conditions).	1 & 2. No incidences reported.

Table 3: Retail Exemption Conditions for Registrable Class R4.

Core Condition	Obligation summary (full details are available in the AER's Exempt Selling Guideline)	Commentary/findings
(9) Payment difficulties and disconnection	1. If customer advises operator that they can't pay due to financial difficulties, the customer must be (a) directed to energy efficiency resources (b) informed of relevant Government rebates, relief schemes etc, (c) not charge a late payment fee, and (d) not charge the customer a security deposit. 2. Must not proceed with disconnection or cessation of supply unless (a) customer requests; (b) unsafe to supply; (c) customer vacating premises (d) customer has not paid a bill by pay-by-date or not adhered to the terms of a payment plan and (i) operator has issued reminder notice, offered more flexible terms and restated forms of assistance available (ii) given a disconnection warning (iii) then used best endeavours to contact customer (iv) customer failed to take action by date on disconnection notice. 3. Must use best endeavours to notify customer prior to disconnection. 4. If state or territory tenancy legislation sets out requirements for disconnection then (1) – (3) does not apply.	1. Difficult to assess this as the customer was invoiced for both energy and rental on the same invoice. However, the long-stay residents appear to prioritise payment of their rental/energy agreement invoices and the situation of disconnection for debt does not appear to have arisen. 2 & 3. Not determined in this study.
(10) When disconnection or cessation of supply is prohibited	1. A customer must not be disconnected where (e) customer is on life support equipment; (f) customer has applied to Government or other 3rd party for assistance/relief payments; (g) customer has made a complaint to Ombudsman or other relevant dispute body & complaint is not yet resolved (h) certain dates/times. 2. Whether disconnection prohibited on a particular day due to extreme weather conditions.	See above.
(11) Reconnection of Supply	1. A customer must be reconnected as soon as practicable if customer requests it and has rectified the situation including payment for reconnection.	See above.
(12) Concessions & Rebates	1. Where customer is eligible to receive a rebate or relief payment, operator must not hinder this process. 2. Where operator must make the claim on behalf of customer(s), the operator must do so on best endeavours basis and provide the rebate to the relevant customers' bills.	1 & 2. Rebates in South Eastern Australia were provided by the State Governments directly to customers on the basis of their bills, and only limited additional information was required from operator of the park (e.g. parent NMI). This does not therefore appear to be an issue for customers, at least in the South Eastern regions, other than the inconvenience of an annual payment. Further assessment is required for customers in North Eastern Australia because the exempt supplier must submit the rebate claims on behalf of the consumers. Anecdotally, this can be an issue and delay receipt of refunds.
(13) Choice of Retailer	1. Where state legislation allows customer to purchase energy from retailer of their choice, the operator must not do anything to discourage or prevent the exercise of this choice.	1. Customers were aware that there were cheaper retail market prices available and would like to have access to these. However, they did not particularly want this via retail competition – the preference was for regulation by government to force owners to share savings.

Table 3: Retail Exemption Conditions for Registrable Class R4.

Core Condition	Obligation summary (full details are available in the AER's Exempt Selling Guideline)	Commentary/findings
(14) Contact Details	1. Operator must provide means of contact for account enquiries & complaints that is readily accessed.	1. Customers expressed concern about raising complaints to the park operator. However, they did not usually know who else they could contact. Some were aware that they could raise a complaint with the relevant tenancy tribunal or civil and administrative tribunal. However, they considered this would be a difficult, expensive and a confrontational process.
(15) Complaints & Dispute Resolution	1. In event of a dispute & in absence of any determination by the relevant tenancy tribunal, the operator must (a) make reasonable endeavours to resolve the dispute, and (b) advise customer of any right that exempt customer has to access Ombudsman or other relevant dispute resolution body.	1. Customers do not consider they can get a fair hearing from the park operator in the event of a complaint or dispute. There was no evidence of a formal dispute mechanism. Customers are very frustrated at the lack of independent and safe options for resolving disputes or addressing complaints.
(16) Life support customers (LSC)	1. If advised that customer is a life support customer, the operator must (a) advise the embedded network manager (if different) (b) advise the operator's retailer and local distribution network of LSC and (c) provide retailer and local distributor all relevant information. 2. Maintain records of any LSC.	Not assessed.
(17) Continuity of supply	1. Must notify customers and the AER immediately if they are or expect to be disconnected or any likelihood they will be unable to continue selling energy.	Not assessed.
(18) Termination of energy supply agreement	1. Obligations on park operator and customer to advise each other of agreed dates for termination. Customer to advise park operator if intending to receive supply from a market retailer.	Not assessed.
(19) Maintaining records	1. Must maintain records for each of exempt customers covering name, address, meter identifier, date account created, copies of any bills issued for previous 12 months, date of most recent meter read and basis of estimating consumption.	Not assessed.

2.3 Registrable embedded network: Class NR4 – Conditions of Exemption

Class NR4: "Persons selling metered energy in caravan parks, residential parks, and manufactured home estates to residents who principally reside there."

In the AER's electricity registration exemption guideline, the AER sets out the following general conditions that apply to operators of registrable embedded networks, including those operators defined in Class NR4. The conditions include the following conditions for a "private network" operator.[99]

99. AER, *Electricity Network Service Provider Registration Exemption Guideline,* 27 August, 2013, pp 24-25.

Table 4: Registrable Embedded Network Exemption Conditions for Registrable Class R4

Core Condition	Obligation summary (full details are available in the AER's NSP Registration Exemption Guideline)	Commentary/findings
1. Meter requirements	Must comply with *National Measurements Act 1980 (Cth)* & associated regulations & with requirements in Schedule 7.2 of the NER.	The customers lacked confidence in the accuracy of the meters but had no way of checking these meters. The meters are unlikely to always meet these requirements given age and reported structure of the meters. While the conditions of exemption do not require the operator to upgrade meters (installed pre 2013), there should be some requirement to ensure meters are still operating correctly.
2. Energy must be metered	All paid energy consumption must be metered except where AER determines an unmetered supply is permitted (only in exceptional circumstances).	The usage was metered, but not necessarily by meters that satisfy technical requirements (as above). The age of some of the meters would suggest that they would not meet minimum standards.
3. Safety of the network	Embedded network must at all times be installed, operated and maintained in accordance with safety requirements (within the jurisdiction). This includes an industry Code or Guideline otherwise applicable to a network service provider providing similar services.	Some customers considered that there was an ongoing lack of maintenance of their embedded network. Customers also had safety concerns, particularly with respect to the electricity wiring from the meter to the customer's premise. There did not appear to be clear standards for this in some parks.
4. Embedded generation conditions	Any generation source within a NSP's private network must meet specified conditions (ability to shut down, or to isolate) to respond to loss of supply from the local DNSP's network. This condition applies to generation source of any kind located in the embedded network.	Not generally applicable. However, some parks had solar PV installed on common buildings. Greater clarity is required on how this condition applies to solar PV generation within an embedded network.
5. Restrictions on who could sell electricity	All selling in the private network must be by either an authorised market retailer or holder of valid exemption registered with the AER or if entitled to a deemed retail selling exemption, or in accordance with regulations in force in a jurisdiction where NERL does not apply.	At this stage only the park operator sells the electricity. It is not known if the operators all meet the requirements of being approved by the AER as exempt from registration with AEMO. Operators of permanent caravan and residential parks cannot be classified as a "deemed" retail exemption entity and must be registered with the AER in order for the operator to on-sell electricity. It is a civil offence for a park operator to on-sell electricity without the appropriate registration with the AER.
6. Complaints & Dispute Resolution Procedure	Must have a dispute resolution procedure in place that customers can access at no cost or on a fee for service basis. If on-selling under the NERL, the operator may use the dispute resolution procedure available in the NERL. Otherwise, it must be specified in formal agreements between the network owner or its appointed agent and the customer.	Customers report that they are not aware of any formal dispute resolution process with the park operator. Nor do they recall if this issue was discussed with them at the time of entry to the park. However, most residents in our sample had been at the park for more than five years. Disputes seem to be addressed through informal contacts and customers do not always feel they are on an equal footing with the owner/operator in these disputes.
7.Customers with adjoining or multiple exempt sites	If suitable metering is installed, meter readings for that customer may be aggregated for corresponding time periods.	Not applicable.
8.Timing of application for registration	Application for registration must be made within 20 BD of acquiring a right to register.	Not applicable.

Table 4: Registrable Embedded Network Exemption Conditions for Registrable Class R4

Core Condition	Obligation summary (full details are available in the AER's NSP Registration Exemption Guideline)	Commentary/findings
9. AER right to revoke or vary conditions	The AER may revoke or amend an exemption at any time or may vary the conditions from time to time.	Not applicable.
10. Life support customers (LSC)	When advised that a customer is a LSC, the operator must promptly notify the local DNSP of the existence of a LSC.	Not considered. But this is an important issue given the current focus on continuing to supply to LSC.
11. Disconnection of LSC	A private network operator must not disconnect supply to an LSC without making arrangements for the safety of the LSC	Not considered.
12.Access to retail competition	A private network operator must not impede a customer's access to retail competition where it is available in a jurisdiction. The operator must provide on request details of the NMI of the gate meter without undue delay.	There is no evidence that consumers were aware of this right to access competition. Most were only mildly interested but very concerned about whether the cost savings to the park operator of a retail market offer were fairly passed on to the exempt customers. Similarly, for parks that installed solar PV systems, consumers believed they should receive some benefits.

2.4 Summary and Recommendations

Exempt customers are frustrated and disempowered

The overall impression arising from this research is that the exempt consumers in caravan and residential parks feel both frustrated and disempowered. These exempt customers may not be aware of the full suite of protections available to them under the AER's conditions of exemptions for R4 and NR4 category consumers. However, they make strong claims that they do not get adequate information from the park operator, that their concerns are not being addressed and, more generally, they are not being offered a "fair deal" in terms of their electricity supply.

Moreover, the exempt customers in the study do not know where, and to whom, they can safely turn in order to resolve their complaints in an effective and impartial manner. While some recognised they could approach the Tenants' Tribunal in their state (or equivalent state body), they were also very concerned about possible repercussions. It was not only their energy supply at stake, but also their accommodation security and risk of other repercussions.

The exempt customers in our study, however, did not look to retail competition as a way of improving the services and energy prices provided by their exempt seller. Instead, the exempt customers in our study looked to the various regulatory authorities to provide this pressure on the suppliers.

Key issues from an exempt customer's perspective

From the perspectives of the exempt consumers who participated in this study, the key issues are:

- inadequate information on prices and charges and the reasons for changes to these prices and charges;
- high fixed charges for supply that appear to exceed the fixed charges in the standard offer of the local retailer;
- a view that while the park owner/manager had lower prices and/or lower energy costs (due to for instance, installation of PV on office buildings) these were not passed on to the consumers;
- the park owner/manager restricting and/or changing the payment options available to customers, e.g. mandating direct debit payment arrangements;
- the inability of the exempt consumers to negotiate on "equal terms" with the park owner/manager;
- the lack of access to cost-effective independent energy dispute settlement mechanisms;
- the poor state of the network infrastructure, particularly the accuracy of the customers' meters, the connection from the meters to the customers' premises and the lack of capacity on the connection; and,
- the lack of effective contact points over weekends and public holidays if there are issues with electricity supply.

Notably, the customers in the SACOSS study were less concerned about access to retail competition.

SACOSS notes that in fact a number of the exempt customers' concerns are already addressed in the relevant AER Guidelines as part of the conditions of supply. Therefore, a substantial number of the customers' issues listed above arise from the gaps in the implementation by the exempt sellers and embedded network operators of the relevant conditions in the Guidelines. The invisibility of these customers to the AER, along with the resources available to the AER to enforce compliance, exacerbates the problem of ensuring exempt suppliers comply with the conditions of exemption. It is important to highlight, however, that these are preliminary observations and are based on the views of consumers rather than the exempt sellers or operators.

There is also a lack of clarity on how the "price cap" is to be applied in practice. The price cap means that the AER must ensure that exempt customers are charged no more than the standing offer price of the local area retailer.[100] Does this constraint include the fixed supply charge component of the standing offer price (which is a growing proportion of the offer price)? If it does, then there is a potential windfall profit for the on-seller.[101] If it does not, then the on-seller is free to charge a fixed fee at any level even if the variable charge is constrained.

The feedback from the customers in this study indicated a wide range of so called 'fixed charges' (fortnightly or monthly depending on when a customer is billed). The situation is further complicated because the energy charges including the fixed charges are usually just one line items in the overall rental invoice.

Exempt small customers were also concerned about arbitrary changes by the exempt seller to the available bill payment methods. A number of participants reported that they were being "forced" into direct debit arrangements, which do not always suit low-income households. In contrast, retailers are required to offer all small customers at least five payment methods that are set out in the NERR. Retailers must also provide an option to pay by Centrepay for customers in financial hardship.

Recommendation 2.1

The AER's conditions of exemption should clarify the conditions associated with pricing and, in particular, the constraints on the fixed supply charge. There seems to be some ambiguity over whether a fixed charge is constrained by the pricing rule and what is included in the fixed charge.

Recommendation 2.2

The AER and the AEMC investigate if there are viable options to enforce some sharing of savings obtained by the exempt seller through lower market offer prices, and government supported efficiency schemes or solar PV generation.

Recommendation 2.3

The AER and jurisdictional governments or regulators further investigate options for a low cost independent dispute settlement mechanism that includes a range of services to exempt customers such as conciliation, investigation and legal capacity to give directions.

Recommendation 2.4

The AER investigate ways in which it can improve its communication with both the exempt suppliers and the exempt consumers so that both parties are clear about the AER's conditions of exemptions. The AER's communication must address both new and established on-sellers and embedded network operators, as exemption arrangements in the past were generally less prescriptive in their registration and consumer protection conditions.

Recommendation 2.5

The AER should collect additional data on typical fixed fees charged to small customers in embedded networks to assess what component of these fixed charges reflects energy supply fixed costs, what component reflects fixed costs of access to the embedded networks and if these fees are consistent with the NERR and the policy intent.

Recommendation 2.6

The AER is reviewing the conditions in its Exempt Selling Guideline relating to payment options. The feedback from customers in this study suggests that current practices are unacceptable and the Guideline needs to be more prescriptive about payment options, particularly access to Centrepay for customers in hardship.

Balancing costs and benefits for vulnerable customers

This study also provides an opportunity to critically assess the current national exemption framework and whether, taken as a whole, it delivers on the policy objective expressed in the NERL, namely "exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under this Law and the Rules."[102]

[100] NERR, Rule 152 (4).

[101] That is, the on-seller will pay a certain fixed fee to the retailer for supply to the park. If the standard offer fixed fee is then recovered from each of the on-sellers' customers, the total fixed amount recovered is likely to exceed the on-sellers fixed supply charge.

[102] NERL, section 114(1)(c).

In developing the guidelines, the AER must seek a careful balance between the policy intent and the reality that in many instances the costs of a full suite of customer protection measures will be relatively high compared to the benefits. Ultimately, if regulation is costly to implement, it will lead to higher prices or lower quality services for consumers.

The AER recognises this issue in its Exempt Selling Guideline. The AER concludes that "exempt sellers differ from authorised retailers … Consequently certain requirements under the Retail Law [NERL] and Retail Rules [NERR] may be more onerous or inappropriate."[103]

SACOSS, however, considers that in making this trade-off, the AER should put more weight on factors such as the greater vulnerability of these customers and the practical reality that retail competition is unlikely to emerge in this sector. In these circumstances, a significant imbalance in 'negotiating power' arises. There is a role for enhancing the consumer protection regulation to achieve more balanced outcomes for consumers in the 'real world' of small customers in caravan and residential parks et al.

Recommendation 2.7

In assessing the costs and benefits of consumer protection regulation for exempt consumers, the AER take more account of the relative vulnerability of many of these customers, particularly when retail competition is not generally a practical option.

Inadequate compliance enforcement mechanisms

The AER's Guidelines explain the consequences of failure to register (for a registrable class of exemption) and failure to comply with the conditions of exemption. Failure to register with the AER may result in civil penalties. Failure by an exempt embedded network operator to comply with the conditions of exemption also carries the risk of "sizeable civil penalties".[104] Failure by an exempt seller to comply with the conditions of exemption may lead to the AER revoking the exemption.

In practice, however, SACOSS did not observe any robust mechanisms for monitoring, reporting and enforcing the conditions of exemption for sellers and for network operators. Without this, the AER is effectively blind to breaches of the registration requirement and the exemption conditions – the penalties exist on paper, but hardly in practice.

SACOSS considers this is an important gap in the customer protection framework for exempt customers, particularly when compared to the performance monitoring and reporting of authorised retailers and distribution businesses.

We acknowledge that it is a significant task to developing procedures for monitoring, reporting and enforcement in this market given the special features of this market. However, this is a sector that is rapidly expanding and it is better to put such mechanisms in place earlier rather than later. It is also a task that can be progressively developed over time.

Recommendation 2.8

The AER develop and implement over time a cost efficient monitoring, reporting and enforcement regime to support its statutory powers and to encourage compliance with the conditions of exemption. The AER should be provided with the resources to undertake regular 'sample' investigations of compliance with the registration process and the associated conditions of exemption.

Recommendation 2.9

The AER develop a more comprehensive and accessible data base of exemptions by category and class; the data base can be used to cross-check if all relevant on-sellers and embedded network operators have applied for exemption or are listed in the correct exemption category.

[103] AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, p 23.

[104] NER, clause 2.5.1(d). Cited in AER, *NSP Registration Exemption Guideline, Version 3*, August 2013, p 18.

3. Other Policy Issues

3.1 Access to Comparable Consumer Protections

Section 2 of this report compared the AER's consumer protection related 'conditions' for granting exemptions under the exemption class R4 and NR4. SACOSS observed some important gaps between the regulatory requirements for an R4 and NR4 exemption and the actual outcome as reported by our sample of exempt consumers.

It is apparent from these reports that at least some park operators are either not aware of their obligations or have concluded that compliance is not necessary. This extends to registration with the AER (all caravan and residential parks (R4) must be registered) as well as gaps in the implementation of the customer protection and safe supply requirements.

SACOSS has therefore recommended a renewed effort by the AER (or the ESC in Victoria) to remind these operators of their obligations to register and to comply with the relevant exemption requirements. SACOSS also recommends that the AER enhance its monitoring and enforcement program to ensure the exempt customers receive the level of services set out in the AER's Exempt Selling Guideline.

However, there is a further question to be examined and that is whether the AER's Exempt Selling Guideline adequately captures the policy intent of providing comparable consumer protections for this segment?

As noted previously in this report, SACOSS recognises that there are some important differences between customers of authorised retailers and customers of exempt sellers. For example, the exempt seller is providing a broader service than just electricity supply and the customer's electricity supply 'contract' is only one part of an overall contract between the park operator and each resident of the park.

It is also important to carefully consider the costs and benefits of any protection and compliance regime. The requirements must also be considered in the context of other protections such as protections under tenancy (or equivalent) laws. For example, the AER states in its Exempt Selling Guideline (Version 3) that:[105]

> *Most residential and small business customers have some protections under their respective tenancy or equivalent legislation or agreements. These protections, when complemented by exemption conditions* [as per the Exempt Selling Guideline]*, will go some way to matching the customer protections provided by the Retail Law.* [emphasis added]

As indicated by the quotation above, the AER emphasises that its conditions of exemption apply only to the extent that they are not overtaken by jurisdictional energy and tenancy regulation. The AER's position is understandable, however, it is most unfortunate. It vastly complicates the task facing an exempt seller in understanding their obligations and an exempt consumer in understanding their rights.

Nevertheless, the following gaps exist between an authorised retailer's obligations to their customers and the obligations on an exempt supplier for customers categorised as R4 and NR4 as set out in the AER's two Guidelines.

These gaps also exist for other categories such as residential exempt sellers and retirement village (Class R2 and R3 respectively)[106] as the AER's exemption conditions for these classes of customers are very similar to the caravan and residential parks class (R4). Relevant conditions also apply to the small commercial/retail on-selling sites (R1).[107]

Therefore, the issues identified in this following sections, while applying specifically to the R4 class of exempt sellers and customers, are in large part relevant to the R1, R2 and R3 classes.

3.1.1 Complaints and Dispute Resolution Procedures

There is a very significant gap between the requirements on authorised retailers and distributors under the NERL and NERR regarding complaint and dispute resolution and the conditions placed on exempt sellers and exempt network operators.

SACOSS has highlighted above the frustration that the consumers in our study felt in terms of the lack of any satisfactory resolution of their complaints and disputes. In part this reflects the gap between the requirements in the Guidelines and the observed practice by exempt suppliers as noted in Section 2.

However, as discussed below, perhaps a more significant source of the exempt customers' dissatisfaction is a result of the much lower level of requirements on the exempt seller in the AER's Exempt Seller Guideline and of the structural issues around access to a specific industry dispute settlement bodies (such as the energy ombudsman). Confusingly, perhaps, the stronger obligation for a formal dispute settlement procedure is contained in the AER's Network Exemption Guideline rather than in the Exempt Selling Guideline.

105. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, p 28.

106. Where there is less than 10 premises at a single site, the supplier is categorized as a deemed supplier (D1 and D2). While the deemed exempt seller does not have to register, they have the same obligations to the exempt consumers.

107. See for instance, AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, Appendix A-3, Table 2.

The NERL sets out a comprehensive and systematic obligation on retailers concerning the management of 'small customer' complaints. This reflects the policy importance that is attached to the effective resolution of disputes by the policy makers as does the fact that the complaints can be made without cost to the consumer.

The NERL, for instance, requires each authorised retailer and registered distributor to: "develop, make and publish on its website a set of procedures detailing the retailer's or distributor's procedures for handling small customer complaints and disputes…".[108] These procedures must be regularly reviewed and substantially consistent with the Australian Standard AS ISO 10002-2006.[109]

The NERL also specifies that a small customer of an authorised retailer may make a complaint about any relevant matter, the complaint must be dealt with in accordance with the relevant dispute handling procedures, the customer must be advised of the outcome and the reasons for this and the retailer or distributor must inform the customer that, if not satisfied, they may take the complaint or dispute to the energy ombudsman in their jurisdiction.[110]

These obligations on the authorised retailers set out in the NERL are mirrored in the NERR with respect to both standard and market retail contracts.[111 & 112] The NERR also requires both the retailer and the distributor to publish their dispute resolution procedures and contact details for the energy ombudsman on their websites[113] and to provide copies of these details on request by a customer, without charge.[114]

In contrast to this relatively detailed and prescriptive approach to the complaint and dispute resolution process in the NERL and NERR, the AER's Exempt Selling Guideline places a more high-level "reasonable endeavours" obligation on the exempt seller. For instance, Condition 2 ('Information Provision'), requires the exempt seller to advise the customer, in writing, of procedures for handling disputes and complaints.[115]

However, the Exempt Selling Guideline does not specify the content of that process, nor does it require the process to be consistent with AS ISO 10002-2006. Condition 15 ("Dispute Resolution") appears to give primacy to the jurisdictional tenancy tribunal (or equivalent).[116] In the absence of a determination by a tenancy tribunal, the exempt seller must:[117]

a. make reasonable endeavours to resolve the dispute, and

b. advise the exempt customer of any right that the exempt customer has to access the energy Ombudsman scheme or other relevant external dispute body in the state or territory in which the exempt customer is located, if applicable.

The exempt consumers in our study are in a situation where they believe that the tenancy tribunal processes can be legalistic and costly, and have an uncertain outcome. It would also appear that not all exempt suppliers have made a "reasonable endeavour" to resolve disputes with their customers. In addition, these customers cannot take their dispute to the energy ombudsman in most states – NSW is the exception, not the rule.

However, the AER's Network Exemption Guideline contains a somewhat stronger obligation than the Exempt Seller Guideline. Condition 6 of the Network Exemption Guideline states:[118]

A private network must have in place dispute resolution procedures which customers can access at no cost or on a fee for service basis. Where retail on-selling is occurring under the Retail Law and a dispute resolution mechanism is available under that Law, the same arrangement may apply for the resolution of disputes. In all other circumstances a suitable dispute resolution mechanism must be specified in the formal agreements between the network owner or its appointed agent and the end-use customer. These procedures must allow a customer to request, and be provided with, written details of all charges applicable to that customer. [emphasis added]

The differences between the AER's two Guidelines make any assessment of the overall compliance of an exempt supplier (seller/network operator) excessively complex. Moreover, it is not at all clear in the wording of Condition 6 (cited above) whether an exempt customer has a right to a 'no cost' dispute settlement mechanism as they would have if supplied by an authorised retailer and by a registered network service provider.

108. NERL, Section 81 (1).
109. NERL, Section 81 (2) & (3). Note: AS ISO 10002-2006:- *Customer satisfaction –Guidelines for complaints handling in organizations*.
110. NERL, Section 82 (1)-(5).
111. NERR, Rule 29 (Billing disputes for standard retail contracts and market retail contracts).
112. NERR, Rule 50 (General small customer complaints and dispute resolution information for market retail contracts).
113. NERR, Rule 56 (1) & Rule 80 (1) (h) (respectively).
114. NERR, Rule 56 (3) & (4) & Rule 80 (3) & (4) (respectively).
115. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, Condition 2 (c), p 41.
116. Ibid, Condition 15, p 46.
117. Ibid, pp 46-47.
118. AER, *Electricity Network Service Provider Registration Exemption Guideline, Version 3*, 27 August 2013, Condition 6, p 24.

Small wonder the exempt customers in our study are so confused and frustrated with this process and do not know where or whom to turn to assist them in resolving disputes. Above all, therefore, the findings of this study suggest there is a real need for all jurisdictions to consider how these consumers can have better access to a no cost complaint and dispute resolution process. Until this is done, the goal of a common and effective customer protection framework for these electricity users will remain elusive.

In stating this, SACOSS acknowledges there are complexities of providing access to an energy ombudsman (or equivalent) including the funding arrangements for such a service. We also note the issue raised by EWON in its recent submission to the AER. EWON notes that it is the only jurisdictional ombudsman to have jurisdiction to receive complaints from customer of exempt sellers. However, EWON also states:[119]

> *While EWON has jurisdiction to take complaints from customers about exempt sellers, in practice most exempt sellers are not members of EWON and therefore are not bound by a decision of EWON. Hence exempt customers who bring a disconnection complaint to EWON will not have the same safety net as retail customers who bring a disconnection complaint to EWON under the same circumstances.*

However, notwithstanding these very real difficulties, SACOSS considers it is unsatisfactory to deny such a fundamental protection as a free and independent dispute settlement mechanism for these most vulnerable customers.

3.1.2 Explicit Informed Consent (EIC)

EIC is required when a customer transfers to a new retailer or obtains a new market contract from an existing retailer. Obtaining EIC from customers prior to transfer or a new contract is a core element of the transfer and contractual processes in the competitive electricity retail market and is recognised in both the NERL and NERR.

The assessment of EIC for exempt selling to R4 class customers is somewhat more complicated than EIC in the retail market. These complications are discussed below. In summary, the complications arise because:

- The agreement to electricity supply conditions is (generally) subsumed into the overall rental agreement; there is no specific and separate document highlighting the electricity supply arrangements;
- The AER's Exempt Selling Guideline does not specifically require EIC as part of the conditions of granting exemption to the prospective on-seller;
- The information provision condition set out in the Guideline is not as comprehensive as the information required from an authorised retailer as part of obtaining EIC; and,
- There is little clarity around the specific requirements for EIC in situations where a customer transfers from the on-seller to an authorised retailer for the supply of electricity.

EIC requirements of the NERL and NERR

The NERL states that EIC requires the retailer to: "clearly, fully and adequately disclose all matters relevant to the consent of the customer including each specific purpose or use of the consent".[120] In addition, the customer must give their consent to the transaction in writing, or verbally (if recorded) or by electronic communication.[121]

The NERR provides further information on the operation of EIC. The NERR states that consent to a transfer or a new market contract requires, inter alia, that the customer is advised of, and consents to "any term or condition in the market retail contract that provides for the variation of tariffs, charges or benefits to the customer under that contract'.[122] The NERR also requires that a small customer must give EIC if the customer enters a bill smoothing[123] or a direct debit arrangement with the retailer.[124]

EIC and the AER's Exempt Selling Guideline

In contrast to the clear obligations on authorised retailers under the NERL/NERR to obtain EIC, the AER's Exempt Selling Guideline does not explicitly mention EIC as part of the conditions of exemption for on-selling to the R4/NRR class of customers.[125]

Presumably, therefore, the AER has attempted to replicate the EIC requirements by including in the Guideline a condition that the exempt seller must be provided, in writing and at the start of their residency at

[119] Energy & Water Ombudsman NSW, Submission on the AER's Draft (Retail) Exempt Selling Guideline, September 2015, p 3.

[120] NERL, Section 39 (1) (a).

[121] See NERL, Section 39 (2)(a)-(c).

[122] NERR, Rule 46A (2).

[123] NERR, Rule 23 (2).

[124] NERR, Rule 32 (3) (b).

[125] The Guideline suggests, in the section on policy principles, that the AER would not approve an exemption application for exemption that did not demonstrate evidence of EIC. However, this appears to be limited to specific instances such as where energy is being sold under a contract negotiated on behalf of a group of customers or to 'brownfield sites', that is, sites that were originally serviced by an authorised retailer(s) but later the owner seeks to retrofit as an embedded network. See for instance, AER, ***(Retail) Exempt Selling Guideline, Version 3***, April 2015, p 27-28.

the park or on request by the customer, a prescribed list of information on the electricity supply arrangements and the customers rights to information (see Condition 2, "Information Requirements").

SACOSS considers that the information requirements set out in Condition 2 replicate many of the pricing and non-pricing requirements in the NERL/NERR. That is, it includes an obligation to advise customers of their right to choose a retailer, flexible payment options, and contact numbers for payment assistance and emergencies as well as tariffs and other charges.

Nevertheless, SACOSS does not consider this is sufficient to satisfy the requirements of genuine EIC particularly when considered against the requirements for EIC set out in the NERL and NERR (as listed above).

EIC as part of the overall rental agreement

As noted above, the NERL requires the exempt seller to provide: "clear, full and adequate" information to the customer. The NERL also requires the exempt seller to obtain the customer's written (or equivalent) agreement to the contract.

In Section 2, we noted that the R4 customers in our study reported that they did not receive adequate information on their electricity supply conditions at the time they signed the rental agreement. Certainly the evidence put to SACOSS suggests that the information provided to the customers was not consistent with Condition 2 of the AER's Exempt Selling Guideline.

In addition to this, however, what limited information is provided to the R4 customer will typically be subsumed into a much larger overall rental agreement and the customer will be signing this overall agreement rather than signing a specific electricity supply agreement.

Although there is an implied acceptance of all the terms of the larger rental agreement, including the conditions of electricity supply, SACOSS would argue that this is not the equivalent of the 'stand-alone' EIC arrangements for customers of authorised retailers.

That is, even if the rental agreement with the R4 customers included all the electricity supply information requirements in Condition 2 (which it generally appears not to do), the inclusion of this information into a much larger rental agreement signed by the customer mitigates against the conclusion that the customer has provided EIC to the specific terms of their electricity supply.

Moreover, the content of the overall rental agreement with R4 customers, including electricity supply, is generally regulated under the relevant jurisdictional laws. These laws do not necessarily specify provision of detailed information on electricity supply nor state that such detailed information be provided to the customer on request by the customer.

Adequacy of the information provision condition in the AER's Exempt Selling Guideline

As noted above, Condition 2 of the AER's Exempt Selling Guideline requires the exempt seller to provide information on matters such as payment options, contacts for payment assistance and emergencies and tariffs and charges.

However, Condition 2 does not require the level of information that an authorised retailer must provide to its customers as part of the requirement to obtain EIC from its customers. For instance, Condition 2 does not require information on the term of the contract, the cooling-off period and restriction on marketing activities.

Some of this type of information may not be applicable to the R4 customer-exempt seller relationship, particularly given that electricity supply is generally just one component of the overall leasing agreement.

A more significant gap between the standard consumer protections under the NERL/NERR and the consumer protections under the AER's Exempt Seller Guidelines relates to the provision of information on electricity pricing and metering arrangements.

For example, the NECF requires a great degree of transparency about the prices/offers available to consumers, including the accessible presentation of standing and market offer prices on the retailers website, and to produce an 'Energy Price Fact Sheet' for each offer that includes unit price of energy, daily supply charge, and any other applicable charges, discounts and rebates.[126]

The AER's Exempt Seller Guideline does not require the R4 exempt seller to supply this detailed pricing information. Nor does it require the exempt seller to provide information about the basis of the prices and other charges and how these prices and charges might vary over time.

This lack of transparency about the actual pricing arrangements in various exempt selling situations clearly creates a difficulty for regulators in assessing the fairness of the exempt supply contracts.

However, it also creates a difficulty for the prospective customer of an exempt seller. Given the contract is open-ended and retail competition restricted in practice (if not by law), it is essential for EIC that exempt consumers are provided not only with adequate details on the

[126] AER, *Retail Pricing Information Guidelines*, August 2015, Version 4.0, section 3 http://www.aer.gov.au/system/files/AER%20Retail%20Pricing%20Information%20Guidelines%20-%20August%202015.PDF

current electricity prices and charges but also include a statement from the exempt seller on how and when their energy prices and charges might change over time.

As noted in section 2 above, the lack of information on the reasons for changes to the electricity prices and charges was a source of frustration and concern for the exempt customers in the SACOSS study.

Moreover, this information on current and future prices and charges will become particularly important if and when retail competition becomes a practical possibility.

For instance, an exempt customer will need to have information on the basis for changes to prices and charges in the future in order to compare their current exempt seller pricing arrangements with an alternative retail market offer. As an example, the lease agreement could state that electricity prices and charges will be changed at a maximum of 'x' times per year, with 'y' days notice and/or that changes in prices and charges will be limited to changes in the prices and charges in the standing offer price of the relevant local area retailer.[127]

It is noted that a number of these requirements for effective EIC may be set out in jurisdictional legislation. SACOSS also notes the AER's comments in the Exempt Selling Guideline that: "Exemption conditions are intended to supplement jurisdictional legislation…".[128] However, we consider that there is value in replicating key requirements, such as information requirements relevant to effective EIC, in the AER's Exempt Seller Guideline. Inclusion of such important matters in the Guideline conditions of exemption will remove the need for both exempt sellers and exempt customers to gain familiarity with both national and jurisdictional requirements in order to understand the rights and protections available.

That is, overall there is likely to be less confusion and improved compliance and compliance reporting, if important conditions relating to EIC, such as pricing plans and the basis for pricing changes, are included in the AER's Guideline.

Similarly, the customer will need explicit information on any **additional charges** that the exempt seller/network operator might pursue in the event the customer takes up a retail market offer, such as a charge for the use of the internal network or for changes to the internal network.

The fact that most exempt consumers will face some up-front costs to take up an alternative offer lends further weight to the requirement for an on-seller to reveal details of both current and future prices and charges.

EIC requirements for transfer of the exempt customer to an authorised retailer

The AER's Exempt Selling Guideline requires the exempt seller to advise the customer in writing of the customer's right, under state or territory laws, to elect to purchase electricity from a retailer of their choice and to provide on options for metering that would allow that choice.[129]

However, in order to be effective in practice, the current EIC requirements applying to an authorised retailer will also need to be adapted to meet this new situation.

The NERL and NERR require retailers to obtain EIC to transfer a customer and EIC requires full disclosure of all relevant matters (see above). However, there is no specific requirement that ensures the exempt customer contemplating a transfer to an authorised retailer will receive all the relevant information regarding the costs that will be incurred such as the costs of upgrading metering and the risk of additional charges from the park management for recovery of the cost of the embedded network facilities.

In particular, it is not clear who has responsibility to advise the customer about these possible additional costs and charges – is it the new retailer or the existing network operator?

The AER has noted a further trend towards owners of multi-premise sites seeking to convert sites where the individual premises are already serviced directly by an authorised retailer with appropriate standard of metering. These owners plan to convert the site to an exempt selling/embedded network (a 'brownfield' site). The AER's Exempt Selling Guideline states that it expects any person applying for an exemption on this basis should demonstrate that: "customers have given explicit informed consent to taking supply from an exempt seller rather than a retailer".[130]

While SACOSS is not aware that this situation has arisen in relation to caravan and residential parks it is important that this policy requirement explicitly includes the R4 (and R1, R2 and 3) class of customers.

127. For instance, see NSW Government Fair Trading, *Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks*, August 2006 (Revised July 2014), pp 3-4. http://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/customer_service_standards_for_the_supply_of_electricity_to_permanent_residents_of_residential_parks_-_revised_july_2014.pdf

128. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, p 26.

129. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015. Condition 2 (1)(a).

130. The AER's Guideline does not set this as a specific condition of exemption, nor does it require EIC from all customers. However, the AER does indicate that it will "closely scrutinize" any exemption applications for brownfield sites (p 28), for (inter alia) evidence of EIC from customers and the protections available to the customer. From 1 January 2015, the exempt seller will need to apply for an individual exemption.

For instance, SACOSS is aware that some parks have a mix of premises supplied by an authorised retailer and exempt customer premises. It is possible at some point in time that the park owner may seek to convert all properties to an embedded network. The extension of the EIC principle to ensure that this only occurs if all affected park occupants agree and are fully informed of such is, therefore, quite appropriate.

3.1.3 Hardship policies, including repayment plans

The progressive development by regulators of energy hardship regulation and hardship program indicators[131] and reporting, along with the associated improvement in the quality of retailers' hardship policies, has been a central feature of the energy consumer protection framework under the NECF and Victorian regulation.

The regulatory approach to hardship recognises the overriding principles that the supply of energy is an essential service for residential customers and that de-energisation of premises due to inability to pay energy bills should be a 'last resort' option. Because they involve access to an essential service, hardship policies should be transparent, consistent and customers should have equitable access. These principles are set out in the NERL and are intended to underpin the more detailed hardship policies prepared by retailers for approval by the AER.[132]

The following sections will therefore consider how these principles are reflected in the NECF (including both the NERL and NERR) in terms of the obligations on retailers and access by their customers to their hardship programs.

We will also review whether the current obligations on exempt sellers and how access by their customers to hardship programs compares to the NECF requirements. The focus will be on the principles and conditions set out in the AER's Exempt Selling Guideline. However, we note that some aspects of consumer protection for exempt customers are captured in jurisdictional legislation for tenants in general and tenants in caravan and residential parks in particular.

As this jurisdictional legislation varies from state to state, SACOSS considers that the AER's Exempt Selling Guideline should not place reliance on jurisdictional legislation to 'fill the gap'.

Authorised Retailers and Hardship Policies

All authorised retailers are required as a condition of their authorisation to have in place and publish a hardship policy that sets out how they will manage customers experiencing financial payment difficulties.[133]

The hardship policy must include how the retailer and the customer will manage both current payment difficulties and repayment of historical debts. The hardship policy, and any variations to the plan, must be approved by the AER[134] (or the ESC in the case of Victoria) and meet certain minimal requirements. These minimum requirements are set out in the NERL,[135] and include:

- Flexible payment options (including a payment plan and Centrepay);
- Process to identify and notify the hardship customer of appropriate government concession programs and financial counselling services;
- An outline of a range of programs that the retailer may use to assist hardship customers; and,
- Processes or programs to assist customers with strategies to improve their energy efficiency (if required by a jurisdictional regulation).

An identified hardship customer cannot be disconnected unless the retailer has offered two payment plans in the previous 12 months and the customer has agreed to one or other of them.[136] If a hardship customer continues to adhere to the terms of a payment plan agreed with the retailer then a retailer cannot commence proceedings for the recovery of debt.[137] Similarly, if a retailer does not comply with its hardship policy or the NERL and NERR requirements for hardship customers, then the retailer cannot commence proceedings for the recovery of debt.[138]

Nor can a retailer require a security deposit from an identified hardship customer.[139] Civil penalties apply if the retailer does not comply with this requirement; an indication of the policy importance attached to the management of hardship customers.

131. NERL, Section 287: "The AER must determine and publish hardship program indicators in accordance with the Rules.". NERR, Rule 75: The hardship indicators must cover entry into hardship programs, participation in hardship programs and assistance available to, and assistance provided to customers under the hardship policy.
132. See NERL, Section 45 (3) which sets out the principles that the AER just have regard to in approving a retailer's customer hardship policy
133. NERL, Sections 44 – 49.
134. NERL, Section 43 (2)(a)(i).
135. NERL, Section 44 (a) – (i).
136. NERR, Rule 111 (2). Rule 111 also specifies when a retailer can arrange de-energisation.
137. NERL, Section 51 (a).
138. NERL, Section 51 (b).
139. NERR, Rule 40 (3) (a).

The AER's web-site includes guidance on the content of customer hardship policies[140] and copies of the approved hardship policies of retailers in all NEM jurisdictions except Victoria,[141] in addition, retailers are required to publish their hardship policy on their own web-sites[142] and are obliged to communicate its customer hardship policy as soon as practicable to a hardship customer.[143]

In addition, the AER's reporting on the performance of retailers in implementing their hardship policies has expanded.[144] The AER produces regular quarterly reports that allow consumers to assess the performance of their retailers in terms of the number of customers on hardship programs, the amount of debt on entry and exit of a repayment plan, the average duration of the repayment plans etc.[145]

Overall, the retailers' hardship plans are expected to be innovative, equitable, transparent and proactive in the implementation of their policies. For example, the NERL sets out a number of principles the AER should apply when considering a retailer's customer hardship policy. These principles include retailers actively assisting customers to avoid disconnection solely due to an inability to pay energy bills. [146] The NERL also states that: [147]

> *Residential customers should have equitable access to hardship policies, and that those policies should be transparent and applied consistently.*

Exempt Sellers and Hardship Policies

Despite the importance given to the development and monitoring of the hardship policies and plans of authorised retailers, the conditions applying to exempt sellers in the AER's Exempt Seller Guideline are comparatively limited. It is not at all clear that the conditions set out in the AER's Exempt Selling Guideline are consistent with the policy objective that the hardship plans are "innovative, equitable, transparent and proactive".

In this instance, the AER's approach is prescriptive. That is, the AER's Exempt Selling Guideline sets out the specific conditions for the exempt seller to manage customers who report they have financial difficulties rather than the AER leaving the exempt seller to develop its own hardship policy, which the AER will approve if it meets the criteria.

For example, Condition 9 of the Exempt Seller Guideline sets out the AER's requirements for exempt sellers when: "the exempt customer informs the exempt person that it is unable to pay energy bills due to financial difficulty".[148] Condition 10 prescribes when disconnection or cessation of supply is prohibited.[149] These two conditions of exemption include (inter alia):[150]

- Directing the customer to the Australian government energy efficiency website or other similar information source;
- Ensuring that the customer is aware of relevant government or non-government energy rebates, concessions and relief schemes;
- Not charging the exempt customer a late payment fee or a security deposit;
- Offering the customer more flexible payment terms; and,
- Not proceeding with disconnection of supply (subject to certain conditions and following a disconnection warning notice).

On the other hand, the AER's Exempt Selling Guideline does not require the exempt seller to actively identify customers who may be in hardship. Nor does it require the exempt seller to have in place and publish an approved Hardship Policy or to report on its compliance with the hardship policy and/or the relevant exemption conditions (Conditions 9 and 10 in particular).

This gap between the NECF arrangements for authorised retailers and the obligations on exempt sellers as set out in the AER's Exempt Selling Guideline is particularly concerning in the context of exempt customers in caravan and residential parks. Residents in these parks include some of the most vulnerable low-income electricity consumers who may not have the resources to assess the exempt seller's compliance with the AER's conditions of exemption, particularly when the relevant

140. AER, *Final Guidance on AER approval of customer hardship policies*, May 2011. https://www.aer.gov.au/system/files/Final%20Guidance%20on%20AER%20approval%20of%20customer%20hardship%20policies%20-%20May%202011.pdf

141. AER n.d. AER approved hardship policies, http://www.aer.gov.au/retail-markets/energy-retailers-customer-hardship-policies/aer-approved-hardship-policies

142. NERL, Section 43 (2)(b).

143. NERR, Rule 71.

144. See for instance, NERL, Part 12 (Compliance and Performance), Division 1 Section 275 & Division 2, Sections 285-287 that set out the requirements for compliance and performance reporting.

145. AER, Retail energy market quarterly performance updates at http://www.aer.gov.au/retail-markets/performance-reporting.

146. NERL, Section 45 (3)(b).

147. NERL, Section 45 (3)(d).

148. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015, Condition 9, (1), p 44. Although this is the same as the definition of a hardship customer in the NERL, the Guideline does not refer to these customers as 'hardship' customers.

149. Ibid, p 45.

150. Ibid, pp 44-45.

conditions may not be published in any readily accessible and up-to date form by the exempt seller.[151]

However, SACOSS acknowledges that replicating all the requirements in the NECF and in the AER's guidance on approved customer hardship policies, may be problematic, particularly for relatively small-scale exempt sellers. For instance, the cash flow impacts of extended payment options might be significant. Moreover, as the payment for electricity is generally part of the overall charges for the lease of the site (albeit an explicit line item in the fortnightly or monthly invoice), it significantly complicates the process of having special repayment plans for electricity.

It is likely therefore that the R4 class of exempt consumers will need to rely more on emergency payments through Government or other agencies than an exempt sellers hardship program and payment options. What is essential therefore is that the exempt customer is provided with comprehensive information on the assistance available from the Government and other agencies.

Of course, if a hitherto exempt customer takes up a market offer, they should have full access to the authorised retailer's hardship and disconnection programs (see below).

3.1.4 Disconnection of Customers for Non-payment and Reconnection

As noted in Section 3.1.3, the NECF incorporates the principle that electricity is an essential service and, therefore, a retailer should only disconnect supply as a 'last resort'.

To whit, the NERR sets out a series of requirements that an authorised retailer must follow before it can disconnect a customer from electricity supply for non-payment of a bill. Similarly, the AER's Exempt Seller Guideline sets out a number of requirements before an exempt seller can disconnect a customer from electricity supply for non-payment of a bill. The similarities and differences are discussed below.

Authorised Retailers and Disconnection/ Reconnection Requirements

The NERR details the process that an authorised retailer must follow before it can disconnect a customer for non-payment of a bill. The retailer can only disconnect a customer if a customer has not paid a bill or has not adhered to an agreed payment plan[152], and the retailer has taken the following steps:[153]

- The retailer has given the customer a reminder notice;
- The retailer has given the customer a disconnection warning notice after the period referred to in the reminder notice has expired;
- After giving the customer a disconnection warning notice, the retailer has used its "best endeavours" to contact the customer in person, by telephone, by fax or electronic means; and,
- The customer has refused or failed to take any reasonable action towards settling the debt.

The NERR is not specific about the timing of each of these steps in the disconnection process.[154] If, however, a customer has either paid the bill or has agreed to a repayment plan, and has paid any charge for re-energisation within 10 business days of de-energisation, the retailer must request the distributor to re-energise the premises.[155]

The NERR does not specify a time period for re-energisation. However, the timing requirements for re-energisation are generally set out in various jurisdictional instruments (regulations or codes). For instance, the *Electricity Supply (General) Regulation 2014* (NSW) requires a distributor to re-energise a premise within one business day of the request from a retailer.[156]

If the customer is identified as a hardship customer, or is a residential customer who has informed the retailer that they are experiencing payment difficulties, the retailer must not arrange disconnection unless the retailer has offered at least two payment plans in the previous 12 months and the customer has not agreed to either of them or the customer has failed to pay in accordance with the plan.[157]

A retailer must not arrange disconnection if, inter alia, the premises are registered as having life support equipment,

151. SACOSS notes that Condition 2 (f) in the AER's Exempt Seller Guideline requires the exempt seller to provide information on: "the forms of assistance available if the exempt customer in unable to pay energy bills due to financial difficulty". However, this does not clearly specify that the exempt seller must provide these forms of assistance. That is, the customer may or may not receive information in writing on the assistance available from the exempt seller (such as payment options) if the customer is in hardship, nor are they likely to know that the AER publishes these conditions on its web-site.

152. NERR, Rule 111 (1) (a) – (b). NERR, Rule 111 (3) sets out similar requirement for a customer on a shortened payment cycle.

153. NERR, Rule 111 (1) (c) – (f).

154. There may be requirements in local regulations, codes and guidelines.

155. NERR, Rule 121.

156. *Electricity Supply (General) Regulation 2014* (NSW), Clause 7(2). The requirement to re-energise within one business day applies to requests made before 3pm. If the request is made after 3pm, the requirement is to re-energise by the end of the second business day after the request.

157. NERR, Rule 111 (2) (a) – (c).

where there is an unresolved complaint to the retailer or the energy ombudsman, where the customer has applied for but is not yet receiving assistance and where a customer has failed to pay an amount on a bill that relates to goods and services other than the sale of energy.[158]

The NERR also prescribes the minimum content of the reminder notice and the disconnection warning notice.[159] In particular, the disconnection warning notice must include information on the applicable re-energisation procedures and any associated charges and the existence and operation of the energy ombudsman.[160]

Exempt Sellers and Disconnection/Reconnection Requirements

The AER's Exempt Selling Guideline sets a process (in Condition 9 (d)) for disconnection of a customer in the event that the exempt customer has not paid a bill by the pay-by-date. This condition applies to Class R4 exempt customers unless state or territory tenancy legislation sets out the process and requirements for the disconnection of supply by the exempt person.[161]

An important difference between Condition 9 and the process set out in the NERR (Rule 111) is that Condition 9 provides a more specific time frame for each step in the process, namely:[162]

- Following non-payment by the pay-by-date, the exempt person issues a reminder notice requesting payment by a date *at least 6 business days* from the date of issue of the reminder notice; the customer must also be offered more flexible payment terms and advised of forms of assistance available if the non-payment is due to financial difficulty;
- Following non-payment by the date specified in the reminder notice (or establishment of more flexible payment terms), the exempt person issues a disconnection warning notice stating that disconnection may occur if payment is not made by a date *at least 6 business days* from the date of issue of the disconnection warning notice;
- After issuing the disconnection warning notice, the exempt person has used its best endeavours to contact the exempt customer in person or by telephone; and,
- The exempt customer has, by the specific date in the disconnection warning notice, refused or failed to take reasonable actions towards settling the debt.

The exempt person must arrange for reconnection of the premises "as soon as practicable" following satisfactory payment of the debt or agreed payment terms.[163]

Overall, therefore, the exempt person can initiate a disconnection from supply at a minimum of 12 business days after the initial pay-by-date (providing the other criteria are met) but does not have a specific time requirement for reconnection other than "as soon as practicable".

The timeframe for the exempt persons' disconnection process is likely to be significantly shorter than the timeframe for an authorised retailer under the NERR. On the other hand, there is no specific time frame imposed on the exempt seller to arrange reconnection of the customer on repayment of the debt (i.e. the Guideline simply states "as soon as practicable").

SACOSS considers that it is reasonable for a small exempt seller to have the opportunity to recover an outstanding debt in a shorter time-frame than most retailers would require from a cash flow perspective.[164] SACOSS also notes that in its current review of Version 3 of the Exempt Selling Guideline, the AER has raised the question of whether the obligation for reconnection should be "time limited" and if so, "what limits should be applied".[165] While a time limit would be desirable, SACOSS is aware that different jurisdictions have different requirements for reconnection and that in some cases tenancy legislation will also set out requirements.

Notwithstanding these difficulties, SACOSS highlights that the R4 class of exempt customers is likely to include customers who will have real difficulty paying the electricity bill component of the their rental charges (particularly in summer and winter when electricity use is likely to be greater than in the milder months). This highlights the importance of early intervention, for example:

- The exempt customer being provided with the earliest possible information on the exempt seller's payment options;

158. NERR, Rule 116 (1) (a) – (i). The NERR also states that a distributor may not de-energise a premise of a life support customer or a customer who has made a complaint to the distributor or the ombudsman and the complaint is not yet resolved. See NERR, Rule 120 (1).

159. NERR, Rule 109 & Rule 110 respectively.

160. NERR, Rule 110 (e) and Rule 110 (f) respectively.

161. AER, *(Retail) Exempt Selling Guideline, Version 3*, Condition 9 (4).

162. Ibid, Condition 9 (2)(d).

163. Ibid, Condition 9 (3).

164. Particularly as this debt would continue to accumulate in the interim, if the exempt customer continues to use electricity.

165. AER, Notice of *Draft Instrument: Amendments to the AER (Retail) Exempt Selling Guideline*, September 2015. p 6, Question 3. The current draft Guideline (Version 4) removes the reference to "as soon as practicable" but does not put any time limit in its place.

- Similarly, the exempt customer should be provided at the earliest possible date with information on any relevant government and non-government energy rebates, concessions and relief schemes; and,
- The processes associated with applications for government or non-government financial assistance should be readily accessible, transparent and efficient.

Condition 9 addresses the first two points to some degree although Condition 9 does not sufficiently emphasise the need for early intervention.[166]

However, with respect to the third point, it is important that the relevant external agencies are aware of the relative short time between the original due date for payment and the point of disconnection. Delays in making decisions create further pressures on both the exempt seller and the exempt customer as the debt accumulates.

The Exempt Selling Guide also outlines circumstances when an exempt person *must not disconnect energy supply to the exempt customer's premises*. In particular:

- An exempt customer cannot be disconnected during the period between the application for assistance and the decision by the relevant agency to provide such assistance[167]; and,
- An exempt customer cannot be disconnected when an exempt customer has raised a complaint directly related to the reason for disconnection, to the exempt person, the energy Ombudsman or other external dispute resolution body, and the complaint has not been resolved.[168]

However, the Exempt Selling Guideline does not specifically address the issue of the disconnection of a 'hardship customer', perhaps because it does not specifically identify such customers. While all customers (including but not only hardship customers) who do not pay on the due date must be offered more "more flexible payment terms",[169] the obligation to specifically accommodate these hardship customers appears to be lesser than in the NERR.

Life Support Customers

The NERL and the Exempt Selling Guideline provide similar protections for persons who qualify as life support customers and who have notified the retailer or the exempt seller of their status as a life support customer.

In particular, an exempt seller (like an authorised retailer) is stopped from disconnecting supply to a life support customers.[170]

Both authorised retailers and exempt sellers are required to maintain records of any customers who notify them that they qualify as a life support customer.[171] Both retailers and exempt sellers are also required to advise the local distributor if any customer or exempt customer (respectively) requires life support arrangements. The exempt seller must also advise its authorised retailer that the exempt seller/embedded network operator is supplying a life support customer.[172]

SACOSS is aware that the AER has issued infringement notices and financial penalties to some distributors that have illegally disconnected electricity supply to the premises of a life support customer without proper notification. Maintaining accurate records of life support customers is clearly, therefore, a broader issue than covered by the SACOSS study. However, it is essential that some monitoring of compliance under the Guideline is undertaken, particularly as neither the authorised retailers (including the local retailer) nor the local network service provider have any direct visibility of the status of these customers unless explicitly informed by the exempt supplier.

3.1.5 Customer Bills and Payment Methods

Transparency in the bill electricity bills is another important consumer protection. It is important that a small customer can easily verify that the price and charges in the bill conform to the actual contract a customer has with a retailer or exempt supplier. The bill should also contain other non-price but important information such as payment method options, contact details etc.

For this reason, both the NERR and the AER's Exempt Selling Guideline are quite prescriptive about the content of a small customer's bill as discussed below.

SACOSS has highlighted in Section 2 our view that the exempt customers are not always receiving all the billing and non-billing information set out in the Exempt Seller Guideline on their bills. In this section, SACOSS finds some important gaps between the Exempt Seller Guideline and the information provided to customers of authorised retailers under the NERR.

166. For example, as Condition 9 is now written, if the exempt seller provides a reminder with 6 business days notice, it is possible that the customer receives offer of a more flexible payment terms only on day 5.
167. AER, *(Retail) Exempt Selling Guideline*, Version 3, April 2015, Condition 10 (1)(f).
168. Ibid, Condition 10 (1)(g).
169. Ibid, Condition 9 (d)(i).
170. ibid, Condition 10 (1)(e).
171. Ibid, Condition 16 (2).
172. Ibid, Condition 16 (1) (a) – (c).

Authorised retailer and small customer bills

The NERR specifies the minimum content on the bill for a small customer, irrespective of whether that customer is on a standard retail contract or market retail contract.[173]

Billing data:

The prescribed content includes all information necessary for the customer to verify the bill, such as the meter identifier, billing period, values of the meter readings at the start and end of the billing period, the total consumption, the tariffs and charges applicable to the customer and the basis of these tariffs and charges, the value of any rebates or concessions, and the total amount payable. The bill must also include details of the available payment methods.[174]

Non-billing data:

If the bill is based on an estimated meter reading rather than an actual meter reading, this must be disclosed on the bill.[175] The NERR sets out the basis for estimation of the bill for a small customer, including the customer's reading of the meter, actual historical metering data or average usage of energy by a comparable customer over the corresponding period (if there is no historical information available for that customer at that premise).[176]

Non-billing information is also required to be placed on the bill including information on average daily usage, energy consumption benchmarks, availability of government funded rebates, concessions or relief schemes, and telephone numbers for accounts, complaints and emergencies.

Provision of historical billing data:

In addition to the information that must be provided on the bill, the NERR states that a retailer must promptly provide a small customer with historical billing data for the customer for the previous two years on request.[177] This data must be provided without charge (subject to conditions).[178]

Payment terms and conditions:

Under the NERR an authorised retailer must offer a range of payment options in its standard contracts, including payment in person, by telephone, mail, direct debt and electronic funds transfer.[179] Retailers must also allow a hardship customer to use Centrepay as a payment option.[180]

Exempt sellers and small customer bills

The AER's Exempt Selling Guideline also provides an extensive list of information requirements to be provided on the exempt customer's electricity bill.[181]

The requirements are broadly similar to the NERR for R4 class customers (and class R2 and R3), although sometimes expressed differently, and there are also some important gaps.

Billing data:

For example, Condition 3, which applies to R4 class customers, includes all the information necessary for the customer to verify the bill including the meter identifier, billing period, values at start and end of period, details of consumption, the tariffs and charges applicable to the customer and the basis of these tariffs and charges, the value of any rebates or concessions and details of available payment methods.

Condition 4 requires that the exempt person must use "best endeavours" to ensure that the meter for each exempt customer is read and used as the basis for any bill issued.[182] If a bill is based on an estimation, this must be clearly stated on the bill.[183] Condition 4 also outlines the basis for estimation of the bill, which is similar to the basis for estimation of a bill by an authorised retailer (see above).[184]

Non-billing data:

However, the availability of non-billing information on the bill is more limited than for an authorised retailer. For example, the exempt seller does not have to provide information on average daily usage or energy consumption benchmarks.

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173. NERR, Rule 25 (a) – (x).
174. NERR, Rule 25 (r).
175. NERR, Rule 21 (3)
176. NERR, Rule 21 (2).
177. NERR, Rule 28 (1).
178. NERR, Rule 28 (2).
179. NERR, Rule 32 (1). Retailers may offer more limited payment options for specific market products (e.g. direct debit), providing these conditions are explicitly set out in the market contract.
180. NERR, Rule 74 (2) and (3). Note, it is mandatory that a retailer allow Centrepay as a payment option on a standard retail contract (Rule 74 (2). Some market contracts may not include Centrepay as a payment option, in which case the retailer must provide an alternative market contract where Centrepay is an option.
181. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015,Condition 3 (4)(a)-(o).
182. AER, *(Retail) Exempt Selling Guideline, Version 3*, April 2015,Condition 4 (1).
183. Ibid, Condition 4 (5).
184. Ibid, Condition 4 (4).

More significantly, the exempt seller does not have to provide any reference on the bill to the availability of government funded energy charge rebates, concessions or relief schemes.[185] Given SACOSS's views above that the customer needs early information about where they can go for assistance, we consider that this is an important gap.

Nor does the exempt seller need to provide a 24-hour telephone number for fault inquiries and emergencies. In Section 2 above, we identified that lack of information on whom to contact regarding electricity supply issues over weekends was a problem for the exempt consumers in the study. Having this information on the exempt customers' bills would address this issue.

Provision of historical billing data:

Unlike the NERR, the AER's Exempt Selling Guideline does not require an exempt seller to provide up to two years historical billing information on request by the customer. In Section 2 above, SACOSS noted that exempt customers were not always satisfied that their bills were based on accurate meter readings. Access to historical billing data is important, particularly if the exempt customer wishes to raise a dispute about the bills with the exempt seller or submit a complaint to a third party (such as the Tenants Tribunal).

Payment terms and conditions:

The AER's current Exempt Selling Guideline does not specify what types of payment methods an exempt seller should offer customers.[186] However, the AER's proposed revision to the Exempt Selling Guideline does state that the exempt seller should offer a small customer a minimum of two payments methods. The AER states that:[187]

> *The current guideline does not specify what types of payment methods an exempt seller should offer customers. We understand some exempt sellers are not giving customers any choice and are requiring them to pay only be direct debit. Direct debit is not the preferred method of payment for many customers. We note the Retail Rules require retailers to provide small customers with five bill payment options (six, if you include Centrepay)(rule 32 (1) of the Retail Rules).*
>
> *A new clause 3 (2) has therefore been inserted which requires an exempt person to offer a customer at least two payment methods.*

While these draft changes to the Exempt Selling Guideline are an improvement to the current version, the Guideline does not mandate what type of payment methods must be offered. In particular, it does not mandate that a hardship customer (as defined in the Guideline[188]) may request to use Centrepay and the exempt seller must allow this.

SACOSS considers that there are considerable benefits to both the exempt seller and the exempt customer in aligning the AER's Exempt Selling Guideline with the NERR by mandating a right for a hardship customer to use Centrepay at that customer's request.

3.2 Other Exempt Customers

This study has focussed on a particular segment of electricity consumers, namely, consumers residing in a permanent caravan or residential park. We have noted above that the AER's Guidelines provide very similar protections to this class of exempt consumers and exempt residential customers in other situations, such as in large-scale apartment complexes.

The 'gaps' that SACOSS identifies in this report between exempt R4/NR4 customers are pertinent also to other exempt residential categories. Indeed, the differences are largely ones of scale and the overall level of financial and social vulnerability.

However, there is another important class of small consumers that frequently operate within an embedded network and receive their electricity from an on-seller. SACOSS recognises that small businesses have a particular exposure to the issues of being an exempt customer with limited negotiating power with the owner.

In this sense, the position of the small business in an embedded network is not dissimilar from the exempt customers in caravan and residential parks. That is, it is difficult to negotiate a better arrangement and the small business is relatively vulnerable to the decisions on supply by that operator.

On the other hand, many small businesses may be in a better position to take up a competitive retail offer and the amendments to the NER will facilitate that process. In addition, it would appear that owners of shopping centres (for instance) are generally large corporate

185. This information must be provided at the start of the tenancy agreement (Condition 2), but is not required on the customer's regular bill, unlike the requirements on the authorized retailer. Given these are long-term residents it is unlikely that they have access to this information from the original agreements.

186. Version 3 of the Exempt Selling Guideline requires the exempt seller to provide the exempt customer with details of the available payment methods (Condition 3 (4)(n)) but is silent on what those methods must include.

187. AER, *Notice of Draft Instrument: Amendments to the AER (Retail) Exempt Selling Guideline*, September 2015, p 19.

188. As noted, the AER's Exempt Selling Guideline does not use the term "hardship" customer. However, the Guideline does refer to special conditions that apply to an exempt customers "that is unable to pay energy bills due to financial difficulty" (see for instance Condition 9 (1)).

bodies who are well aware of their obligations under the exemption process, more visible to the regulator and more likely to avoid the risk of non-compliance.

Similarly, the small business owner will be more familiar with the implications of the energy supply terms in their contracts and will generally have access to legal advice before signing a contract.

In addition, an important reform is the clarification and amendment to the Rules with respect to property owners who wish to convert sites that are individually metered (and therefore where the small business can select its own retailer) to an embedded network arrangement. The amendments clarify that the owner must obtain the explicit informed consent of the small business.

3.3 Safety and Reliability of the Embedded Network Infrastructure

The embedded network includes the entire infrastructure from the 'gate' meter to and including the exempt customers' meters. The NEL, NER and jurisdictional distribution codes and regulations all set out strict requirements on the local distributor with respect to consumer protection and with respect to the safety, reliability and security of the network infrastructure.

In addition, the AEMO provides detailed technical requirements for metering standards (Metrology Procedures etc).

The AER's Network Exemption Guideline sets out a very similar range of consumer protection conditions including conditions relating to who is eligible to sell in an exempt network,[189] requirements to have a dispute resolution procedure in place,[190] aggregation of meter readings under certain circumstances[191] and obligations regarding supply to life support customers.[192] In addition, an exempt network operator must not impede a customer's access to retail competition where it is available in a jurisdiction.[193]

As discussed in Section 2. 1.8, the Network Exemption Guideline also sets out some general conditions with respect to the standards for electricity meters and sub-meters. The customers' meters must comply with the requirements of the National Measurement Act 1960 (Cth) and associated regulations for meters and sub-meters and with the requirements in schedule 7.2 of the NER.[194]

The Guideline links the safety standards of the embedded networks to the safety requirements imposed on distribution businesses. Condition 3 states:[195]

> *All private networks must, at all times, be installed, operated and maintained in accordance with all applicable requirements (within the jurisdiction in which the network is located) for the safety of persons and property. This includes where relevant, an industry Code or Guideline otherwise applicable to a network service provider providing similar services.*

However, we have already highlighted that, SACOSS has strong concerns about whether these conditions in the Guideline to maintain a safe, secure and reliable internal network are sufficient to ensure this outcome is consistently achieved in practice. The consumers in our study report that there has been little or no activity by the network operator to upgrade or replace the existing infrastructure and in many cases the infrastructure is quite old and/or providing low capacity services to customers.

Similarly, the quality and reliability of metering arrangements appear to be out of line with metrology requirements for checking and replacing meters to ensure accurate reading. Finally, there did not appear to be any specific requirements on the operator to ensure that the supply from the meter to the premises was safe. This was a priority issue for some customers and their concern is understandable given the potential for fire to spread in a caravan or residential park.

The customers in the exempt network were also concerned about the adequacy of the capacity of their supply. The capacity of the network was seen as too restrictive and inadequate for the reasonable needs of permanent residents. For example, the customers report that they could not use a kettle while the air conditioner was on.

Overall, it is not immediately clear if these real concerns of residents with the overall safety and performance of the embedded network reflect gaps in the regulations of the exempt network or a gap in the implementation of the regulations. However, we consider there is a serious need for the AER to examine ways in which the safety, reliability and quality of supply for permanent residents of caravan and residential parks can be improved.

It is interesting to see, for instance, that the NSW Fair Trading regulation of customer service standards for electricity supply in residential parks regulates the fixed

189. AER, *NSP Registration Exemption Guideline, Version 3*, August 2013, Condition 5, p 24.
190. Ibid, Condition 6, p 24.
191. Ibid, Condition 7, p 24.
192. Ibid, Condition 10, p 25.
193. Ibid, Condition 12, p 25.
194. Ibid, Condition 2, p 23.
195. Ibid, Condition 3, p 23.

"service availability charge" (SAC) for electricity supply to be no more than that charged by the relevant local area retailer, except where electricity is supplied to the park resident's site at a rate of less than 60 amps. If it is less than 60 amps, then the standards set a maximum level that is from 70% (for 35-59 amps) down to 20% (for less than 20 amps) of the SAC of the local area retailer.[196]

The park owner is also required to advise the permanent resident of the level of power available to the site at or before the commencement of the tenancy agreement.[197]

It would be worth considering how such a constraint on the fixed charge could be incorporated into the national guideline to provide an incentive to embedded network operators to upgrade their supply to permanent residents. At the very least, the AER's information provision condition(s) should include a requirement to advise residents in advance of the level of power to the site.

3.4 Summary and Recommendations

Dispute resolution and complaint management

The exempt customers in our study were particularly badly served in terms of access to independent and low or no cost dispute settlement mechanism.

Such a mechanism is fundamental to addressing the power imbalance between a supplier and their customers. To whit, each state has established its own independent energy and water industry ombudsman scheme to provide specialist services to address complaints and resolve disputes between retailers and distributors on the one hand and customers on the other (particularly small customers).

However, the customers in the SACOSS study, who represent some of the more vulnerable customers in the overall energy market, have no such access (with the exception of NSW). Instead they must rely on the Tenancy Tribunal, Civil and Administrative Tribunals (or equivalent) in each state. Hearings in these Tribunals are potentially an expensive and legalistic judicial process, despite efforts to include conciliation. Little wonder, small customers are unwilling to submit to this process.

The lack of access to an independent industry mediator is most inequitable and effectively denies an important right to a small customer of an independent, free and industry specific dispute resolution process.

Recommendation 3.1

The AER work with the relevant jurisdictional bodies to develop an effective, low cost, energy specific dispute settlement and complaint handling procedure for exempt small customers.

Changing prices and charges

The AER's Exempt Selling Guideline is not specific about when and on what basis an exempt seller can change prices and charges whereas there are limits to how many times a retailer can change their standard offer prices in a 12 month period.[198] Details on the expected price changes are also required to be included in a retailer's market contract but there is no such specific obligation on exempt sellers.

Recommendation 3.2

The conditions of exemption for exempt sellers to small customers should include a requirement that customers are advised in advance (i.e. at the time of signing a tenancy agreement) of the basis for any changes in prices and charges and the likely timing of such changes.

A safe and reliable embedded network infrastructure

All electricity consumers, including exempt consumers, have the right to a safe and reliable electricity network including metering infrastructure. This right is captured in the AER's Network Exemption Guideline by reference to four "basic" requirements for exempt networks (in addition to a number of class specific conditions). The Guideline states than an exempt person must:[199]

- ensure that the network is safe;
- have a dispute resolution mechanism;
- ensure that network pricing is in accordance with strict controls; and,
- ensure that electricity meters comply with National Measurement Act 1960 (Cth) requirements for electricity meters installed from 1 January 2013 and other applicable standards.

Notwithstanding that these basic requirements have the force of law, at least some consumers in our study reported very different outcomes. They reported that the electricity network was old and not maintained on a regular basis. There were many complaints about the age and reliability of the meters. They did not appear to have confidence in the way disputes were handled or in obtaining 24/7 access to reporting failures in the embedded network. Some exempt customers also noted

196. NSW Government Fair Trading, Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks, August 2006 (Revised July 2014), p 4.

197. Ibid.

198. NERR, "Model Terms and Conditions for Standard Retail Contracts", Schedule 1, Clause 8.2 (b).

199. AER, *Electricity NSP Registration Exemption Guideline, Version 3*, August 2015, p 9.

connections from the meter to the premise were not always safe ("the line is hanging from trees" and similar such comments). There were many complaints about the voltage stability and the lack of capacity of the embedded network supply to the customers' premises.

SACOSS recognises that many caravan and residential parks were established some decades ago. However, we do not regard this as a reason to ignore aging, unsafe and inadequate electricity infrastructure. Some reports suggest that existing small customer meters can be over 30 years old and no one has seen them being maintained or tested.

We have found it difficult to obtain a comprehensive picture of the regulatory instruments that govern the safety and reliability of the existing embedded network infrastructure and the accuracy of the metering technology.

However, the NERR provides for the AER to impose conditions on exempt sellers with respect to "installing, maintaining and reading of meters of exempt customers…".[200] Setting such conditions explicitly in the Network Exemption Guideline would be a welcome step but may not be sufficient to address issues with existing metering arrangements. Nor is it appropriate to wait for retail contestability to force meter upgrades – this may be a long wait for these small customers!

Recommendation 3.3

The AER develop a comprehensive atlas of the current national and jurisdictional regulatory instruments that govern the safety and reliability of the embedded network infrastructure, including requirements for small customer metering in exempt networks that was installed pre 1 January 2013.

Recommendation 3.4

The AER, together with jurisdictional regulators and technical/safety regulators (as the case may be) review these standards to establish a consistent set of minimum standards for embedded network operators and their customers.

These standards for existing and new infrastructure should be clearly set out in the AER's Network Exemption Guideline and some monitoring and enforcement procedures established.

Recommendation 3.5

The AER consider the inclusion of more specific conditions with respect to maintenance and testing of customer meters, and meter reading data recording exempt customers.

200. NERR, Rule 152 (5).

4. Appendices

Appendix A: Interview Proforma

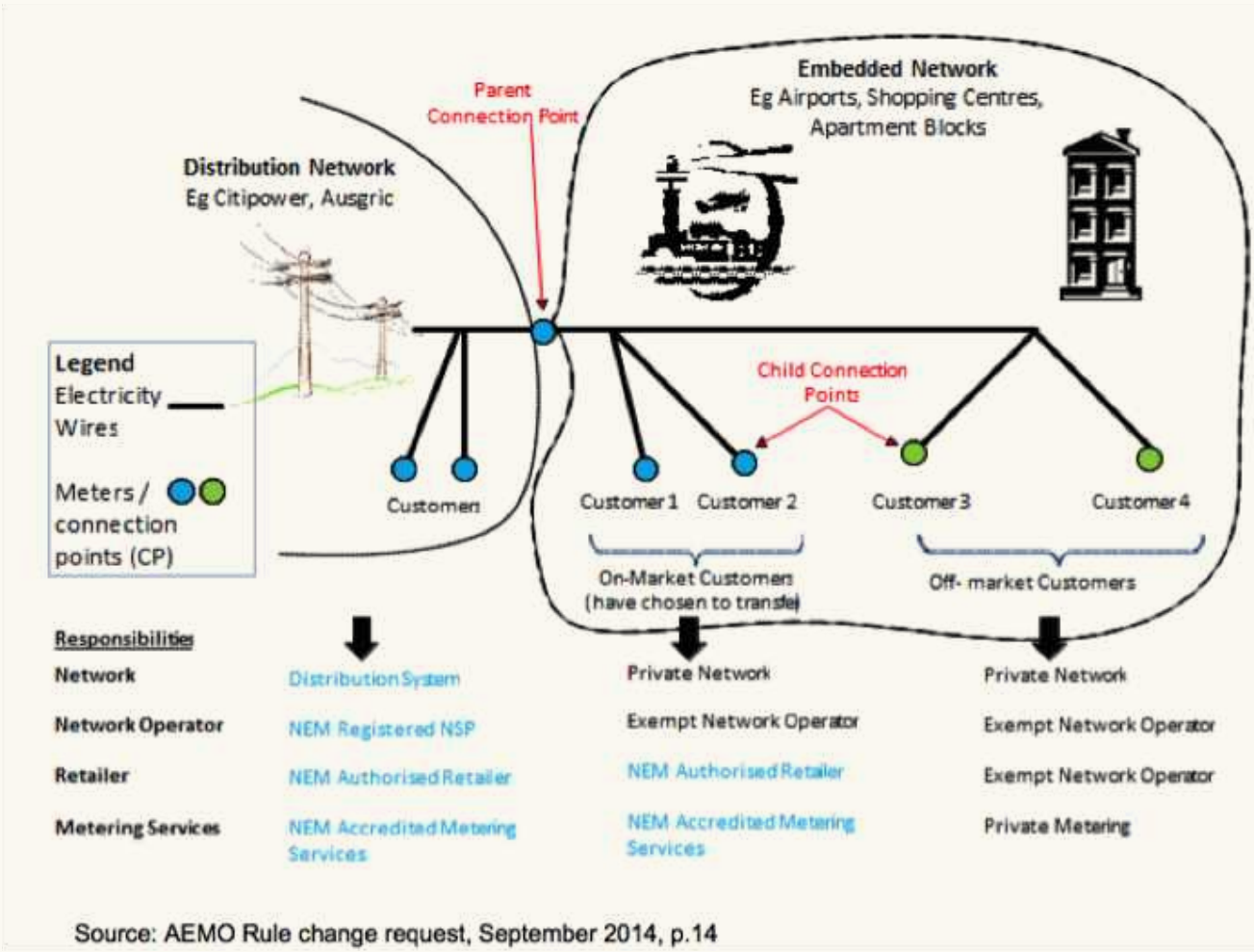
The basics

1. Who owns the embedded network?
2. Who operates it?
3. Who provides the retail services (i.e. sells you the electricity)?
4. Do you have your own meter at your place. If so, is it a 'child meter" or the usual electricity meter you see on houses/flats?
5. Do you have concerns about the accuracy of the meter used to bill you?
6. Do you have access to a retailer such as AGL, Origin, Energy Australia, Lumo if you wanted to?
7. How are you billed (part of your rent, separately, monthly, quarterly etc)?
8. Have you had many issues with reliability of electricity supply (e.g. supply fails, or quality of supply varies your TV dips up and down, computer blinks etc)?
9. When you moved here, were you made aware of the arrangements for your electricity supply?

The consumer issues:

1. Have you had any problems with the way your bill is provided (timeliness, accuracy, clarity)?
2. If you have, who might you take your complaint to and what was the result - how is the complaint resolved?
3. Have you ever been to the AER, or the Energy Ombudsman to assist you in resolving this complaint?
4. What happens when people get behind in their electricity bill payments?
5. Do you know if people have been disconnected from electricity supply by the network/on-seller, (including yourself) - if so, how was that resolved; did the owner offer some sort of assistance (e.g. deferral of payments, payment plans) - and did that person get access to any community services to assist in this?
6. If you are eligible for a concession on your electricity bill have you been able to readily get access to that concession rebate through your embedded network owner/reseller?

Appendix B: Embedded Networks Structure for Customer Interviews



Source: AEMO Rule change request, September 2014, p.14

Appendix C: Case studies: Consumers connected to embedded networks

As part of SACOSS' Embedded Networks project we have interviewed 20 consumers around Australia who receive their electricity supply via an embedded network. The research has focused on investigating the experiences and concerns consumers have with embedded network arrangements. The following case studies illustrate some of the consumer narratives SACOSS has encountered. In order to protect the privacy of research participants we have not disclosed full details of consumers interviewed, including where these consumers reside.

Case study 1:

This case study documents consumer views for a residential site located in South Eastern Australia. This site contains multiple (more than 10) permanent dwellings with some long-term residents.

Residential connection to the electricity supply at this site is via a network comprising of a main connection point/meter that delivers electricity to the site from a local supplier. Residential dwellings are connected to the site supply via a hub configuration. The hub houses four separate meters that are connected to four individual residential dwellings. Residents must purchase their electricity from the site owner.

Residents with hub meters are billed for their electricity supply by site management and meter readings are conducted every fortnight by site staff. Residents are charged for the amount of electricity they consume and pay a fee to have their meter read. Charges are issued to residents every fortnight.

Some concerns regarding the billing information provided to residents were raised. This includes the omission on the bill of the kWh charges and dates of the meter read and the billing period, however the actual meter reading is provided. Variations in bills from fortnight to fortnight was also raised with a concern that meter estimating may be occurring. This was also supported by a lack of confidence in site management to conduct proper meter readings with observations of site management not actually checking the meter expressed.

Methods of bill payment were discussed and pressure for residents to agree to a direct debit arrangement has been experienced. Concern over the direct debit amount being taken from the resident's bank account one day earlier than agreed and access to bank accounts was voiced.

There is residential concern regarding the flow of information from site management with residents wanting more transparency on several issues. These include information on who provides electricity to the site, details of the embedded network setup for new residents (billing, supply, outages and complaint resolution processes) and access to accurate energy efficiency advice.

Uncertainty over the process of who to contact if supply is interrupted was also voiced. This is viewed as a potential issue for hub connected meters as running several appliances at once can often trip the system and a fuse reset needs to be done. Resident knowledge of routine processes for maintaining and inspecting the onsite electricity infrastructure is not apparent. Any upgrades to infrastructure are to be funded by the resident.

Frustration was clearly voiced over the lack of complaint resolution avenues for consumers utilising embedded networks, including the incapacity of the Energy and Water Ombudsman to assist embedded network customers. A concern over the perceived risk to their residential tenancy has also prevented complaints from being lodged with the relevant jurisdictional authority.

Residents at this site are able to access the relevant energy concessions once a year via the Department of Human Services.

No evidence of disconnection to supply for incapacity to pay electricity charges was indicated.

Case study 2:

This case study documents consumer views for a caravan park located in South Eastern Australia. The park has over 30 permanent residents with some residing there for many years.

Residential connection to the electricity supply at this site is via a network comprising of a main connection point/meter that delivers electricity to the site from a local electricity distributor. Caravans are connected to the site supply via a hub configuration. The hub houses four separate meters that are connected to

four individual caravans. Connection from the hub to the caravan is via an overhead cable. Residents must purchase their electricity from the site owner.

Residents are billed monthly for their electricity and can pay by cash or card. The distribution business supplying electricity to the park is known and long-term and permanent residents can negotiate with the park owner to pay the full supply charge. An example provided of a weekly supply charge indicated a significantly higher amount than those reported by residents living in other locations. Concern over whether the park owner was profiting from the on selling of electricity to residents was strongly voiced. It was noted that until recently charges have been below the acceptable rate.

Concerns were also voiced about the lack of information on electricity bills. Residents are only provided with the total kWh consumed and the total dollar amount due. There is a consumer expectation that meter readings, dates and tariffs should also be provided.

There was some suspicion that meter readings are being estimated. Doubt over the accuracy of consumption and charges has arisen when a resident receives a bill for a period of time where they have been living off-site and the bill has not decreased. Unexplained variations on the amount payable on the bill have also occurred, even when the resident believes their consumption patterns have not changed.

Communication from the park owner is perceived as problematic for residents. There is a lack of transparency on charges, including the supply charges the park owner is paying; residents are not always notified when arrangements change and there is no transparency if formal reductions (i.e. abolition of the carbon tax) are being passed on to residents. There is also no consumer knowledge of any information/formal processes for new residents moving into the park.

Concern over infrastructure arrangements was expressed. In some cases the electricity cable that connects the caravan to the hub meter is routed through trees. If a resident wishes to underground the cable this is done at the residents' expense.

Dissatisfaction with complaint resolution avenues was also expressed, as the Ombudsman cannot help and the jurisdictional authority was not helpful.

Residents at this site are able to access the relevant energy concessions once a year via the Department of Human Services.

No evidence of disconnection to supply for incapacity to pay electricity charges was indicated.

Case study 3:

This case study documents consumer views for a residential site located in South Eastern Australia. The site has over 100 permanent residents.

Residential connection to the electricity supply at this site is via an embedded network. The network is comprised of a main connection point/meter that delivers electricity to the site from a local distributor. Residential dwellings are connected to the site supply via individual meters and must purchase their electricity from the site owner.

Residents are billed quarterly by site management. Billing information provided to residents includes the meter reading, unit price (kWh), amount of electricity consumed and the total consumption and supply charges. Concern was raised that residents cannot verify billing information. Payment of bills is usually via direct debit and to date this has not created any problems.

Concern was raised over the site owner's encouragement for residents to install solar panels on their homes. Residents were told it will save them money and they will not be charged for the installation. However residents have not seen any evidence of the implications or benefits of the solar installations on their electricity bills.

Communication from the site management was deemed to be generally good. For example advance notice of a planned supply interruption is given where possible, changes to electricity charges are communicated in writing and site management is available 24/7 in the event of a supply failure. However there appears to be a lack of information given to residents regarding the power arrangements for this site during the moving in stage.

Whilst the site manager was described as approachable and extremely good, the resident recognised the lack of appropriate external complaint resolution avenues.

Residents at this site are able to access the relevant energy concessions once a year via the Department of Human Services.

No evidence of disconnection to supply for incapacity to pay electricity charges was indicated.

Case study 4:

This case study documents consumer views for a residential site located in North Eastern Australia. The site has hundreds of permanent residents.

Residential connection to the electricity supply at this site is via a network comprising of a number of electricity meters that deliver power to the site from a local distributor. Residential dwellings are connected to

the site supply via individual meters and must purchase their electricity from the site owner. The network infrastructure is owned by the site owner.

Meters are read monthly by site management. Residents are charged for consumption only. Previously a monthly supply charge was added to electricity bills however this component was deemed to be contrary to jurisdictional legislation and has subsequently been removed.

Commentary regarding solar arrangements at this site was voiced. In the past residents were allowed to install solar panels on their dwellings. However approval for installation was removed by the site owner once a certain number of installations had occurred. The reasoning behind this, as explained to residents by the site owner, was that the park system could not accept any more generated electricity.

Communication from site management is generally good. Residents are normally notified of planned interruptions to supply and there are good procedures to deal with unexpected supply failures. However this site does not display electricity charges within the site, as is expected from recent jurisdictional determinations. There is also a lack of information on electricity arrangements for new residents moving into the site.

Residents at this site are able to access the relevant energy concessions via their electricity bill.

No evidence of disconnection to supply for incapacity to pay electricity charges was indicated.

Summary observations

Consensus across the four case studies highlights consumers are not being provided with enough information. SACOSS believes consumers have indicated a strong desire to be fully informed on all aspects of their electricity supply and billing arrangements. This issue in conjunction with the distinct lack of appropriate complaint resolution processes appears to be disempowering for consumers. This is further exacerbated for consumers who cannot choose their energy retailer, thus excluding them accessing retail market competition.

SACOSS notes the diversity of experiences and concerns for consumers connected to embedded networks. This point alone illustrates the need for consumer protections that cater for all energy participants and not just those who are protected by the National Energy Customer Framework.

Appendix D: Research Participant Consent Information

All phone and face-to-face interviews with research participants were preceded with the following information:

An introduction to SACOSS, the names and roles of each interviewer, the purpose of the research and a description of how the research will be conducted.

Verbal consent to participate in the research was gained by all research participants following verbal provision of the following statement:

"As part of our research approach we want to ensure that you are all comfortable with participating today. Please note: Your participation in this meeting is confidential.

You can withdraw from the meeting at any time and you do not have to answer any questions that you don't want to.

A final report for this project will be produced.

You will not be named in this report and no-one will be able to identify you in the report.

If you change your mind and decide not to take part in this research, SACOSS will not use anything you have said in this research.

Does anyone have any questions at this point?".

Appendix E: Discussions with Regulatory Bodies and Community Advocates

As part of defining the parameters of the study, SACOSS undertook more detailed discussions with representatives of the key national regulatory bodies. We also sought to obtain additional insights into this market from a jurisdictional regulator, the Essential Services Commission of South Australia (ESCoSA) and from a community organisation, the Consumer Utilities Advocacy Centre (CUAC) based in Victoria.

Note: In our discussions with staff in the various regulatory bodies, the staff emphasised that the discussions were informal and while based on their experience, the comments did not necessarily represent the formal policy position of the relevant regulatory body. We thank the staff for their insights and acknowledge the qualifications to their comments.

Therefore, any reference to a regulator body in this section (e.g. to the "AER"), should be taken to mean the relevant staff of the AER and does not necessarily represent the policy position of that regulatory body.

SACOSS has also conducted 'desk top research' reflecting the relatively long history of regulatory and community concerns with the on-seller and embedded network market sectors. This includes reviewing submissions to the various regulatory inquiries over the last five years.

AER Staff – Management of the exemption process under the NECF and NEL/NER

The AER is responsible for the development of the relevant Exempt Selling and NSP Embedded Network Guidelines as well as administering the national exemption frameworks under the NERL/NERR and the NEL/NER for both retail and network exemptions (respectively).

The AER has noted a steady rise in exemption registrations as more sellers become aware of their NECF obligations. The AER has also received a larger number of applications for individual exemption than expected and attributes this to the growth in new business models, for example, the sale of electricity through solar power purchase agreements.

The AER intends that its Guidelines and general approach provide a level of protection for small customers of exempt sellers in embedded networks that is, to the extent practicable, equivalent to the protections offered to small customers of authorised retailers. In particular, the AER's Exempt Selling Guideline sets out a framework of consumer protections that the AER considers reflects the key customer protections in the NERR and associated regulations.

The AER also notes recent improvements to the registration process through a streamlined on-line registration form and better alignment of the Retail Exemption Guideline and the NSP Exempt Registration Guideline, and development of a public register of registerable and individual exemption applications/ approvals including the category of exemption.

The AER undertakes targeted compliance and monitoring activities and generally addresses consumers' issues when it receives a complaint (for example, through its 1300 line or AER Inquiry email service), and is in the process of undertaking broader activities in the market.

Other key issues identified by the AER with respect to the application of the Guidelines include:

- **Deemed exemptions:** Deemed exemptions are not recorded and so the AER does not know how many of these types of exemption exist. The AER considers this reflects the intent of the Retail Law and Rules (which provide for the creation of deemed exemption classes) and notes the challenges and resource intensiveness of identifying and recording such exempt sellers significantly outweighs any potential consumer benefits that might arise from registering such activity, given the nature of these selling activities (for example, an entity selling energy in a holiday unit or other short-stay accommodation).
- **Compliance reporting & monitoring:** Exempt sellers are not subject to the same formal reporting requirements as authorised retailers. However, the AER can take compliance action in relation to breaches of exemption conditions (ranging from administrative resolution of matters to litigation) and is currently considering ways to promote compliance in this area.
- **Complaint handling:** The AER does not have a role in the resolution of individual disputes, but does attempt to assist customers to resolve specific issues. The AER also keeps a record of complaints which inform its compliance functions, including helping identify systemic issues.

The issue of dispute resolution for exempt customers is complicated by the fact that, other than in NSW, exempt consumers cannot access the jurisdictional energy ombudsman.

- **Communications:** The exemption guidelines have changed in recent years and will continue to evolve as awareness of exempt selling issues grows and the market evolves further. The AER follows a legislatively mandated process for revising the exempt selling guidelines which involves public consultation and the consideration of public submissions. However, the diverse nature of exempt sellers and customers means that it can be challenging to ensure that all customers and sellers are aware of their current regulatory rights and obligations. The AER continues to refine its communications approach with a view to broadening its audience and ensuring exempt sellers and customers are aware of their rights and obligations.
- **Information Provision:** the AER has identified that the exempt sellers' bill to the customer may not always contain all the required information—similarly, the information exempt sellers must provide customers about their rights. The AER is working with on-sellers to address this situation.
- **Retail Competition:** Some jurisdictions do not allow retail competition for exempt customers. The AER also notes that the "retrofitting" of embedded networks into buildings in which customers previously had a direct connection to the network is becoming more common. Such retrofits make it more difficult for customers to access retail competition and an individual exemption must now be sought before retrofitting occurs. Entities looking to obtain an individual exemption for retrofitting activities must provide detail of how they propose to address the potential consumer detriment arising from the change as part of their application. The AER is also undertaking significant compliance work in relation to this area.
- **Access to rebates/benefits**: In some states (e.g. Queensland), customers have to apply for rebates through their exempt supplier, who in turn arranges the rebate with their authorised retailer. This process can cause challenges for both sellers and customers.

The AER also notes that while they have received complaints about billing, exempt sellers generally appear to be complying with the law. Complaints usually stem from a lack of understanding by customers as to what they can be charged for. Only one instance of disconnection of an exempt customer has been reported to the AER.

AER Staff – Changes to the AER's Guidelines and the NER

General Comments

The AER identified that one of the difficulties of the national exemption process was that network and retail exemptions are covered by two different sets of legislation, the NEL/NER and the NERL/NERR (respectively). To address this, the AER has revised the relevant exemption guidelines so that there is better alignment between the classes and categories in the network exemption guideline and the retail exemption guideline (see discussion in section above).

In addition, there are differences in the operation of the exemptions as a result of the overlay of state legislation. Victoria, for instance, has not signed up to the NECF/NERR and is developing its own framework for on-selling arrangements but is subject to the NEL/NER and the AER's Network Exemption Guideline.

Even in the states / territories that have implemented the NECF (South Australia, New South Wales, Australian Capital Territory and Queensland), there are differences in the application of the NERR and these differences have impacts on the exemption processes and outcomes.

It is stated policy in Queensland and Tasmania customers in an embedded network cannot access retail market offers through 'parent-child' metering arrangements. The effect of this is that any customer seeking a retail market offer must arrange to be directly connected to the NEM. This will usually be impractical for the customer.

Proposed changes to the NER

The AER has been closely involved in the AEMC's current process to amend the NER to facilitate embedded network customers' access to competitive retail offers. These changes involve significant amendments to Chapter 7 of the Rules (Metering). The draft changes envisage the appointment of an Embedded Network Manager (ENM) for all registered and individual classes of network exemptions and potentially for deemed exemptions if requested by any one customer of the network[201].

However, while the AER supports the principle, there is real concern that the potential costs of the changes and, in particular, the cost of appointing an Embedded Network Manager (ENM) is not well understood. For smaller embedded networks the costs may outweigh the benefits. Mandating such an appointment may discourage the use of embedded networks when the arrangements have overall, potential benefits – for

[201] The draft rules state that if any one customer of an embedded network deemed as exempt seeks a retail offer, then the manager/owner of the embedded network must appoint an ENM.

instance, an embedded network may significantly reduce costs to the building overall and thereby result in lower costs for tenants.

The AEMC has recognised this issue and the draft rules provide for the AER to exercise its discretion to exempt an embedded network operator from the requirement to appoint an ENM until/unless a customer requests access to a retail market offer.

As noted, however, access to a competitive offer will require the installation of a market-ready meter and increasingly, this will require installation of a market meter capable of reading half hourly interval consumption data. This will add costs and is likely to further increase the barrier to embedded network consumers accessing the competitive retail electricity supply market.

A further question for the AER is the question of pricing for the embedded network services. In particular, it is not clear how the embedded network operator might recover the costs of the internal network from that customer if a customer in an embedded network takes up a retail market offer. The AER is concerned that it would find itself having to make a decision on network pricing for thousands of embedded networks if the embedded network operators decides to charge for access to the internal network.

At this stage, this would require a pricing determination from the AER under Chapter 6 of the NER and this is an expensive and impractical outcome. The AER staff consider that the best solution is for the total charge to be no more than the standing network tariff for small customers. However, the AER's staff consider that large embedded network customers are in a position to negotiate a fair outcome with the operator of the network and regulatory intervention is not required beyond ensuring that the charging regime is explicitly set out in a commercial agreement between the parties.

Therefore, the AER is concerned not only with the cost/benefit trade off of the requirements to appoint an ENM but also with the consequential changes required in other regulatory instruments and effective coordination with the implementation of the AEMC's recent amendments to the NER and NERR to provide for competition in the provision of metering services to retailers for their small customers.[202]

AEMC and the regulation of embedded networks

The discussion with the AEMC centred on the AEMC's Draft Rule Determination that was initially proposed by AEMO in response to request by the COAG Energy Council as part of the "Power of Choice" program.

The overall objectives of the Rule Determination are to enhance access to competitive retail market offers for small consumers in embedded networks and to improve the clarity, transparency and predictability of the transfer process for embedded network consumers. The AEMC also seeks to achieve a balance between the costs and potential benefits of the proposed rule changes.

The final rule establishes the position of an embedded network manager (ENM) tasked with facilitating the process of accessing a competitive retail market offer. All embedded network operators must appoint an accredited ENM unless specifically exempted by the AER. Exemptions will only apply when a customer is unable to gain access to an authorised retailer (e.g. due to regulatory barriers such as in Queensland, Tasmania and ACT) or the costs of appointing an ENM outweigh the potential benefits to the customer. Until ENM's exist, there will be a lack of clarity on what an ENM would cost for a given embedded network configuration. The AER will assess this trade off on a case-by-case basis.

From a policy perspective, the AEMC strongly supports the principle of equitable access to retail competition. However, the AEMC notes that its regulatory scope only extends to considering changes to the NER (because the rule change request was in reference to the NER only and did not include the NERR). A more optimal solution for the consumers in this market is to make parallel adjustments to the NERR, the AER Guidelines and to legislation in a number of jurisdictions. The AEMC does not have the power to initiate these changes.[203] However, the AEMC has identified and recommended a number of changes that can be considered by these other bodies and could be included in a NERR rule change request.

Other concerns highlighted by the AEMC to SACOSS include:

- The many unique arrangements of embedded networks makes it difficult to ensure that the NER and NERR adequately cover all the concerns for all the relevant consumers;
- The NERR is designed around a triangular relationship of the consumer, retailer and network. It should be amended to include the role of the ENM;

[202] The AEMC made its final rule determination on competition in the provision of metering services on 25 November 2015. See AEMC, Expanding competition in metering and related services, Rule Determination, 26 November 2015, Sydney. http://www.aemc.gov.au/getattachment/ed88c96e-da1f-42c7-9f2a-51a411e83574/Final-determination.aspx

[203] In particular, the AEMC cannot initiate a rule change request. In this case the proposed amendments to the NER arise because of an application to amend the NER by AEMO. The AEMC requires a third party to propose changes to the NERR.

- Current provisions regarding Explicit Informed Consent (EIC) may also be an issue. Currently EIC moves between the authorised retailer and the customer. However, the position of a customer in an embedded network seeking to transfer from the embedded network operator to an authorised retailer is less clear; and,
- The AEMC considers that the embedded network customers would only be able to access a market offer (by construct of the general framework, these customers do not have access to a standing offer) and therefore cannot choose to have all the protections provided under the standing offer.

Essential Services Commission of South Australia (ESCOSA)

The Electricity Act 1996 (SA) prohibits any person carrying on operations within the SA electricity supply industry unless they hold the appropriate licence. ESCOSA administered the SA retail licencing regime until 2013 when SA signed up to the NECF and associated legislative instruments.

Until 2013, the electricity regulations (Electricity (General) Regulations 1997, R 6) provided for three statutory exemptions from the requirement to be licenced,[204] including a statutory exemption for persons carrying out operations as an 'insert network operator' or 'insert network retailer'.[205] An exemption could not be allowed unless all the requirements under the regulation were met including maximum charges, information provision and effective right of access to a licenced retailer of the inset customer's choice, and an approved dispute resolution process.[206]

ESCOSA highlighted a number of issues that impacted on the effectiveness of the exemption process for inset networks prior to 2013:

- Lack of data on the number and nature of inset networks in South Australia;
- The apparent low level of awareness and understanding of the regulatory framework by the inset network operators and customers;
- The extent to which inset customers are receiving an effective right of access to an electricity retailer of their choice;
- Uncertainty about the costs of providing inset customers with an effective right of access;
- The lack of information on the level of compliance with the regulatory regime; and,
- ESCOSA's future role in price monitoring and price protection.

SACOSS's study suggests that these issues are still relevant to the assessment of the overall regulatory regime under the AER's authorisation and exemption process. The lack of visibility of these vulnerable customers in caravan and residential parks is a constant challenge to assessing the most cost effective approach to customer protection.

Consumer Utilities Advocacy Centre (Victoria) (CUAC)

CUAC has undertaken important studies in Victoria drawing attention to the issues faced by customers of resellers located in embedded networks.[207] CUAC has also provided a number of submissions to the ESC, AEMC and the AER on the issues of reselling and embedded networks.

In discussions with SACOSS, CUAC highlighted several of these issues, some of which are pertinent to the different arrangements in Victoria but many of which are relevant to the national program as administered by the AER. These issues include:

- Lower consumer protections resellers' customers receive as compared to retailers' customers. Resellers are not obliged to offer hardship assistance to their customers. The dispute settlement arrangements for embedded network customers are also unsatisfactory. In all states except NSW, customers do not have access to the local energy ombudsman. Taking a dispute to the relevant Tribunal (depending on the jurisdiction) is more complex, 'risky' (especially for tenants obtaining their electricity supply from their landlord/reseller) and costly to the consumer than resolving a dispute through the energy ombudsman which offers a free and independent service for retailers' customers. While this will involve revision of the constitution ombudsman schemes in each state, CUAC considers it is important that the ombudsman schemes be extended to cover the customers of exempt sellers.
- CUAC believes that the same concessions and rebate framework that applies to energy retailers' customers should, in principle, also apply to re-sellers' customers. In Victoria, energy retailers' customers have the concession

204. Electricity (General) Regulations 1997, R 6.

205. Electricity (General) Regulations) 1997, R6 (3).

206. See Electricity (General) Regulations 1997, R 6 (3) ((e) – (h)

207. For example, see CUAC, *Growing Gaps: Consumer Protections and Energy Re-Sellers, a CUAC Research Report*, December 2012. . The Department of Economic Development, Jobs, Transport and Jobs is currently undertaking a review on exemptions in Victoria. The Department considered CUAC's report in the development of its 'Review of the General Exemptions Order Issues Paper' in July 2015

amount applied directly onto their bills. This is not the same for resellers' customers who have to apply to the Department of Human Services for a rebate (half yearly/annually). This may result in some customers falling through the cracks and not claiming their entitlements because of a lack of awareness. CUAC is of the view that resellers should provide information to customers about concessions not just when the account is first set up but on a more ongoing basis such as on their bills.

- Despite improvements in the national rules and guidelines, there are still significant practical difficulties in implementing retail competition especially for existing properties with an embedded network. For example, there are still substantial costs for the customer associated with upgrading their meter. In addition, many authorised retailers are not willing to sell into this market because of the costs and complications.
- The AER's Guidelines still envisage a "deemed" category of exempt seller/operator. Deemed exemptions are automatic (no requirement to register or apply). The 'deemed' category is 'self-selected' by the embedded retailer or network operator.

  A broadly similar category applies in Victoria under the GEO[208] and is likely to impact a broader range of customers. CUAC highlights that this means the state and national regulatory bodies know little about the size, location and conduct of the exempt seller/network operator and consumer experience. CUAC considers that such an outcome is quite unsatisfactory.
- Given the practical barriers that consumers experience in exercising retailer choice in embedded network arrangements, a price cap is appropriate. From a Victorian perspective, the standing offer is no longer an appropriate benchmark for a price cap given that prices are deregulated in Victoria. The standing offer as a benchmark does not guarantee that customers of exempt sellers receive a competitive offer from their reseller. Given that access to competitive energy services is a fundamental aspect of Australian energy policy, a price cap should reflect the best market offers available for a customer in a particular network area, rather than the standing offer.

  The lack of energy price fact sheets on these pricing arrangements means that regulators or community organisations have very limited capacity to assess whether prices and other charges are fair and reasonable. CUAC is also concerned that some of the fees charged to exempt customers are high. For instance, CUAC cites a case where a customer contacted CUAC about a connection fee of $450 in a new residential development.
- Given that the consumer protections extended to customers in embedded network arrangements are not comparable or equivalent to the consumer protections extended to energy retailers' customers, CUAC has concerns about retrofitting of sites to an embedded network. At the very least, tenants/customers need to know about the loss in consumer protections that would arise if they obtain supply from a re-seller (following retrofitting). This includes loss of access to the energy ombudsman (only customers of NSW resellers have access to the energy ombudsman) and hardship arrangements (resellers are not required to offer hardship support to their customers), and the differences in the way concessions are actually administered or applied to their bill.

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[208] The Department of Economic Development, Jobs, Transport and Jobs is currently undertaking a review on exemptions in Victoria. Concurrently, the Essential Services Commission of Victoria is undertaking a review on its licensing framework

Appendix F: Embedded Network Customer Protections

Embedded Network Customer Protections Mapped Against NECF

Summary of Protections

This table is consolidated from a comprehensive list detailing each NECF provision.

Broad category	Summary of related provisions	Status for embedded network customer
NECF		
Energy Marketing	Required information, communication of required information, pricing information, restrictions on marketing	
Consent Requirements	Explicit informed consent: obtaining and informing	
Standing contracts	Terms and conditions, variations and designated retailers	
Market Contracts	Provision of	
Billing	Estimations/actual, under and overcharging, collection cycles, late payment fees, information about Ombudsman	
Security deposits	Retailers process and procedures	
Hardship policy	Minimum requirements	
Payment plans	Terms of offer	
Disconnection and reconnection	Permissibility, pathway	
Disputes and complaints	Procedures and information provision	
Life support	Distributor and retailer roles	
Disruption of supply	Planned and unplanned interuptions notification	
Pre-payment meter systems	Information and conditions	
Pre-payment meter systems Information to be provided (other than minimum)	System operating procedures, consumption, information about credit, recovery of debt, recovery of undercharged amounts, system testing, over and undercharging, self-disconnection, payment difficulties, contract termination	
Victoria		
Wrongful Disconnection		
Smart meter consumer protections		

Key

Equivalent protection	Some related protections	no related protections

South Australian Council of Social Service
Marjorie Black House
47 King William Road
Unley, SA 5061 Australia

t (08) 8305 4222
f (08) 8272 9500
e sacoss@sacoss.org.au

facebook.com/SACOSS

@SACOSS

www.sacoss.org.au

Review of the Australian Energy Regulator's and Essential Services Commission of Victoria's Frameworks for Customers Facing Payment Difficulties

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47 King William Road
Unley, SA 5061 Australia

p (08) 8305 4222

f (08) 8272 9500

e sacoss@sacoss.org.au

www.sacoss.org.au

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Executive Summary

Consumer protection frameworks in the National Energy Market have been evolving over recent years. Identification of unresolved debt issues and high rates of disconnections are two of the key issues shaping the regulatory approach to these frameworks. While the consumer impacts are well documented, there has been less focus on how the underlying strategic policy settings are impacted by different regulatory approaches to these issues.

SACOSS believes that discussion of these strategic policy issues is timely with the development of the Australian Energy Regulator's (AER) Sustainable Payments Framework and the release of the Essential Services Commission of Victoria (ESC) Hardship Review Final Report. SACOSS notes that both the AER and the ESC have identified similar issues – rising debt levels, high disconnection rates, variability between retailers and within retailers and low success rates in hardship programs. While the identification of issues is similar, the approach to resolving them is vastly different.

Late in 2015, SACOSS began a project which focussed on conversations with energy retailers to try to influence their approaches to dealing with vulnerable customers. We have been working with seven energy retailers – AGL, Energy Australia, Red, Lumo, Simply, Origin and Alinta. The idea is carrot rather than stick. It involves intensive discussion of the barriers to better practice transformation, and ongoing conversation to try to find the most useful means of overcoming those barriers.

In the course of our discussions, we have found that all seven retailers have programs to address the needs of their vulnerable customers. Each retailer also had more plans underway to expand their programs. However, a number of factors have impacted on this expansion. The progress of reform in Victoria and the potential that it has to impact on these businesses is reportedly one significant factor. The different customer base and cost structures of the businesses is another. In general, we have found that the tier 2 businesses are less likely to have fully developed programs in place, and have more work still to do in this area than the tier 1's.

After several rounds of discussion, the need for cultural transformation within some of these businesses has emerged. If some of the tier 2 businesses are to further expand the development of their programs for vulnerable customers, they will need the right organisational culture to support such changes to occur. SACOSS believes that energy retail businesses have a special obligation to their vulnerable customers as providers of an essential service. SACOSS considers that this needs to be made explicit to these businesses on entry to the market, and proposes for consideration the entrenchment of the related expectations in the licensing framework.

Through the process of intense conversation with retailers, SACOSS has also developed a number of fundamental principles that underpin our view on what is an effective and sustainable program for managing vulnerable energy customers. These principles include:

- Disconnection of a vulnerable energy customer is a 'last resort' and there must be clear processes around if, when and how energy supply is disconnected and reconnected;
- Early identification and constructive intervention on a person to person basis is more effective than later remediation;
- A vulnerable customer has the right to be treated with respect and empathy throughout the process;
- The vulnerable customer must be fully engaged in, and have a reasonable sense of, personal control during the process;
- The process must be sufficiently flexible to accommodate changes in the customer's circumstances during the process;
- Similarly, the process must be adaptable to changes in the energy market itself, such as smart meters, remote connect/disconnect, local generation;
- Collaborative partnerships between vulnerable customers, retailers and other service providers enhance the outcomes for all parties;
- Regular reporting and feedback to the industry, policy makers, regulators, and consumer stakeholders provides the foundation for continuous improvement; and
- The benefits of the program, and any changes to the program, must outweigh the costs and risks of change to the vulnerable customers and to the community at large.

Rights - Role of empowerment

SACOSS further holds that the success of any program to assist vulnerable customers in accessing an essential energy service lies not only in reducing the level of consumer debt and the number of disconnections (although these outcomes are of course important) but also in terms of the quality of the process and the outcomes for consumers. By this SACOSS means that the process undertaken by retailers and regulators must recognise the complexity of the causes of vulnerability and demonstrate empathy and respect for vulnerable consumers.

The process must also seek to meaningfully engage with vulnerable customers throughout the program. Meaningful engagement means that a vulnerable customer can understand the options available, is able to fairly negotiate appropriate solutions with their energy retailer and can, over time, become an active participant in, and beneficiary of, the competitive retail market.

In turn, this outcome requires flexibility and sensitivity by the energy service providers in their communications with the customer.

In contrast, regulatory processes that remove or lessen a customer's engagement in the process and their agency in finding resolution to their energy payment difficulties are not likely to be sustainable. There is a real risk that in the absence of engagement and agency, a vulnerable customer will become locked into a long term and destructive cycle of mounting debt and ultimately, a higher risk of disconnection.

Comments on reform processes

This report provides an assessment of the ESC's Victorian Hardship Review Final Report and the AER's Sustainable Payments Framework.

It is appropriate at the outset of any assessment of the two proposals to express SACOSS' support for the work of both the AER and ESC in critically evaluating the existing regulatory frameworks for vulnerable energy customers.

SACOSS also shares the concern of both the AER and the ESC that despite all the efforts to improve the outcomes for consumers, very little has changed from the perspective of a vulnerable customer.

Both the AER's and the ESC's retail performance reports indicate that many customers are not completing the repayment plans, and the most vulnerable customers are generally not able to eliminate their historical debt. In some cases, the level of debt is increasing.

This is an unacceptable burden on these vulnerable customers, and on the community as a whole. Ultimately, the cost of unpaid debt is passed on to all customers.

However, it appears that this has not necessarily translated into increasing levels of disconnection.

A second area that is unacceptable to SACOSS is the finding by the AER and by the ESC that there are significant differences between retailers, in their treatment of vulnerable customers. Individual retailers also appear to change their approaches over time.

While the AER and the ESC state that there was no evidence of systematic non-compliance by retailers with the existing regulatory regime, it is clear that the current regimes leave scope for retailers to comply with the letter of the law while having very different outcomes for their customers.

The paucity of customers receiving advice from their retailers on how best to manage their usage is also indicative of a gap in the management of vulnerable customers.

In summary, SACOSS agrees that there is a need to 'rethink' the current regulation of programs for vulnerable customers experiencing payment difficulties and we support the AER and the ESC in conducting these reviews.

Customer representatives in general have been very committed to the review process and SACOSS has initiated a number of multi-disciplinary conferences on the topic.

SACOSS therefore has some sympathy with the views of the ESC Chairman, Dr Ron Ben-David as the ESC commenced the process of reviewing regulatory frameworks for customers experiencing payment difficulties. At a conference in May 2015, he stated:

> *...dealing with financial hardship is perhaps the most vexing of problems we face as a regulator charged with promoting the long term interests of all consumers.*[1]

This is a Gordian knot in manifold dimensions. A knot of issues and consequences; rights and obligations; choices and capacities; customers and retailers. This knot sits in a rope with no free ends; no obvious starting point from which we might begin to unravel its entangled mesh of concerns.

However, having recognised the complexity of the issue of financial hardship for customers of an essential service, the ESC's final response is to implement a highly structured framework with mandated steps and payment options.

The ESC's framework relies heavily on system-based solutions and less on early engagement with customers and empowerment of these customers to better manage their payment difficulties and their interaction with the competitive retail market in general. SACOSS questions whether system-based solutions are the most appropriate method to manage the complex problems identified by the ESC, or to resolve the 'manifold dimensions' of the Gordian knot.

Perhaps an alternative is to turn to the insights of Tolstoy, namely:

> *Happy families are all alike; every unhappy family is unhappy in its own way*[2]

[1] Dr Ron Ben David, "Supporting Energy Customers in Financial Hardship: Untying the Gordian Knot?" 11 May 2015, p. 23. Paper presented at the Credit Collections & Hardship Program in Utilities conference.

[2] Tolstoy, L. (Original work published 1875-1877). Anna Karenina (R. P. L. Volokhonsky, Trans.). New York, NY, USA: Viking Penguin.

SACOSS would argue that every vulnerable customer is vulnerable in their own way. It follows that any process to better manage these customers, particularly those customers with long-term debt, must take account of the specific circumstances facing that customer.

SACOSS does acknowledge that there are still many uncertainties around the effective management of vulnerable customers. This should not inhibit an immediate focus on respectful communication, engagement and empowerment while the search for better and more comprehensive and sustainable solutions continues.

SACOSS places a strong emphasis on implementing a process that demonstrates respect and empathy for the customer and their situation.

SACOSS also emphasises the importance of the vulnerable customer having a sense of engagement and control over the process, and empowerment to make decisions on the management of their debt and future energy use.

This is not to say that the vulnerable consumer is not supported in this decision-making. The AER's framework, for instance, encourages the retailer to provide information and advice to the customer in coming to this decision.

Nor does empowerment and agency mean that the customer is not required to pay back their energy debt and manage ongoing payments. To the contrary, empowerment provides the consumer with the personal resources to better manage these situations and to have confidence to participate in the competitive market in the future.

SACOSS' view on this is supported by both practical experience and social theory as captured in the following quotation:

> *Marketing and policy responses must be against discrimination, against promoting or facilitating learned helplessness and for empowerment by assisting individuals to develop skills that foster optimal functioning and individual agency... Public policy should be based on consumer perspectives of vulnerability, not on well-meaning third parties' evaluations of their situations. Being treated like someone else wants to be treated may well not be appreciated.*[3]

SACOSS considers that the ESC's approach in the Final Report is too prescriptive and is overly broad in its sweep. In particular, the ESC's framework suggests that any customer who has missed a payment must be automatically placed on a monthly repayment plan. This 'decision' involves no discussion with the customer. An automated process with a standardised payment plan is not necessarily beneficial to the more vulnerable customers.

In particular, the extent of automation and standardisation is likely to remove any sense of control over the process by the customer. Both the process and the payment plan will depend only on the 'type' of customer debt rather than the individual customer's needs at the time.

The customer is in effect disempowered and likely to be disengaged in finding constructive solutions with their retailer. Moreover, there is no flexibility for the retailer to respond to the individual circumstances of the customer. The billing machine is in control!

In marked contrast to this automation of the initial stages of the process, the AER's framework is very much focussed on enhancing and personalising the initial contact between the retailer and the customer. That is, the AER's framework is designed to engage and support the customer at the very outset.

By enhancing the customer's sense of control and agency early in the process, SACOSS believes that the AER's Sustainable Payment Plan Framework offers a more effective pathway towards improving the outcomes for vulnerable customers.

While the ESC is correct in saying it is not its task to evaluate these situational factors, this does not mean that these factors are not an important component of the retailer's conversation with the customer. These conversations offer a pathway not only to effective resolution of the current payment difficulty, but also enhance the capacity of the customer to manage future situations and avoid future payment 'crises'.

Secondly, SACOSS also has some concern that the AER's Framework is voluntary and aspirational. There is already evidence accepted by both the AER and the ESC of good practices by some retailers. These same retailers will no doubt be the first to sign up to the voluntary Framework.

However, it is a leap of faith that other retailers who, while complying with the minimal requirements under

[3] Baker SM, Gentry JW & Rittenburg TL, "Building Understanding of the Domain of Consumer Vulnerability". Journal of Macromarketing, Vol 25 No. 2, December 2005, p. 10. https://www.researchgate.net/profile/James_Gentry2/publication/258153302_Building_Understanding_of_the_Domain_of_Consumer_Vulnerability/links/5592d42f08ae1e9cb4297cfa.pdf

the National Energy Retail Law (NERL) and National Energy Retailer Rules (NERR), will start to provide more in the way of consistent and appropriate support to vulnerable customers.

Will these industry laggards be sufficiently motivated to move towards best practice? Or will their more vulnerable customers continue to receive a lower standard of service.

If moral suasion is to be a component of the AER's Framework, then it is essential that there be more public scrutiny of the different performance and customer outcomes.

Some recommendations for governments

Victorian Government

SACOSS understands and supports the Victorian Government's concerns when it established the broad ranging Hardship Enquiry in response to increases in the rate of disconnections.

In the first instance, however, before embarking on wholesale changes to the current Energy Retail Code (Version 11) SACOSS considers it is important to understand exogenous influences such as the impact of smart meters and remote disconnection and reconnection on the reported number of disconnections and on the experience of consumers.

As evidenced in section 5 of this report, it is reasonable to maintain that it was the increase in disconnection completion rates (controlled by the distributors) that was driving the jump in actual disconnections in 2013–14. SACOSS notes that they appear to have stabilised in 2014–15 in line with the near completion of the smart meter roll-out.

SACOSS would also welcome the Victorian Government investigating in detail the costs of the ESC's proposal to Victorian consumers relative to the incremental benefits, particularly given the analysis above. This should include consideration of the immediate and longer-term costs of Victoria moving further away from harmonisation with the national regime.

Commonwealth Government & COAG Energy Council (CEC)

SACOSS is concerned that despite supporting many industry workshops on consumer vulnerability, the CEC has not demonstrated sufficient leadership on the issue.

Nor has the CEC formally acknowledged the importance of the issue in its current work program despite the fact that changes in the energy market can have a disproportional negative impact on vulnerable customers if not proactively managed.

SACOSS strongly recommends that COAG and the CEC put the issue of vulnerable customers squarely 'back on the table'. The impacts of the CEC's policy decisions on vulnerable customers should be considered as a specific topic in each major policy area.

While there has been debate about rising energy prices, there has been little recent policy discussion on the corollary of increasing price rises, that is, the increasing challenge facing vulnerable customers in affording essential services such as energy.

The current focus of these bodies on the Power of Choice fails to recognise the limited choice that is available to these customers. Nor does it recognise that with the increasing complexity of the market, vulnerable customers risk being left further behind and missing the benefits of competition and technology change.

SACOSS also recommends that COAG investigate the possibility of establishing Australia's own Customer Vulnerability Strategy program under the auspices of the AER or the Australian Energy Market Commission. The need for good quality, independent research to support policy decisions has never been more important.

Post script

In August 2016, SACOSS hosted a public forum on consumer protections with representatives from the ESC, AER and business and consumer representatives. The forum considered the range of perspectives of stakeholders in the Victorian and National Energy Consumer Framework jurisdictions on the reform processes underway.

It is notable that after the SACOSS forum, the ESC indicated to SACOSS that the ESC was in the process of dealing with the issues raised at the forum. SACOSS understands that following the forum, there were some modifications made to the ESC proposed approach for reform as compared with the Hardship Review Final Report.

It is beyond the scope of the current project to undertake a comprehensive review of the modifications that the ESC has made following the SACOSS forum. However, SACOSS has undertaken some preliminary analysis and we remain very concerned with the direction of the ESC in relation to payment difficulties. Specifically, SACOSS remains concerned that increased automation will take away customer agency, consumers who currently pay below consumption will fall between the cracks, the reform will result in increasing numbers

of disconnections, there is an exceptionally high cost of reform, and there is entrenchment of divergence in consumer protection frameworks.

Acknowledgements

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Full responsibility for any errors or omissions rests with SACOSS.

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1. Introduction

1.1 Context for this study

SACOSS holds that energy supply is an essential service for all Australian households. As such it is the joint responsibility of the whole of the Australian community, the industry regulators and all state and federal governments to ensure that households are not denied access to energy services as a result of difficulties in paying their energy bills.

SACOSS further holds that the success of any program to assist vulnerable customers in accessing an essential energy service lies not only in reducing the level of consumer debt and the number of disconnections, although these outcomes are of course important.

The success of any program must also be measured in terms of the quality of the process and the outcomes for consumers. By this SACOSS means that the process undertaken by retailers and regulators must recognise the complexity of the causes of vulnerability and demonstrate empathy and respect for vulnerable consumers.

The process must also seek to meaningfully engage with vulnerable customers throughout the program. Meaningful engagement means that a vulnerable customer can understand the options available, is able to fairly negotiate appropriate solutions with their energy retailer and can, over time, become an active participant in and beneficiary of the competitive retail market.

In turn, this outcome requires the energy service provider to demonstrate both flexibility and sensitivity in their communications with their customers.

In contrast, regulatory processes that remove or lessen a customer's engagement in the process and minimise the customer's agency in finding resolution to their energy payment difficulties are not likely to be sustainable. There is a real risk that in the absence of engagement and agency, a vulnerable customer will become locked into a long term and destructive cycle of mounting debt and ultimately, a higher risk of disconnection.

SACOSS also emphasises that financial vulnerability is not just about a customer's capacity to pay for adequate energy supply. Vulnerable energy customers generally face challenges in meeting all their basic needs and are constantly prioritising and reprioritising their expenditures.

As a result, policy makers should not rely just on changes to the regulation of the energy retailers' conduct, important as that may be. The regulation of energy retailers forms only part of the broader issue of consumer vulnerability. A wider and more integrated approach that addresses issues such as government concessions and rebate schemes, non-government services, housing and appliance standards, efficiency, social wages and energy prices is also required.

SACOSS notes that this need for a comprehensive and integrated approach has been well recognised by regulators and consumer representatives.

For instance, in 2013, the Australian Energy Ombudsmen, the Energy Retailers Association of Australia (ERAA) and the Australian Council of Social Services (ACOSS) conducted a "National Affordability Roundtable". The Standing Council of Energy and Resources (SCER) endorsed the Roundtable and a report with an extensive list of recommendations was submitted to SCER in May 2013.[4]

The Roundtable initiative was based on the premise that addressing energy affordability was a challenge for all sectors, and that solutions "require a partnership approach with Governments, Industry, the Community sector, Ombudsmen and Regulators".[5] Representatives from all these sectors were therefore included in the Roundtable and committed to its recommendations.

Nevertheless, despite SCER's support in principle of the underlying premise of an integrated approach, SACOSS has been unable to find any evidence of further discussion of this important issue by SCER or its successor, the COAG Energy Council (CEC).

Therefore, any critique of the current arrangements or proposed arrangements to improve the regulatory framework for management of vulnerable customers by retailers must also take account of this national policy vacuum.

1.2 The objective of this report

The specific purpose of this report is to assess the recent developments by regulators designed to improve the management of vulnerable customers and to ensure disconnection of these customers from their energy supply because of their inability to pay is a 'last resort'.

The report will also consider whether the revised regulatory arrangements provide a sustainable solution that encourages customer choice and agency in the future.

In particular, the report will consider how the Australian Energy Regulator (AER) and the Victorian Essential Services Commission (ESC) are proposing to address these issues through the new regulatory arrangements that have been recently published.

4. See, "National Energy Affordability Roundtable Report to the Standing Council on Energy and Resources (SCER)", May 2013.
5. ibid, p.p. 2-3.

In undertaking this review, this report will first examine the current regulatory frameworks for the management of vulnerable customers. This includes an examination of the national regulatory framework for hardship customers set out in the National Energy Consumer Framework (NECF) legislation and in the AER's guidance documents.

While the AER is not a law or rule maker, it can interpret the law and rules through the provision of formal guidelines or less formal guidance to retailers or other energy market participants. In addition, the AER is responsible for enforcing the national law and rules in jurisdictions that have signed up to the NECF. This responsibility includes the monitoring and enforcement of the hardship program requirements that are set out in the energy laws and rules.

Victoria is not a signatory to the NECF. Instead, retailers' obligations are captured in the relevant electricity and gas industry laws and in the Victorian Energy Retail Code (Code) and associated guidelines. The ESC administers the Code and has the statutory power to amend the Code and to develop guidelines for retailers.

This report will therefore consider the reviews of retail practices undertaken in 2014–2015 by both the AER and the ESC.

This report will also discuss the differences between the AER's and the ESC's new approaches. It will assess these differences against the stated aims of reducing debt and disconnections. However, the report will also consider the two approaches in terms of the longer-term sustainability of the process.

1.3 SACOSS' assessment approach

SACOSS' conclusions in this report also reflect a number of fundamental criteria that underpin our view on what is an effective and sustainable program for managing vulnerable energy customers. The criteria have been developed having regard to the findings of the AER and the ESC along with SACOSS' long experience with the issues around affordability of energy for vulnerable customers.

Table 10 (p. 89) sets out SACOSS' evaluation of the AER's and the ESC's framework proposals on each of these assessment criteria. They include:

- Early identification of the customer's payment difficulties;
- Improving the quality of the initial conversations with the customer;
- Ensuring customers have access to relevant information on rebates etc.;
- Flexibility to respond to customers' requests and changing circumstances;
- Regulatory monitoring of customers' energy usage and debt levels;
- Providing feedback and encouragement to stay on the plan;
- Improving the level and quality of additional assistance measures (e.g. energy management advice);
- Appropriate referral to qualified 3rd parties (e.g. specialist financial counsellors);
- 'Checking in' with customers after completion of the plan to minimise future payment issues;
- Cost effective mechanisms to identify and process customers; and
- Processes that can be adapted readily to changes in the market.

In making these assessments, SACOSS has also carefully reviewed the regulatory development processes conducted by the AER and by the ESC. SACOSS has also conducted interviews with a number of key consumer representative bodies in Victoria and nationally who have participated in these processes.

SACOSS also considers there are valuable lessons to be learnt from other essential services industries, and our assessment has drawn on their experiences.

Finally, SACOSS emphasises that there are risks and costs in developing different regulatory processes across the energy market and SACOSS is, therefore, generally supportive of national harmonisation of regulation.

Having nationally consistent policies and programs not only reduces costs for retailers and confusion for customers. National policy and program consistency also enables the community sector to more efficiently and effectively contribute to social policy development and to support vulnerable customers across a range of essential services.

1.4 The regulatory context

SACOSS considers that an understanding of the regulatory context in which the AER and the ESC operate and develop a regulatory framework for the management of vulnerable customers is important. It underpins a constructive evaluation of the respective proposals by the AER and the ESC.

Section 2 of this report will therefore provide more detail regarding the regulatory framework in which the AER and the ESC have developed their new arrangements for customers facing difficulty paying their energy bills. A brief overview of the key regulatory components follows below.

1.4.1 Regulatory context for the AER

The AER administers the NECF. The NECF includes the National Energy Retail Law (NERL) and the National Energy Retail Rules (NERR). Together, the NERL and NERR provide the legal framework for the management of vulnerable customers in the ACT, New South Wales, Queensland and South Australia.[6]

The relevant law and rules for instance, define the obligations on retailers to offer payment plans for vulnerable customers and to offer a more intensive "hardship" program for customers facing significant challenges in paying their energy bills.

The AER does not have powers to make laws or rules in the national energy market. The energy laws set out in the NERL are determined by the Australian Council of Australian Governments (COAG) with the advice of the COAG Energy Council (CEC) representing each of the states. The Australian Energy Market Commission (AEMC) determines the rules in the NERR following formalised consultation processes.

These two instruments define the role of the AER. For example, the NERL tasks the AER with approving retailers' hardship policies and monitoring and reporting on retailers' compliance with the minimum standards set out in the NERL and the NECF more generally.

To facilitate this task the AER also provides guidance to retailers on its interpretation of the law and rules and its expectations with respect to retailers' management of vulnerable customers and the content of a retailer's hardship policies.[7]

The AER has developed a suite of performance measures ('hardship indicators') to monitor retailer compliance with the NERL and NERR. The AER provides both quarterly and annual public reports on retailers' compliance with the law and rules and on the outcomes for vulnerable customers.[8]

Overall, therefore, the AER is not at large to make substantial changes to retailers' obligations or to mandate that retailers perform beyond these minimum standards set out in the NERL and NERR. The AER's task is to ensure retailers' compliance with the minimum standards, to bring clarity and consistency to the interpretation of the law and rules, and to use 'moral suasion' to move the industry to best practice.

The AER's Sustainable Payment Plans Framework is designed to achieve this outcome.

1.4.2. Regulatory context for the ESC

Victoria is not a signatory to the NECF and is therefore not subject to the NERL and NERR or to the AER's compliance monitoring and reporting. The AER's proposed enhancements summarised above are, therefore, not directly relevant to the retailers operating in Victoria and to their Victorian customers.

The relevant regulatory framework in Victoria includes broad obligations defined in the Electricity Industry Act 2000 (EIA), the Gas Industry Act 2001 (GIA) and the Essential Services Commission Act 2001 (ESC Act).

The EIA and GIA (the Acts), for instance, include reference to the promotion of best practice service delivery to facilitate continuity of energy supply to domestic customers experiencing financial hardship.[9]

The Acts also state that a licence to sell electricity or gas is 'deemed' to include a condition requiring the licensee to prepare a financial hardship policy that includes flexible payment options, energy audits, replacement equipment and processes for early response to domestic customers with bill payment difficulties.[10]

The ESC has the authority under the Acts to approve a retailer's financial hardship policy subject to certain principles such as equitable access and that energy supply will not be disconnected solely because of a customer's inability to pay – disconnection should be a last resort.[11]

Under the ESC Act, the ESC is also required to determine indicators of performance of an energy retailer in relation to disconnections and reconnections, compliance with licence conditions, wrongful disconnection and penalty notices and any other indicators the ESC determines as relevant.[12]

In addition, the ESC is authorised to publish guidelines and to make 'Codes of Practice'.[13] A Code of Practice

6. A number of the states that are signatories to the NECF have additional requirements and/or derogations that are captured in their jurisdictional regulations and codes. These additional requirements are not addressed in this report.

7. See AER, Final Guidance on AER approval of customer hardship policies, May 2011. A list of retailers' approved hardship policies can be found at http://www.aer.gov.au/retail-markets/retail-guidelines/guidance-on-aer-approval-of-customer-hardship-policies

8. See: http://www.aer.gov.au/retail-markets/performance-reporting

9. EIA, s. 42; GIA, s. 48F.

10. EIA, s. 43; GIA, s. 48GC.

11. EIA, s. 45; GIA, s. 48K & 48KI

12. ESC Act, s. 54W

13. ESC Act, s. 47.

may provide for a regulated entity to: "develop, issue and comply with customer-related standards, procedures, policies and practices... in accordance with the Code".[14]

A Code may impose a duty, direct how a matter is to be done, create an enforceable legal right and impose a penalty.

Thus, through the mechanisms of retail licence conditions and the Energy Retail Code, the ESC has scope to make significant changes to the manner in which the retail market operates, including the management of vulnerable customers (or as the ESC states: "customers experiencing payment difficulties").

Therefore, within the broad parameters of the relevant Victorian Acts, the ESC is at large to act on its view that the current financial hardship policies are no longer fit for purpose and require substantial amendment.

1.5 What defines a "vulnerable customer"?

In this report, SACOSS prefers to use the term: "vulnerable customer". However, it is important to define at the outset what is meant by the term "vulnerable customer".

In general, SACOSS' understanding of a vulnerable customer parallels the implied definition in the NERL.

The NERL does not, in fact, use the term 'vulnerable customer'. However, the NERL does identify two classes of customers, the first of which can be regarded as a subset of the second.

For example, the NERL sets out the obligation on retailers to "offer and apply" payment plans, as follows:[15]

(1) A retailer must offer and apply payment plans for:

a) hardship customers; and

b) other residential customers experiencing payment difficulties if the customer informs the retailer in writing or by telephone that the customer is experiencing payment difficulties or the retailer otherwise believes the customer is experiencing repeated difficulties in paying the customer's bill or requires payment assistance.

SACOSS considers these two classes of customers that are described in the NERL provide a useful framework for defining and identifying vulnerable customers. That is, the NERL identifies both a general class of vulnerable customers and a specific class of 'hardship customers' who can be differentiated from other vulnerable customers by the severity of their payment difficulties.

While the NERL places obligations on retailers servicing either of the two classes of vulnerable customers, it places more extensive obligations on retailers servicing hardship customers. For example, the NERL requires a licenced retailer to have a hardship policy and it sets out quite specific minimum requirements for this policy.[16] The minimum requirements include (inter alia) a requirement that the retailer's hardship policy sets out processes to identify customers "experiencing payment difficulties due to hardship".[17]

However, despite the centrality of the concept of a 'hardship' customer, and the obligations on a retailer that follow this, the NERL provides surprisingly little guidance on how a retailer is expected to define a hardship customer. For example, the NERL defines a "hardship customer" as follows:[18]

> *Hardship customer means a residential customer of a retailer who is identified as a customer experiencing financial payment difficulties in accordance with the retailer's customer hardship policy.*

In other words, the NERL defines a hardship customer as a customer that an individual retailer determines is a hardship customer in its hardship policy. That is, under the NERL it is still up to the individual retailer to define and operationalise the criteria they will use to assess if a customer qualifies as a "hardship customer" or as a "customer experiencing payment difficulties". Little wonder there has been such a divergent approach between retailers to the management of their vulnerable customers.

Despite the limitations of the NERL, the AER has provided a useful operational distinction between the two categories of vulnerable customer in its retail performance reports. For example, in its 2014–15 annual retail performance report the AER states:[19]

> Referral to a hardship program is generally the most appropriate form of assistance **when a customer's payment difficulties are overwhelming**, such that they cannot meet a payment plan arrangement because they lack the capacity to pay for current and future consumption. (emphasis added)

Based on this analysis, SACOSS considers that the term "vulnerable customer" should refer to an energy customer who is willing to pay for their energy usage but

14. ESC Act, s. 47 (2)(a)
15. NERL, s. 50.
16. See NERL, Division 6, s. 44.
17. NERL, Division 6, s. 44 (a).
18. NERL, Part 1, Division 1.
19. See for instance, AER, Annual Report on the Performance of the Retail Energy Market 2014-15, November 2015, p. 24.

has had difficulty in doing so either at a particular point in time or at various times in the past.

Within that general category of vulnerable customers and in line with the AER's operational distinction above, SACOSS recognises that there is a sub-group of energy customers who cannot, or are unlikely to be able to in the future, manage a payment plan that recovers both outstanding debt and ongoing energy usage costs. In these instances, the customer's debt will continue to climb and, without significant intervention, disconnection becomes a strong possibility.

The identification and management of customers in these two different classes of vulnerable customers goes to the heart of any assessment of both the regulatory framework and the implementation processes set out by the AER and by the ESC (for Victorian customers).

It is important to also recognise that a vulnerable customer's payment difficulties can be caused by a number of factors. It can arise from relatively short-term factors, such as a period of unemployment or ill health. Vulnerability can also arise from longer-term, more systemic factors, such as low household income or chronic health issues. Increasingly, however, difficulties in paying bills are occurring in what would be regarded as average income households reflecting the pressure of other commitments such as high mortgage payments.

SACOSS considers that a clear understanding of these different factors and their impact on the customer's requirements for assistance is an essential component of any effective and sustainable regulatory approach to vulnerable customers.

For this reason, this report draws on the work by Ofgem and the progressive development of Ofgem's Consumer Vulnerability Strategy (CVS). The CVS explicitly links the requirements of vulnerable customers with the causes of vulnerability.

1.6 Summary of the AER and ESC assessments of the current regulatory framework

Over the last two years, the AER and the ESC have undertaken parallel investigations into the operation of their respective regulatory frameworks for the management of financially vulnerable energy customers.

Both regulatory bodies have found very similar issues with the operation of the current frameworks. In terms of customer outcomes, little had changed over the years. Relatively few customers (25%) completed their repayment programs. In many cases debt was higher at the end than it was at the beginning of the program.

Both the AER and the ESC identified that there were:

- Large variations in the way retailers interpreted their regulatory obligations and the manner in which they managed their vulnerable customers;
- Significant inconsistencies in retailers' approach to identifying a customer's 'capacity to pay' and, therefore, in their ability to place a customer into the most appropriate assistance program;
- Limited success in improving outcomes for customers as measured by the amount of debt customers held, the reduction in debt as a result of the programs, and the number of disconnections for debt.

Many other studies have found similar results. It is an area where issues are complex and solutions hard to find.

As a result of this research, and feedback from many stakeholders, both the AER and the ESC have proposed changes to their respective frameworks for the management of vulnerable customers.

Notwithstanding the issues with the current regulatory framework are common to both the AER and ESC, their solutions are quite different.

Partly this reflects the different regulatory functions of the AER and the ESC. For instance, the AER is not empowered to adopt a binding code on retailers; the AER must work within and is limited by the NERL and NERR. The ESC, however, has the power to bind retailers through its control over the licencing of retailers and the Energy Retail Code.

However, in large part the different 'solutions' to the problems identified in their research appear to reflect a more fundamental difference in the AER's and the ESC's view on how the vulnerable customer is identified and managed through the hardship process in order to achieve the objectives of reduced debt and fewer disconnections.

At a high level, SACOSS has described the difference between the AER and the ESC as 'evolutionary' change versus 'revolutionary' change. The key elements of the AER's and the ESC's proposals are summarised below.

1.7 Summary of AER's "Sustainable Payment Plan Framework"

The AER's Framework builds on the existing Hardship Policy Framework captured in the NERL, NERR and in the AER's own guidance documents. There is a

[20] See for instance: ESC, Harmonisation of the Energy Retail Code and Guidelines with the National Energy Customer Framework, Final Decision Paper, July 2014. Chapters 18 and 19.

common emphasis on retailers assessing the vulnerable customer's 'capacity to pay' as this defines the payment plans and additional service offerings.

The AER's new Framework is aimed at identifying good practice in assessing a customer's capacity to pay and encouraging retailers to sign up to this Framework. However, adoption of the AER's Framework is voluntary. The Framework goes beyond the minimum requirements set out in the NERR and NERL and the AER does not have the statutory power to force a retailer to sign up to the Framework.

The AER's voluntary Framework is principles based and stresses the importance and value of the retailer applying these principles in all its interactions with the vulnerable customer. The good practice principles include:

- Empathy and respect;
- Flexibility to changing circumstances; and
- Consistency in the management of the customer.

The AER's Framework is also based on encouraging the customer to become engaged in the process. For example, the 'capacity to pay' conversation between the retailer and the customer would start with the customer suggesting what they could afford to pay rather than the retailer imposing a repayment schedule.

The retailer may then discuss with the customer if this amount is appropriate given factors such as the level of debt, the customer's ongoing usage and their particular circumstances. The retailer can also explain what the proposed amount would mean in terms of the overall time period required to complete the repayment.

Based on this additional advice, the customer may propose a different repayment schedule. Alternatively, the customer may choose to work with an independent financial counsellor to clarify what a sustainable payment plan might be in their particular circumstances before reverting to the retailer.

The AER's Framework then describes three options based on the discussion with the customer with each option in turn defining an optimal level of ongoing support for the customer. The options are:

- **Option A:** The customer nominates an amount that the retailer agrees to that will cover their ongoing usage and repay any amounts owing over a period up to 12 months.
- **Option B:** The customer nominates an amount that the retailer agrees to that will cover ongoing usage and repay debts owing over a period of 12 to 18 months. The retailer should consider if the customer would benefit from more support such as the support available under the retailer's hardship program.
- **Option C:** The customer nominates an amount that is less than the amount needed to pay for ongoing usage and reduce any debt. This is a signal that the customer would benefit from the more tailored support under the retailer's hardship program.

If the customer makes the agreed payments the retailer should still monitor usage and conduct routine checks with the customer. However, if the customer misses payments or finds the plan unaffordable there would need to be further mutual review of the repayment options. If the customer does not engage with the retailer, however, then the retailer may proceed to implement the disconnection process.

The AER's view is that if the conversations with the customer are respectful, if the approach is flexible and takes account of the customer's circumstances and there is a consistent and positive approach, then the customer is more likely to maintain their engagement with the retailer and proactively seek further assistance if required.

In addition, the AER considers that if an approach encourages the customer to realistically define their capacity to pay and commit to the agreed payment plan, then the plan is more likely to be sustainable and repayments completed.

Follow up monitoring by the retailer and regular 'checking-in' with the customer will also support the ongoing engagement of the customer and the sustainability of the program.

1.8 Summary of ESC's new framework: "Supporting Customers, Avoiding Labels"

In its current form, the regulatory requirements in Victoria for retailers managing customers with payment difficulties are largely aligned with the requirements in the NECF. This alignment reflects the extensive work undertaken in 2014–15 to 'harmonise' the Victorian Energy Retail Code with the NECF as a prelude to Victoria's expected signing up to the NECF.

Following its 2015–16 Inquiry, however, the ESC concluded that the current regulatory framework was no longer 'fit for purpose' and required substantial reforms. Community stakeholders generally supported the need for reforms given the mounting levels of debt and customer disconnections.

The ESC has, therefore, put forward a very different approach to resolving the issues identified in its Inquiry. This different approach will require significant changes to the Energy Retail Code, the industry laws and to many other processes and procedures.

The ESC's analysis begins with the proposition that the assessment of a customer's 'capacity to pay' is inherently a subjective and intrusive process and results in inconsistent outcomes. In its Final Decision, the ESC builds a new framework around what it sees as objective criteria, i.e. assistance to customers is defined by the 'type' of payment difficulty that the customer is experiencing. This 'type' of payment difficulty can, in turn, be objectively defined and consistently applied by retailers.

The ESC defines 5 'types' of payment difficulty in its Final Decision. For each type of payment difficulty there is a corresponding obligation on the retailer to provide a specific and codified form of assistance (the 'safety net' assistance). That is, the ESC's process sets a precisely defined minimum service level for each type of customer. The ESC states that the retailer is also free to provide services above the safety net standards. The five 'types' are defined as follows in order of severity of the actual or potential repayment difficulty:

Type A: The customer has not yet missed a payment but is concerned about the next payment. Retailers must provide a 'self-service' web based facility that allows the Type A customer to choose a variety of pre-set payment plan options.

Type B: The customer has failed to make a payment by the end of the reminder bill period (as set out on the reminder notice) and therefore has an 'energy debt'. The retailer must automatically place this customer on a monthly prepayment plan with pre- specified standard conditions for repayment amounts and period.

Type C and D: The customer has an energy debt and is making repayments of the debt and payment for ongoing energy usage. However, the customer is not paying sufficient amounts to reduce the overall level of their debt sufficiently. These customers must be placed on a standardised repayment plan and may require more tailored assistance such as information on rebates and energy efficiency.

Type E: The customer is unable to pay for their ongoing energy usage and is not repaying their debt. As a result, debt continues to increase. The retailer must assign this customer to a "connection support" arrangement focussed initially on reducing energy consumption to an affordable level. The customer may be placed on a pay-as-you go payment plan[21] after three months.

At each stage (A to E), the retailer must provide the customer with access to each of three mandatory elements of an assistance plan (the 'building blocks'), namely:

- Payment plans to enable the customer to progressively repay accrued debt through monthly or more regular payments;
- Energy management information to reduce the cost of consumption; and
- Information and referral to other government and non-government agencies.

The customer also has an obligation at each stage to make the payments under the self-selected option or through an agreed repayment plan. If the customer fails to do so and fails to engage with the retailer, then the retailer may commence the formal disconnection process.

However, if a retailer disconnects a customer who is making payments and/or is negotiating with the retailer for an alternative arrangement, the retailer will be subject to a Wrongful Disconnection Notice (WDN).

The ESC states that its approach will avoid subjective 'capacity to pay' assessments and labelling of customers as 'hardship' customers. Further because of the automatic nature of much of the process and the prescribed features of the payment plans, customers will see a more standardised level of service and will avoid the accumulation of debt.

Figure 1 below illustrates the overall process and the relationships between the payment difficulty type and the required level of assistance as envisaged by the ESC in its Final Decision.

1.9 Other research

There is a considerable body of literature on the best practice approach to managing customers experiencing difficulties paying for essential services. Some of these views are supported by specific research; other views are based more on direct experiences with assisting vulnerable consumers.

It is not within the scope of this report to consider all these different views. However, this report briefly considers some of the more recent investigations by Ofgem in the UK.

Ofgem conducted a review of suppliers' approaches to debt management and prevention in 2010. The findings of that review were very similar to the observations made by both the AER and the ESC in their reviews.

As a result, Ofgem initiated a Consumer Vulnerability Strategy (CVS). The CVS supports an ongoing research program designed to provide 'evidence-backed' solutions to the complex issue of customer vulnerability. It provides important insights for the assessment of the new regulatory frameworks in Australia.

21. The ESC states that this is not a pre-payment meter plan.

The CVS program includes the development of a conceptual 'model' of vulnerability and the use of this model to frame the assessment of retailer programs.

Figure 2 above illustrates the model of vulnerability. Notably, it takes into account both the individual characteristics of the customer and the characteristics of the market (such as access to competitive market offers). Taken together, these two 'risk' factors define the overall situation facing the vulnerable customer.

Having identified the risk factors for vulnerability, the CVS has emphasised the importance of early intervention, empowerment of customers and improved access of vulnerable customers to the market. Going forward, the CVS has stated its aims are to:[22]

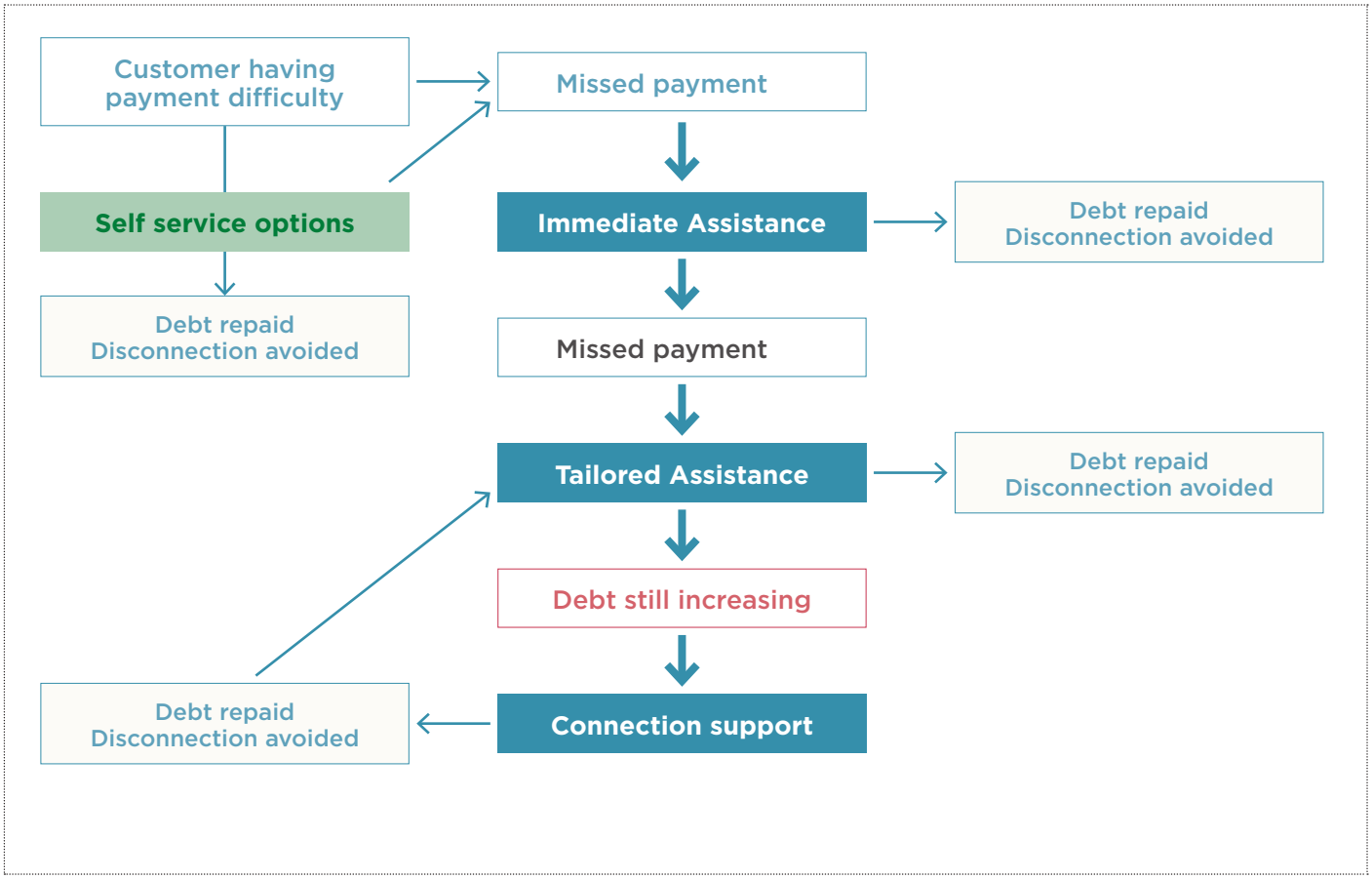
- Protect and empower consumers in vulnerable situations – to reduce the likelihood and impact of vulnerability; and
- Ensure all consumers can access market benefits so that nobody is at a disadvantage due to their circumstances.

The last section of this report will set out SACOSS' conclusions on the respective merits of the new frameworks proposed by the AER and ESC. We consider that the insights provided by the CVS' research program is relevant to this assessment.

For example, SACOSS places great importance on the nature of the interactions between the retailer and the consumer and the extent to which the process empowers the customers to make decisions and find solutions that best suit their individual circumstances.

Similarly, SACOSS believes it is important that vulnerable customers are assisted in getting access to the competitive market and to products and services suitable for their needs at competitive prices.

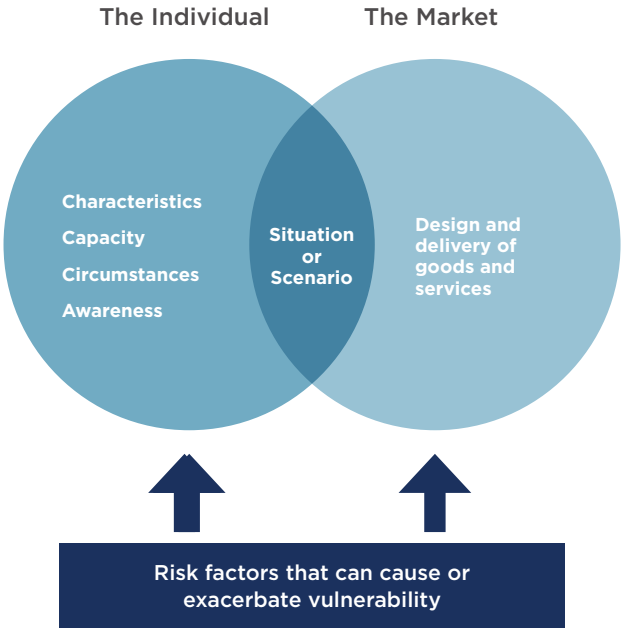
Figure 1: Outcomes of the ESC's Final Determination process



Source: ESC, *Supporting Customers, Avoiding Labels*, Feb 2016, Figure 4.5 p. 69.

22. Ofgem, Consumer Vulnerability Strategy Progress Report, September 2015, p. 10.

Figure 2: Risk Factors that can cause or exacerbate vulnerability



Source: Ofgem, *Consumer Vulnerability Strategy Progress Report*, September 2015, p. 67

2. Current Regulatory Framework

2.1 Background

SACOSS recognises that both the AER and the ESC have committed significant resources to assessing the outcomes of the current regulatory framework for protecting vulnerable customers and developing potential improvements to the framework. Their investigations have provided useful insights into the problems facing vulnerable customers, complementing the existing substantial body of information that has been collated over the last decade or so.

SACOSS also appreciates that both regulators have consulted extensively with community representatives, retailers and other stakeholders as they progressed through the review process. As noted in many responses to the reviews, financial vulnerability is a 'shared' problem and the solutions must lie in engaging a broad cross section of stakeholders bringing multiple perspectives and experiences to the issue.

Moreover, the AER has undertaken its investigations in the absence of any significant policy guidance from the Federal Government or the CEC. While the Victorian Government provided more direction in initiating the ESC's review, its terms of reference to the ESC were relatively broad and gave no specific direction on if and to what extent the ESC should seek to establish a new framework that went contrary to the previous NECF harmonisation programs.[23]

SACOSS also acknowledges that energy retailers have made important contributions to the community understanding these issues. In a sense the energy retailers are the 'first responders' and they have collectively built up a body of evidence on what works and what does not from both a retailer and a customer perspective. Ultimately, all the energy retailers should share the objective of reducing bad debt, while retaining the confidence and trust of their customers.

Over time, a number of energy retailers have made sustained efforts to improve their management of vulnerable customers and the efforts of these retailers go well beyond "compliance" with the 'minimum standards' required under the law.

However, as highlighted elsewhere in this report, customer vulnerability is a complex and multi-faceted problem and sustainable policies and practical solutions require a joint commitment by governments, regulators and ombudsman, retailers and consumers and their representatives.

It follows that this report can only represent one slice of the overall challenge of providing affordable essential services to vulnerable consumers in our community.

SACOSS also understands that the remit of the AER and ESC is constrained by the national law and rules (AER) and by Victorian law and the Victorian Governments' Inquiry Terms of Reference (ESC).[24] The broader social drivers of energy poverty and disconnection are beyond the scope of the two regulatory authorities.

The pity is that while the national policy makers define the scope of the regulators, they have not sought to fill the gap identified through regulatory review. Specifically, there is no national commitment by officials to ensuring that the interests of vulnerable customers are considered as a priority item in each of the CEC's "priority" areas.[25]

Subject to these caveats, the current report considers both the most recent regulatory programs developed by the AER and separately, by the ESC over 2014–16. Both regulators seek to improve the standards of service provided to energy customers experiencing difficulty in paying their energy bills. This includes not only the traditional 'hardship customer' but the broader group of customers who face difficulties in paying their energy bills in the short or long-term.

However, to understand the proposals by the AER and the ESC, it is important to first consider the current regulatory frameworks.

2.2 Requirements under the NECF and the AER's Guidance to Retailers

The NECF has been progressively rolled out across all eastern states except Victoria over the period 2011–2015. It comprises the National Energy Retail Law (NERL), the National Energy Retail Rules (NERR) and associated national regulations.

Victoria is not a signatory to the NECF. As discussed in the Introduction, retailers in Victoria are subject to Victorian industry laws and the Victorian Energy Retail Code.

The NECF does not include legislation on energy retail prices, or control the price that consumers pay for energy services. Nor does it have a role in determining energy concessions and energy rebate programs – both important components of the management of the most vulnerable customers.

23. The Victorian Government initiated the "Energy Hardship Inquiry" in February 2015. The terms of reference for the ESC reflected the government's concern with what it perceived to be a growing number of disconnections and was consistent with its amendments to objectives in the Essential Services Commission Act 2001.

24. The ESC's review was initiated by direction from the Victorian Government who also established the terms of reference for the study in February 2015.

25. SACOSS notes that the Energy Consumers Australia has been established to inform regulatory and policy decisions impacting on customers, but this is an advisory role and its views do not appear to be central to the priority area assessment processes.

Energy concessions and energy rebate programs are the responsibility of each state and territory government and vary significantly from state to state in the amounts and 'terms and conditions' of the concessions and rebates. This variation in turn leads to different outcomes for these most vulnerable customers.

Nor does the NECF have any direct influence on social wage and pension arrangements, social housing conditions or energy efficiency standards, all of which impact on the affordability of energy for households.

2.2.1 Requirements under the National Energy Retail Law (NERL)

The NECF regulation has progressively replaced jurisdictional legislation with a common national framework[26] that defines the responsibilities of energy retailers towards vulnerable residential customers (noting the caveats on concessions and rebates described above).

The NERL also sets out matters that the Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC) must consider when exercising their respective regulatory functions. For example, the NERL states that:[27]

> *The AER must, in performing or exercising an AER regulatory function or power, perform or exercise that function or power* ***in a manner that will or is likely to contribute to the achievement of the national energy retail objectives, and where relevant, in a manner that is compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers****. [emphasis added]*

Similar requirements are placed on the AEMC with respect to its rule making functions.[28]

The NERL identifies two classes of vulnerable customers that are nominated for 'consumer protections' with respect to the supply of energy, namely: [29]

- 'Hardship' customers, as defined in a retailer's hardship policy; and
- Other residential customers experiencing payment difficulties who have advised their retailer of this, or if the retailer observes that the customer has repeated difficulties in paying the customer's bill.

A retailer must offer their 'hardship' customers a payment plan but these particular customers also have additional protections under the NERL to reflect their higher level of financial vulnerability.

Other residential customers who advise their retailer that they are experiencing payment difficulties (or the retailer has good reason to believe so) must also be given access to payment plans and are protected from disconnection if they are meeting the agreed payment plan or have contacted their retailer to seek a revised plan.

In practice it appears that retailers do not generally distinguish between hardship customers and other residential customers with payment difficulties in the services they offer even though the NERL appears to differentiate the two groups (without clearly defining the criteria to distinguish them).

The principle regulatory obligations with respect to hardship customers (only) are set out in Division 6 of the NERL, and are summarised below:[30]

- Obligation on energy retailers to develop, manage and communicate a hardship policy;[31]
- The minimum requirements for a customer hardship policy (for details see Box 1);[32]
- Conditions for AER's approval of a hardship policy or variation of an existing policy, including a requirement for the AER to have regard to certain regulatory principles, namely:[33]
  - Supply of energy is an essential service for residential consumers;
  - Retailers should assist hardship customers by means of programs and strategies to avoid disconnection due to inability to pay bills;
  - Disconnection due to inability to pay bills is a last resort option; and
  - Residential customers should have equitable access to hardship policies, and these polices should be transparent and applied consistently.

26. Excluding Victoria, see Introduction
27. NERL, Division 1, s. 205.
28. See NERL, Division 1, s. 236 and Division 6, s. 49(2).
29. NERL, Division 6, s. 50 (1) (a)-(b)
30. The NERL sets out these obligations with specific reference to 'hardship customers' only. A customer who was not qualified by the retailer as a hardship customer even though having payment difficulties appears to sit outside these obligations including the obligations to provide minimum conditions of service for a hardship customer.
31. NERL, Division 6, s. 43 & 46.
32. NERL, Division 6, s. 44.
33. NERL, Division 6, s. 45.

Box 1: Minimum requirements for a retailer's customer hardship policy[34]

a) Process to identify residential customers experiencing payment difficulties due to hardship;

b) Process for early response by the retailer where the customer is identified as experiencing payment difficulties;

c) Flexible payment options (including a payment plan with Centrepay);

d) Process to identify appropriate government concessions and financial counselling services and to notify hardship customers of these services;

e) An outline of a range of programs that the retailer has to assist hardship customers;

f) Process to review the appropriateness of a hardship customer's market retail contract;

g) Process or programs to assist customers to improve their energy efficiency, where such actions are required by a local instrument;

h) Any variations specified by the AER or required by the Rules; and

i) Any other matters required by the Rules. Base Year1.

In addition to the specific protections for hardship customers (above), both hardship customers and other residential customers experiencing payments difficulties have the following important protections set out in Division 7 of the NERL:

- Obligation on energy retailers to offer payment plans to both hardship customers and to other residential customers experiencing payment difficulties;[35]
- Prohibition on debt recovery if customer adheres to payment terms or retailer has failed to comply with requirements of hardship policy or the law;[36]
- Retailers' obligations to provide quarterly and annual performance information to the AER.[37]

2.2.2 Requirements under the National Energy Retailer Rules (NERR)

The NERR provides further detail on the application of the NERL in the development, application and approval of each retailer's hardship policy.

Specifically, the NERR reinforces the obligations for retailers to communicate their customer hardship policy[38], to implement suitable payment plans[39], to apply a waiver of late payment fees[40], provide access to payment by Centrepay[41], to develop and apply hardship program indicators.[42]

The NERR also specifically leaves open the option for a retailer to waiver the debt of a hardship customer – however this is not an obligation.[43]

The NERR includes the process a retailer must work through prior to disconnecting a customer for non-payment.[44] The NERR also sets out when a retailer cannot arrange for a customer to be disconnected.[45]

This prohibition on disconnection includes a hardship customer or a residential customer who is adhering to a payment plan. It also extends to the situation where a customer has made a complaint that is directly relating to the reason for the proposed disconnection to the retailer or an ombudsman.

Disconnection is also prohibited when a retailer becomes aware that the customer has formally applied for assistance such as a rebate, concession or relief payment under any government funded scheme, and the decision on the application is pending.

The NERR also requires the AER to set a "minimum disconnection amount" of debt. If a residential customer's energy debt is less than the specified minimum amount, the retailer cannot disconnect that customer for non-payment.[46]

34. See NERL, Division 6, s 44 (a) – (i).
35. NERL, Division 7, s. 50.
36. NERL, Division 7, s. 51
37. NERL, Part 12, Division 2, s. 282.
38. NERR, r. 71.
39. NERR, r. 72.
40. NERR, r. 73
41. NERR, r. 74
42. NERR, r. 75
43. NERR, r. 76. Specifically the rule states that nothing in this Part (r. 71 – r. 75) prevents a retailer from waiving any fee, charge or amount of arrears for a hardship customer in accordance with the retailer's hardship policy.
44. NERR, r. 111 (1) – (3).
45. NERR, r. 116 (1).
46. NERR, r. 116 (g). The AER approved a minimum amount of $300 (GST inclusive) for both gas supply and electricity supply, effective from July 2012. The AER is currently conducting a review of this amount (see: AER: Review of the Minimum Disconnection Amount –2016). http://www.aer.gov.au/retail-markets/retail-guidelines/review-of-the-minimum-disconnection-amount-2016

With respect to the *suitability of a payment plan for a hardship customer*, the NERR mandates that:[47]

1) A payment plan for a hardship customer must have regard to the customer's capacity to pay, the arrears owing by the customer and the customers expected energy consumption needs over the next 12 months; and

2) The retailer must inform the customer of the duration of the plan, the instalment amounts and dates due, the number of instalments to recover the arrears and, if payments are required in advance, the basis on which instalments are calculated.

2.2.3 AER's guidance for approval of a retailer's hardship policy

In 2011, the AER published a guidance notice to inform retailers how it will interpret the requirements in the NERL and NERR and what factors it will take into account when approving a retailer's hardship policy.[48]

For example, in its guidance to retailers, the AER stated that a retailer's hardship policy should satisfy the following principles based on the NERL requirements:[49]

- The supply of energy is an essential service for residential customers;
- Retailers should have programs and strategies in place to assist customers to avoid disconnection solely due to inability to pay;
- Disconnection of a hardship customers should be a "last resort"; and
- Customers should have equitable access to a hardship program.[50]

The AER's guidance to retailers also sets out some 13 separate "factors" that flow from these principles and will be considered by the AER when approving a retailer's hardship policy.

The factors include such matters as: whether the policy is clearly written and "consumer friendly"; explains how a customer can access a hardship program; the obligations on customers re compliance with the program; and information on the retailer's complaints handling procedures.[51]

The AER's Final Guidance (2011) to retailers includes a checklist that the AER will use to assess whether a retailer's hardship policy complies with the minimum requirements in the NERL and with the NERR.[52] Table 1 on the following page sets out these hardship indicators.[53]

2.2.4 Retail Performance Reporting & Hardship Policies

In addition to approving retailers' hardship policies, the AER has an important role in monitoring and reporting retailers' performance on a range of hardship indicators.

The AER's obligations to monitor and report on performance are set out in some detail in the NERL. For example, the NERL requires the AER to determine and publish hardship indicators[54] along with procedures and guidelines to provide guidance to retailers on measuring performance against these hardship indicators.[55]

The NERL also requires the AER to publish an annual 'Retail Market Performance Report'. This Report must include, inter alia, a report on the performance of retailers by reference to the 'hardship program indicators'.[56]

The AER's performance reporting framework was finalised in 2012 after extensive consultations with stakeholders.[57] The framework includes both quarterly and annual reporting on many measures including customer complaints, handling of customers experiencing payment difficulties, levels of debt, disconnection and reconnection, energy concessions, security deposits, and hardship program indicators.

The AER's hardship program indicators for customers experiencing payment difficulties are particularly relevant in this context. The indicators include the following relevant measures for electricity and gas (E&G) customers:

47. NERR, r. 72 (1) – (2).
48. AER, Final Guidance on AER approval of customer hardship policies, May 2011.
49. ibid, section 2.7, p. 7.
50. NERL, Division 6, s. 45(3).
51. For details of the 13 factors identified by the AER, see: AER, Final Guidance on AER approval of customer hardship policies, May 2011, p. 8.
52. See NERL, s. 287.
53. The AER's hardship indicators include 10 measures that must be reported quarterly and an additional 3 measures that form part of the AER's annual retail performance report. Results are generally reported by jurisdiction and by retailer.
54. NERL, s. 287.
55. NERL, s. 286.
56. NERL, s. 284 and s. 285.
57. See: AER (Retail law), Performance Reporting Procedures and Guidelines, June 2012, Version 2, p. 15-17, "Handling customers experiencing payment difficulties".

Table 1: Customer hardship policy approval submission checklist

Section	Requirements		Included in customer hardship policy
3.3-3.7	**Identifying customers experiencingpayment difficulties**	Processes to identify customers eligible for inclusion in the hardship program including: • Self identification • Retailer identification • PPM customers	
3.8-3.10	**Early response**	Processes in place for early response	
3.11-3.13	**Flexible payment options**	Flexible payment options that may be offered, including: • Payment plans • Centrepay	
3.14-3.16	**Government concession programs and financial counselling services**	Processes in place to identify and notify the customer of: • government concession programs, and • financial counselling services	
3.17-3.19	**Programs used to assist hardship customers**	Programs and initiatives that are on offer to hardship customers	
3.20-3.22	**Processes to review market retail contracts**	Processes for reviewing the appropriateness of hardship customers' market retail contracts to ensure Centrepay available	
3.23-3.25	**Strategies to improve energy efficiency**	Processes or programs to assist customers with strategies to improve their energy efficiency, including: • those required by a local instrument • others offered by the retailer	
3.30-3.32	**Other hardship obligations**	Hardship customers will not be charged late payment fees. Hardship customers will not be required to pay a security deposit Communication and promotion of the customer hardship policy to residential customers Disconnection of a hardship customer's premises is a last resort option	

Source: AER, *Final Guidance on AER approval of customer hardship policies*, May 2011, p. 24. Note: PPM is pre-payment meter customers.

- Number of residential E&G customers on a retailer's hardship program at the end of each month;
- Number of E&G hardship program customers who are also energy concession customers;
- Number of E&G customers denied access to the hardship program during each month;
- Average debt upon entry to the hardship program by calendar month;
- Levels of debt of customers entering the hardship program with an energy bill debt that was:
  - o between $0 and $500
  - o over $500 but less than $1,500
  - o over $1,500 but less than $2,500
  - o $2,500 or more
- Payment methods of hardship customers:
  - o Payment plan
  - o Centrepay
  - o Prepayment meter
  - o Any other payment method
- Average energy bill debt of E&G program customers;
- Number of customers exiting the program;
- Reasons for customers exiting the program;
- Disconnection of previous hardship program customers;
- Reconnection of previous hardship program customers;
- Assistance provided to hardship program customers;
- Case studies (optional).

Figure 3 below provides an illustration of the type of information that the AER publishes based on the data collected from retailers on their payment plans and hardship programs.

It is clear from Figure 3, for instance, that hardship customers (as defined by the AER) are experiencing much higher levels of average debt than other vulnerable

customers on payment plans. There are also significant differences between jurisdictions in the proportion of customers on payment plans or hardship programs. It is not clear from the AER's report what are the reasons for these differences.

Although not illustrated here, the AER's performance reports also suggest there are very significant differences between retailers on the AER's various hardship indicators.

SACOSS would expect that an effective national policy for the management of vulnerable customers should not result in such a diversity of outcomes.

National regulatory policy needs to be sufficiently flexible to address the differences between jurisdictions, and responsive to the various underlying causes of vulnerability and energy affordability. However, the ultimate goal should include some consistency and equity in outcomes for vulnerable customers across the country. It remains to be seen if this divergence continues into the future and following the implementation of the AER's Sustainable Payment Plan Framework.

2.2.5 SACOSS' conclusions regarding the AER's current framework

The current national regulatory framework for the management of vulnerable customers consists of the NERL, the NERR, the AER's Final Guidance to retailers for the approval of Hardship Policies and the AER's Performance Reporting Procedures and Guidelines.

Each regulatory instrument has been developed following a substantial consultation process and draws on the experience of jurisdictional regulators, the energy retail industry, jurisdictional ombudsmen and community representatives.

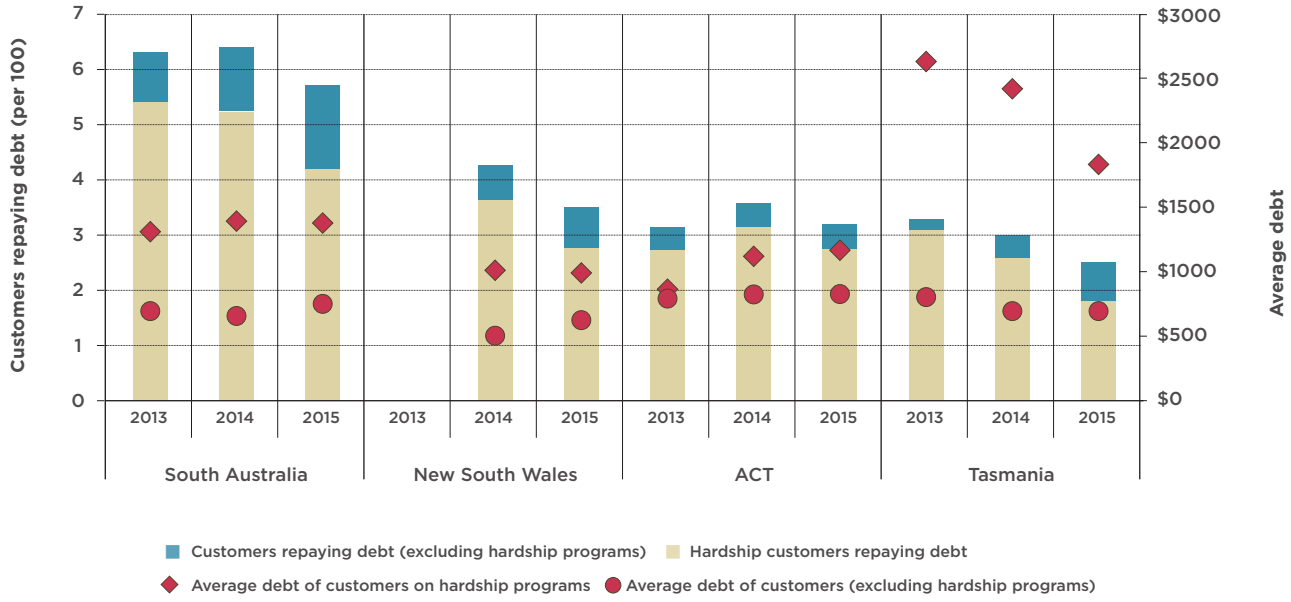
Taken together, the regulatory requirements should provide a significant degree of protection for customers experiencing payment difficulties. Appropriately, the regulatory requirements have a particular focus on what are called 'hardship customers'.

Unfortunately, however, there is no clear definition of what constitutes a vulnerable customer, a customer facing payment difficulties or a hardship customer. For instance, the NERL defines a hardship customer as:[58]

> *a residential customer who has been identified as a customer experiencing financial payment difficulties due to hardship in accordance with the retailer' customer hardship policy.*

In other words, a hardship customer is a hardship customer if an individual retailer defines them to be such in their hardship policy.

Figure 3: Residential Electricity Customers repaying debt and average debt as at 30 June 2015



Source: AER, *Annual Report on the Performance of the Retail Energy Market*, 2014-15, November, 2015, Figure 2.2, page 21.

[58] NERL, Div. 1, s. 2(1), p. 35.

Many of the regulatory protections for a customer are linked to the customer being defined as a hardship customer. Therefore, in the interests of equitable access to hardship program protections, it is important that there is consistent application of the definition of a hardship customer.

However, retailers can and do vary in how they identify a hardship customer and therefore which customers will gain access to the additional protections in the retailer's hardship program.[59]

Similarly, there is no real definition of what counts as a customer experiencing "financial payment difficulties" as set out in the second leg of the NERL's categories of customers requiring specific protections from disconnection.

Most retailers' hardship programs include some sort of eligibility criteria and financial hardship indicators. These may include self-reports or referrals from third party agencies and/or billing history data.

However, again there is a lack of consistency regarding what constitutes a "financial payment difficulty" that will create an obligation on the retailer to offer a payment plan and to withhold disconnection for non-payment while that plan is in place (as required by the NERL).

As a result, retailers appear to have developed their own set of financial indicators of hardship, and this in turn has led to inconsistent outcomes for customers regarding access to a payment plan or a hardship program and the debt levels that they take into the plan or program.

There is also little regulatory guidance for determining what type of payment plan is most appropriate and the time period over which the repayments occurs.

Nor is their regulatory guidance on what are the most effective and realistic methods for improving the efficiency of energy use in the home for vulnerable customers.

The AER's Final Guidance for instance requires the retailer to have processes or programs in place to assist customers with their energy efficiency[60] but it does not provide guidance about what these programs should be. As a result, retailers have adopted very different practices ranging from energy saving 'tips' on the retailers' web-sites to retailers arranging for in-home audits.

SACOSS also notes that there is limited referral in the NERL, NERR or the AER's Final Guidance to the quality of the interactions between the customer and the retailer.[61] SACOSS considers that the quality of this interaction includes treating customers with empathy and respect, engaging customers in the process, allowing customers a sense of control over the process.

These are, in turn, all factors that are fundamental to the successful management of vulnerable customers. The variation in outcomes for different retailers in terms of the level of debt and the completion rates for repayment plans suggests that retailers may vary significantly in the quality of their interactions with customers.

In contrast, Yarra Valley Water's measured success in reducing debt levels and increasing level of payment plan compliance demonstrates the value of focussing on the quality of the interactions with the customer in establishing a sustainable payment plan and ensuring completion of the plan.

The NERL states that as a matter of principle all residential customers should have equitable access to hardship policies and that these policies should be transparent and applied consistently.[62]

However, the variations in practices and outcomes between retailers and even within a retailer over time, suggest that this principle is somewhat lacking in practice across the sector.

2.3 The Victorian Legislation, Energy Retail Code and Guidelines

2.3.1 Background

Victoria had long seen itself as a leader in energy market reform and consumer protection. Therefore, the Victorian Government has been reluctant to sign up to the NECF if it perceives that this will reduce or remove some consumer protections available to energy users in Victoria.

Taken together, the Victorian energy legislation, Energy Retail Code and the energy licences and ESC guidelines provide a relatively well-developed framework for the protection of vulnerable customers. Unpicking this framework is, arguably, a relatively complex task compared with other jurisdictions.

As a result, Victoria is not yet a signatory to the NECF although in recent years there has been a move to better align Victorian legislation, licences, codes and guidelines with the NECF in the expectation that Victoria would eventually sign up to the NECF; albeit with a number

59. For example, the minimum requirements for a customer hardship policy only specify that the retailer must have a 'process to identify residential customers experiencing payment difficulties due to hardship'. See NERL, s. 44 (a).

60. AER, Final Guidance on AER approval of customer hardship policies, May 2011, Section 3.23 – 3.25, p. 15.

61. The main reference to the quality of the interaction is in the AER's Final Guidance and this is made in the context of staff training and as one of the factors the AER 'may consider'. See ibid, 3.4 (b), p. 10.

62. NERL, Division 2, s. 45 (3).

of derogations to preserve elements of the consumer protection framework. For example, the current Victorian Energy Retail Code[63] reflects the Victorian Government's policy intent of aligning Victorian retail codes and guidelines with the national retail regulation (the NECF) "to the extent possible"[64].

In Victoria, the energy industry retail legislation (including consumer protections) and the legislation governing the role and responsibilities of the ESC are solely the province of the Victorian Government. The Victorian Government can also direct the ESC to undertake investigations and has done so with respect to the current investigation into the Victorian consumer protection framework.

The ESC is the regulatory body tasked with the development and implementation of the Energy Retail Code, and associated guidelines and licence conditions. As such, the ESC has significantly more influence over the structure and content of the consumer protection framework in Victoria for licenced retailers and their customers than the AER.

While the AER's role is limited to guidance and enforcement of the law and rules, the ESC combines the rule making and rule implementation and enforcement roles of both the AEMC and the AER (respectively).

The energy industry legislation and the ESC legislation set out relatively high level parameters with respect to consumer protection, as discussed below. The detailed obligations on retailers relating to consumer protections, including the protection of vulnerable customers, are contained in the Energy Retail Code and associated guidelines.[65]

2.3.2 Requirements under the Energy Industry Acts

The relevant energy industry acts in Victoria are the Electricity Industry Act 2000 (GIA) and the Gas Industry Act 2001 (GIA).

2.3.2.1 Energy sector objectives in the Industry Acts

The EIA and GIA set out specific energy sector objectives for the ESC. These three objectives are to promote:[66]

- Consistent regulatory approach between the electricity and gas industries, to the extent that it is efficient and practicable to do so;
- The development of full retail competition; and
- Protections for customers, including in relation to assisting customers who are facing payment difficulties.

Given these legislated objectives, the ESC must find a careful balance between promoting retail competition and protecting consumers, particularly consumers facing payment difficulties.

For example, additional regulation of retailers has the potential to inhibit the entry of new retail companies into the retail market, ultimately leading to reduced competition and higher prices for consumers.

SACOSS considers that it is important to test the ESC's proposed amendments to the Energy Retail Code against these statutory objectives. In particular, it is not clear to SACOSS how the ESC has considered the statutory objective of protecting consumers with the objective of promoting full retail competition. Promoting full retail competition would require a careful and transparent assessment of the costs and benefits of such a significant change including the costs of creating a separate consumer protection process to the established national process.

This same challenge will arise when considering the statutory obligations on the ESC under the Essential Services Commission Act 2001 as discussed below.

2.3.2.2 Financial hardship policies in the Industry Acts

As a condition of a retail licence, the EIA and GIA require retailers to prepare a policy to deal with domestic consumers experiencing financial hardship, and submit that policy for approval to the ESC within three months of being granted a licence.[67]

The obligation in section 43 of the EIA and 48G of the GIA is supplemented by additional requirements as set out below. These requirements include the quite extensive amendments to the acts made in 2014 as part of the project to harmonise Victorian legislation with the NECF.

The ESC is also empowered under the acts to direct a 'licensee' (retailer) to review and amend their policy for customers facing financial hardship.[68]

A retailer's financial hardship policy for domestic customers must include:[69]

- Flexible payment options;
- Provision for the auditing electricity usage;

63. Energy Retail Code Version 11, January 2015.

64. See ESC, "Harmonization of Energy Retail Codes and Guidelines with the National Energy Customer Framework". http://www.esc.vic.gov.au/project/energy/2116-harmonisation-of-energy-retail-codes-and-guidelines-with-the-national-energy-customer-framework/

65. Prior to Version 11 of the Energy Retail Code, the ESC's Hardship Customer Guidelines were contained in a separate document. It now forms part of Version 11 of the Code.

66. EIA (2000), s. 10 (a) – (c), GIA, s. 18 (a) – (c). The objectives in the EIA and GIA were updated in 2015 to include specific reference to customers facing payment difficulties,. (see: Energy Legislation Amendment (Consumer Protection) Act 2015, s. 4.

67. EIA, s. 43 and GIA, s. 48G.

68. EIA, s. 43A and GIA.

69. EIA, s. 43C and GIA.

- Flexible options for purchase or supply of replacement electrical equipment; and
- Processes for the early response by both retailers and customers to electricity bill payment difficulties.

The EIA and GIA also state that the ESC may develop, issue and amend guidelines in relation to the retailers' financial hardship policies and these guidelines must be published by the ESC.[70]

In approving a financial hardship policy for domestic customers, the ESC must have regard to a number of factors including:[71]

- The essential nature of electricity and gas supply;
- An expectation that retailers will work with domestic customers to manage present and future electricity or gas usage and associated financial obligations;
- Supply will not be disconnected solely because of a customer's inability to pay for electricity or gas supply;
- The principle that energy should only be disconnected as a last resort; and
- The principle that there should be equitable access to financial hardship policies and that those policies should be transparent and applied consistently.

The Industry Acts direct that a retailer cannot disconnect a domestic customer if the customer is complying with the terms and conditions of an agreement entered into under the terms of a retailer's financial hardship policy. A term in a market contract is void if it is inconsistent with these obligations.[72]

2.3.3 Requirements under the Essential Services Commission Act 2001 (ESC Act)

The ESC Act sets out the specific objective of the ESC, which is to promote the long-term interests of Victorian customers with regard to the price, quality and reliability of essential services.[73]

In seeking to achieve this outcome, the ESC must have regard to the following matters (as relevant):[74]

- Efficiency in the industry and incentives for long-term investment;
- The financial viability of the industry;
- The degree of, and scope for, competition within the industry;
- The relevant health, safety, environmental and social legislation applying to the industry;
- The benefits and costs of regulation (including externalities and the gains from competition and efficiency) for:
  - o consumers and users of products and services (including low income and vulnerable consumers);
  - o regulated entities;
- Consistency in regulation between states and on a national basis; and
- Any other matters specified in the industry's empowering instrument.

In January 2016, the ESC Act was amended to further promote the objectives of the ESC and to include a *new objective for the ESC* to promote protections for customers including in relation to assisting customers who are facing payment difficulties.[75]

These amendments to the ESC Act also included a requirement for the ESC to publish an annual Compliance and Enforcement Report.[76] The report will provide more detailed information on retailer performance including the retailers' performance against the obligations in the Energy Retail Code and with respect to customer disconnection and reconnections.[77]

The amendments also strengthened the capacity of the ESC to enforce the obligations under the industry acts and the Energy Retail Code and to take action on retailers that do not comply with the relevant Codes.[78] The ESC has recently published its compliance and enforcement policy that sets out the ESC's approach to compliance and enforcement under the revised ESC Act.[79]

Similar to the EIA and the GIA, SACOSS notes that the ESC Act requires the ESC to balance a number of potentially competing factors. For example, the ESC Act requires the ESC to have regard to efficiency, viability and competition in the industry while promoting the long-term interests of consumers.

70. EIA, s. 44 and GIA.
71. EIA, s 45 and GIA.
72. EIA, s. 46A and GIA.
73. Essential Services Commission Act 2001, s. 8.
74. Essential Services Commission Act, 2001 s. 8A.
75. See: Energy Legislation Amendment (Consumer Protection) Act 2015.
76. Essential Services Commission Act 2001 s. 54V.
77. Essential Services Commission Act 2001 s. 54W.
78. See, Energy Legislation Amendment (Consumer Protection) Act 2015, s. 14 & s. 17. These sections set out amendments to s. 10 of the ESC Act and s. 54 (respectively).by including a new section 10AA.
79. Essential Services Commission 2016, Energy Compliance and Enforcement Policy, July 2016.

As described above, the ESC Act also requires the ESC to balance the benefits and costs of regulation with specific reference to the low income and vulnerable customer sector.

The ESC's proposed amendments to the Energy Retail Code must, therefore, be tested against all the ESC's statutory requirements under the industry acts and the ESC Act.

2.3.4 Victorian Energy Retail Code– Version 11 (Energy Retail Code)

2.3.4.1 Background to the Victorian Energy Retail Code

The Energy Retail Code is a 'Code of Practice' that applies to all licenced energy retailers.[80] The Energy Retail Code has the power of law and the ESC can enforce compliance with the Code including imposing penalties for non-compliance.

The Energy Retail Code covers many issues that are relevant to all customers, including vulnerable customers, such as: explicit informed consent; terms and conditions in standard retail contracts and market retail contracts; energy price and product disclosure; publication of offers; billing requirements; tariff changes; security deposits; information provision and marketing activity.

More particularly, the Energy Retail Code now includes specific obligations on licenced retailers with respect to their customer hardship policies and disconnection procedures.

The discussion in this section of the report centres on Version 11 of the Energy Retail Code that was published in October 2014 with minor revisions in January 2015.

Version 11 of the Energy Retail Code was prepared as part of the Victorian project to harmonise the Code with the NECF 'to the extent possible'. Version 11 also incorporated a number of what were previously separate ESC Guidelines including "Guideline no 21 – Energy Retailers' Financial Hardship Policies – April 2014."

Given the overall project to harmonise the Victorian Energy Retail Code with the NECF regulatory instruments, the existing Code requirements are similar to those found in the national laws and rules.

As such, the Victorian Energy Retail Code Version 11 includes some of the same ambiguities and definitional difficulties which, in turn, may result in different outcomes for customers. In particular, the Victorian Energy Retail Code includes:

- A distinction between 'hardship customers' and 'customers experiencing payment difficulties'. A retailer's obligations to hardship customers are more extensive than to the general category of customers experiencing payment difficulty. However, there is no clear and objectively defined distinction between the two classes of customer;
- The definition of a 'hardship customer' is somewhat circular: a hardship customer is what a retailer's hardship policy says it is. For instance, the definition of a 'hardship customer' in the Energy Retail Code mirrors that in the NERL, namely:[81] [82]
    - *hardship customer means a residential customer of a retailer who is identified as a customer experiencing financial payment difficulties due to hardship in accordance with the retailer's customer hardship policy.*
- Similarly, the definition of a 'payment plan' is circular: a payment plan is defined as a plan for a hardship customer or a residential customer who is not a hardship customer but who is experiencing payment difficulties.[83] Such a definition also requires clarification on what is a hardship customer that goes beyond the definition cited above.

2.3.4.2 Obligation to offer payment plans

As discussed above, a retailer must offer and apply payment plans for both hardship customers and all other residential customers experiencing payment difficulties.

A customer may self-identify as a 'hardship customer' and a 'customer experiencing payment difficulties'. Alternatively, the retailer may identify the customer if the retailer believes the customer is experiencing repeated difficulties in paying the bill or otherwise requires payment assistance.

In both instances, a retailer is obliged to provide information to the customer about the availability of government funded energy charge rebate, concession or relief schemes including the Victorian Utility Relief Scheme.

However, a retailer is not obliged to offer a payment plan if the customer has had two previous payment plans cancelled for non-payment in the previous 12 months or has been convicted of illegal use of energy in the previous two years.

80. The Energy Retail Code does not cover suppliers of electricity or gas who are classified as exempt retailers under a General Exemption Order or individual exemption granted under an Order in Council.

81. ESC, Energy Retail Code, Version 11, p. 14.

82. However, the Code does state, when setting out the contents of a customer hardship policy, that "..a customer in financial hardship is a residential customer who has the intention but not the capacity to make a payment within the timeframe required by the retailer's payment terms. See ESC, Energy Retail Code, Version 11, cl. 71B (2)(a), p. 66.

83. ibid, p. 16.

Section 72 of the Energy Retail Code sets out the high level requirements of a payment plan for both a hardship customer and a customer experiencing payment difficulties as defined in the Code.[84] Section 72 states:

- a payment plan must have regard to a customer's capacity to pay; any arrears owed by the customer and the customers expected energy consumption needs over the following 12 months;[85]
- a payment plan must include an offer for a customer to pay in advance or in arrears by instalment payments;[86]
- a retailer must inform the customer of the duration of the plan, the amount of each instalment, the frequency of instalments and the date by which each instalment must be paid.[87]

A retailer must not commence proceedings to recover an energy sale debt from a residential customer if the customer continues to adhere to the terms of an agreed energy plan or payment arrangement.[88] If the retailer has failed to comply with all aspects of the retailer's hardship policy, the industry acts and the Retail Energy Code, including offers of payment plans, the retailer cannot commence debt proceedings.[89]

The Energy Retail Code also provides some protection for a 'small customer' (including residential customers) regarding a retailer's request for a security deposit.

For instance, a retailer cannot require a residential customer to provide a security deposit if the customer is identified as a hardship customer by their current retailer or was identified as a hardship customer by another retailer.[90]

In addition, a retailer cannot demand a security deposit from a residential customer unless the retailer has offered the option of a payment plan and the customer has rejected the offer.[91]

The Energy Retail Code also sets out very specific obligations on a retailer to allow a hardship customer access to payment using the Centrepay facility. A retailer must allow the hardship customer to use Centrepay as a payment option irrespective of whether the customer is on a standard or a market contract.[92]

If the customer is already on a market contract that does not include the Centrepay option, then the retailer must transfer the customer (with the customer's explicit informed consent) to a market contract that does include that option at no cost or penalty to the customer.[93]

2.3.4.3 Obligation to develop and apply a customer hardship policy (CHP)

The Energy Retail Code states that for the ESC to approve a CHP, the CHP must include the specific requirements set out in the EIA and GIA.[94]

In addition to compliance with the industry acts, section 71B of the Energy Retail Code sets out the expected contents of a CHP if it is to be approved by the ESC. Box 2 below provides a summary of the extensive list of requirements for a retailer's hardship policy.

2.3.4.4 Disconnection and Reconnection

The Energy Retail Code includes a strict prohibition on a retailer disconnecting a customer who is a hardship customer or a residential customer who has informed the retailers that they are experiencing payment difficulties.[95]

In addition, if the retailer believes the customer is experiencing repeated difficulties in paying the energy bills or requires payment assistance, the retailer must not disconnect the customer unless the customer has been offered two payment plans in the previous 12 months and has not agreed to either of them or has not paid the retailer in accordance with the payment plan(s).[96]

The retailer is also prohibited from disconnecting a customer if the retailer is advised that the customer has applied for assistance such as for a rebate, concession or relief payment under a relevant government funded scheme and the decision on the application has not yet been made.[97]

84. ESC, Energy Retail Code, s. 33 (4) links the obligation for payment plans for customers experiencing payment difficulties to s. 72, although s. 72 (1) refers to a payment plan for a 'hardship customers'. See also Note to s. 72.
85. ESC, Energy Retail Code, s. 72(1)(a).
86. ESC, Energy Retail Code, s. 72(1)(b).
87. ESC, Energy Retail Code, s. 72(2)(a) & (b).
88. ESC, Energy Retail Code, s. 72A(a).
89. ESC, Energy Retail Code, s. 72A(b).
90. ESC, Energy Retail Code, s. 40(3)(a) & (b).
91. ESC, Energy Retail Code, s. 40 (4).
92. ESC, Energy Retail Code, s. 74(2) & (3).
93. ESC, Energy Retail Code, s. 74(4) – (8).
94. ESC, Energy Retail Code, s. 71A(2).
95. ESC, Energy Retail Code, s. 111(2)
96. ESC, Energy Retail Code, s. 111(2) (a)-(c).
97. ESC, Energy Retail Code, s. 116(e).

Customers cannot be disconnected if the outstanding amount relates to an energy bill less than $120 (GST exclusive).[98]

A customer has the right to be reconnected if they have rectified the debt or made satisfactory arrangements with the retailer for repayment of the debt within 10 business days of the disconnection.[99]

More particularly, if a 'small customer' is eligible for a Utility Relief Grant (URG) and applies for that grant within 10 business days of disconnection, the retailer must take this as rectification of the matter that led to disconnection.[100]

2.3.5 Retail Performance and Hardship Program Indicators

The ESC highlights that:[101]

> *Victorian legislation aims 'to promote best practice' in facilitating continuity of energy supply to domestic customers experiencing financial hardship ...The Energy Retail Code is the primary instrument that sets out obligations of energy retail businesses with respect to customers experiencing financial hardship.*

The Energy Retail Code states that the ESC may, in consultation with retailers and other interested stakeholders, determine hardship program indicators.[102]

Box 2: Energy Retail Code: Contents of a Retailer Hardship Program

(a) reflect the fact that a customer in financial hardship is a customer who has the intention but not the capacity to make a payment within the timeframe of the retailer's payment terms;

(b) allow customers in financial hardship to identify themselves to the retailer, be identified by a financial counsellor to the retailer or be identified by the retailer;

(c) provide details of the processes and criteria the retailer will use to identify hardship customers;

(d) provide details of the options that will be provided to hardship customers and how they will be assisted to maintain participation in the payment plans;

(e) provide details of the process the retailer will use to work with the hardship customer and, as appropriate, with a financial counsellor;

(f) offer fair and reasonable payment options with fair and reasonable instalment intervals that accommodate individual circumstances and to monitor payments including debt levels;

(g) provide details of how and in what circumstances the retailer will make field audits of energy usage and the cost to the customer of these including circumstances for partial funding by customer;

(h) provide details of circumstances when retailer will assist customer to replace electrical and gas appliances;

(i) provide for the referral of hardship customers to other support agencies where appropriate;

(j) set out the process the retailer will follow to advise a hardship customer of their rights and obligations under the hardship plan;

(k) set out circumstances in which a hardship arrangement will cease;

(l) require the retailer's staff to be made aware of the policy and require staff with direct involvement to have the necessary skills to 'sensitively' engage with hardship customers;

(m) be transparent, accessible and communicate to hardship customers; financial counsellors and community assistance agencies;

(n) recommend the most appropriate tariff at the time of entry into the hardship program;

(o) monitor hardship customer's behaviour and consumption to ensure they remain on the most appropriate tariff and facilitate a tariff change if necessary.

98. ESC, Energy Retail Code, s. 116(g).

99. ESC, Energy Retail Code, s. 121(1).

100. ESC, Energy Retail Code, s. 121(2A).

101. Essential Services Commission 2016, Energy Retail Comparative Performance Report – Customer Services, May 2016, p. 22.

These indicators may cover entry into hardship programs, participation in hardship programs and assistance available to and provided to customers under customer hardship policies.[103]

The ESC's annual *Energy Retail Comparative Performance Report – Customer Service*, provides (inter alia) an annual update of customer participation and retailers' performance on the payment plans and hardship programs.

As an example, Table 2 below summarises the ESC's findings for 2014–15 for the two categories of services offered to customers experiencing payment difficulty, namely payment plans and hardship programs.

The ESC intends to update its annual Energy Retail Comparative Performance Report to include additional measures of retailer performance on a range of hardship indicators. The revised report will also include information on the ESC's compliance and enforcement activities. SACOSS notes that it is important that these reports are published as soon as possible if they are to have maximum value to customers, retailers and regulators.

2.3.6 SACOSS' conclusions regarding the ESC's current framework

The current regulatory framework for the management of vulnerable energy customers in Victoria consists of the industry acts (the EIA and the GIA), the ESC Act and the Energy Retail Code (including the previous Guideline 21 on Hardship Programs).

In 2014, the ESC undertook a very substantive program to rewrite the Energy Retail Code in order to better align its content with the NECF.

Since 2015, the Victorian Government has been strengthening the legislative framework. For instance, the Government has included a new objective in the EIA, the GIA and the ESC Act which require the ESC to explicitly consider the impact of its decisions on customers experiencing payment difficulties.

SACOSS notes that this may contradict the objective in the Act of promoting competition and it is not clear how the ESC should or does balance these two requirements.

The compliance and enforcement powers of the ESC have also been increased through amendments to the ESC Act and the ESC has recently released guidance on how it proposes to implement these enhanced powers. As noted above, the ESC will be expanding its performance reporting on customer outcomes, retailer compliance and the ESC's enforcement activities.

SACOSS notes that the ESC consulted widely during these developments of Version 11 of the Retail Code and the consumer representatives in Victoria generally supported its approach. SACOSS considers these developments have moved the Victorian energy market towards a more equitable consumer protection regime for customers experiencing payment difficulties.

However, given the retail market data is not yet available for 2015–16 it remains to be seen if the current Code has succeeded in its intent.

In addition, there are a number of gaps that SACOSS has identified in the current national framework that also appear in the current Victorian framework.

For example, there is some ambiguity over how a hardship customer is identified versus a customer experiencing payment difficulties, yet this distinction underpins the level of support provided to a customer experiencing payment difficulties.

It is hardly surprising that there are large differences in the rate of participation in hardship programs when different retailers may use different criteria and different sources to identify hardship customers.

Table 2: Customer participation rates in payment plans and hardship programs

Victorian Data		Rate per 100 customers	Highest rate[1]	Lowest rate[1]
Payment Plans (not hardship)	Electricity Gas	3.25 3.08	9.13 8.31	1.42 1.21
Hardship Programs	Electricity & Gas	1.20[2]	1.66	0.4

Note 1: Includes only first tier retailers and major second tier retailers (AGL, Energy Australia, Lumo, Origin Energy, Red Energy, Simply Energy),
Note 2: Rate is based on rate per 100 electricity customers, due to difficulties disaggregating the relevant data.
Source: ESC, *Energy Retail Comparative Performance Report – Customer Service*, May 2016, Tables 3.1, 3.2 and 3.4.

102. ESC, Energy Retail Code, s. 75(1).
103. ESC, Energy Retail Code, s. 75(2).

Like the NECF's minimum requirements for an approved hardship policy, the requirements in the ESC Act focus on ensuring there are processes in place to identify hardship customers and to determine the appropriate payment plans. It is less clear what these processes should include.

Similarly, the criteria by which a customer can be classified as having payment difficulties and eligible for a payment plan is not clearly defined in the regulatory instruments. It is again not surprising that there is a large range in proportion of customers on payment plans across different retailers.

The ESC Act also requires that the retailer offer payment plan options that are fair and reasonable. However, it is up to the retailer to further define what fair and reasonable may be for each individual customer. There is no guidance on this in the regulatory instruments.

The retailers must also set out 'how and in what circumstances' they would propose an energy audit or appliance replacement. The regulatory framework provides no guidance on how this decision might be made or what level of assistance should be provided in these circumstances.

This may explain why the ESC states that its 2014–15 retail performance data show that: "energy field audits are not being provided to customers by retailers to any meaningful extent".[104] Only two retailers reported conducting energy field audits.

SACOSS also notes that there is limited referral in Victorian regulatory instruments to the quality of the interactions between the customer and the retailer.[105]

SACOSS noted a similar gap in the NECF framework and highlights again the importance of the quality of interaction between the retailer and the customer and the importance of the customer having a sense of engagement and control in the process.

The variation in outcomes for the customers of different retailers suggests that retailers may also vary significantly in the quality of these interactions with the vulnerable customers.

The Victorian legislative framework emphasises as a matter of principle that all residential customers in financial hardship should have equitable access to hardship policies and that these policies should be transparent and applied consistently.[106]

However, just as we observed in the national framework, the variations in practices and outcomes between retailers in Victoria and even within a retailer over time, suggest that this principle is lacking in practice across the sector.

The frustration is that these gaps continue despite the best intentions of all stakeholders to implement a sustainable program for customers experiencing payment difficulties that minimises the rate of disconnection due to inability to pay energy bills.

The next section of this report will consider the outcomes of the AER's and the ESC's review of their hardship policies in 2014–15.

[104] Essential Services Commission 2016, Energy Retail Comparative Performance Report – Customer Services, May 2016, p. 30.

[105] The main reference to the quality of the interaction is in the ESC's Energy Retail Code where it refers to a process for training staff in the skills to sensitively engage with hardship customers as one of the factors that the ESC would consider when approving a hardship policy. See also Box 2.

[106] See for instance. ESC, Energy Retail Code, s. 71(b) and (m).

3. Findings of AER and ESC in their reviews of Hardship Customers and Retailer Policies

Section 2 of this report outlined the current regulatory requirements set out in the NECF and the Victorian legislative instruments. Section 2 also summarised the AER's and the ESC's interpretations of these requirements as presented in the AER's Guidance to Retailers and the ESC's Energy Retail Code and related documents.

Over the course of 2014 and 2015, both the AER and the ESC conducted reviews of the relevant policies and the outcomes for customers experiencing payment difficulties.

The reviews provide valuable insights into the challenges facing the AER and the ESC in providing an effective and efficient regulatory framework. Both the AER and the ESC have, therefore, used the findings of these studies, to further develop the programs to support vulnerable customers, including hardship customers.

The results of these two separate reviews are, therefore, summarised below.

Section 3.3 presents findings from other research, specifically, the work of Ofgem. Ofgem has spent well over a decade refining its energy customer protection framework and their work has some relevance for stakeholders in Australia.

3.1 The AER Hardship Policy & Practices Review[107] (AER Review)

3.1.1 Reasons for the AER's Review

The AER undertook a "targeted" review of the operation of retailers' hardship policies and practices throughout 2014.

The review was instigated in the first instance by the concerns of various consumer representative organisations with the practical implementation of the retailers' hardship policies. In particular, consumer representatives identified two specific areas of concern, namely:[108]

- Barriers that restrict customer access to hardship assistance; and
- Retailers setting unaffordable payment plans.

In addition, the AER's and the ESC's retail performance reports revealed that vulnerable customers were entering payment plan arrangements and hardship programs with very high levels of debt and were, in many cases, not reducing that level of debt. There was a high rate of 'drop-out' from hardship programs. Clearly, neither process was consistently achieving the desired outcomes.

The AER also noted that an independent review of Centrepay in 2013 raised concerns that customers may be carrying high credit balances and recommended that the AER investigate energy retailers' practices with regard to this.[109]

Given these concerns, the AER initiated the review as part of its compliance activities for 2013–14. The stated purpose of the review was to:[110]

- Better understand the significance and prevalence of concerns regarding customer access to hardship assistance and affordability of payment plans;
- Identify any concerns with retailers' compliance with the NERL and NERR, particularly with respect to the identification of customers, how retailers have regard to capacity to pay when establishing payment plans and how retailers promote, use and monitor Centrepay; and
- Work collaboratively with retailers and consumer stakeholders to promote compliance and improve the effectiveness of assistance provided to customers experiencing hardship.

Consistent with the stated purpose of the review, the AER adopted a multi-faceted approach that included meetings and surveys of consumer representatives, community workers, jurisdictional ombudsmen and retailers as well as examination of the most recent retail performance data for 2013–14.[111]

3.1.2 Findings of the AER's Review

The AER's Review presented its findings and observations under four headings. They were:[112]

- Identification of vulnerable customers and access to suitable assistance programs;
- Capacity to pay assessments;
- Centrepay arrangements; and
- Review of hardship policy documents.

The AER's findings are consistent with the concerns raised by consumer representatives with the current processes of managing customers facing payment difficulties. The AER's findings on each of these four matters is summarised below.

107. AER, Review of Energy Retailers' Customer Hardship Policies and Practices, January 2015 ("AER Review").
108. ibid, p. 3.
109. ibid. See also: Department of Human Services (Australian Government), Report of the Independent Review of Centrepay 2013.
110. See AER: ibid, p. 6.
111. ibid, p. 7.
112. ibid, p. 8.

3.1.2.1 Identification and Access

The NERL requires that retailers have processes in place to identify customers experiencing payment difficulties due to hardship, including identification by the retailer, and self-identification by a residential customer.[113]

The AER notes that:[114]

> *Early identification of customers experiencing financial hardship will maximise the opportunities for effective intervention to help the customer manage and overcome their difficulties.*

This is consistent with SACOSS' observations and our priorities for policy reform.

In line with the NERL, the AER also identifies two 'pathways' to the identification of a customer experiencing payment difficulty, namely self-identification by the customer and identification by the retailer.

The AER's review, therefore, considers practices that address both identification pathways with the aim of uncovering factors that might promote earlier identification by the customer and/or the retailer. The AER's findings on each of the two pathways are set out below.

Self-identification by the customer

The AER observed that there is a range of practical and social barriers to self-identification by customers. Similarly, the AER observed that: "retailers varied in the nature and scope of their efforts to overcome these barriers and promote their hardship programs..."[115]

The barriers to the customer approaching their retailer included barriers that arose from or were exacerbated by the retailer's policies and treatments. The AER identified the principal barriers as follows:

- Lack of awareness by the customer of the existence of their retailer's hardship program. Retailers differed in the extent to which they effectively used a variety of channels to communicate with their customers;
- Reluctance to notify their retailer that they were in financial difficulties due to various social factors. Retailers differed in their methods to overcome this reluctance.
- High mobile phone costs could be a barrier. Some retailers offered to call back when receiving a mobile call and/or provided email contact options;
- Call centre hours. Some retailers provided extended hours to provide greater accessibility for customers.
- Previous poor experience when asking for assistance. Some retailers demonstrated greater commitment to training staff in working with vulnerable customers.

Identification by the retailer

The AER found that retailers differed in both the processes used to identify customers with payment difficulties and in their efforts to contact customers who have been identified as 'at risk'.

For example, some retailers use automated credit management systems to flag customers who have missed payments and remove them from the billing and collections cycle for follow up. Other retailers use checking systems that result in manual reviews of accounts in arrears, while others flag customers who have reached a certain level of debt or missed a number of payments.

In terms of attempts to contact customers, the AER found some retailers who made up to eight or nine efforts to contact the customers, where other retailers made only the minimum number of contacts required by the regulations. The AER observed that using a combination of contacts methods (letters, SMS, emails, phone calls) at different times appears to be more effective.

Access to 'meaningful and appropriate' hardship assistance

The AER observed retailers offered different types and different levels of assistance such as extension of time to pay, realistic payment plans and referrals to the retailer's hardship program.

The challenge for retailers is to establish a process that places the customer in the 'right box and at the right time'. For example, extending the time to pay or establishing a payment plan may not be sufficient when the customer cannot meet payments for their current and ongoing usage.

Such customers will need access to a more tailored and more comprehensive suite of intervention services such as those available in the retailer's hardship program. The hardship program should address not only payment plans, but access to concessions and rebates, appropriate tariffs, and energy usage information and intervention.

The AER noted the comments of consumer advocates that 'front-line' staff often did not have the necessary knowledge of the retailer's hardship programs or the skills to identify the appropriate level of assistance required for each customer.

These essential retailer staff skills include the provision of information on concessions, tariffs, energy efficiency and so. Also important is that the retailer's front line staff

113. ibid, p. 9. See also NERL, s. 44(a).
114. ibid.
115. ibid, p. 10.

are trained in the 'soft skills'. The AER stated that these soft skills include active listening, respectful practice and demonstrated empathy and sensitivity to the customer and their situation.

The AER also noted the importance that consumer advocates place on these 'soft skills'. The consumer advocates emphasised that the quality of this initial interaction will influence the customer's sense of empowerment, their ongoing engagement with the retailer and their willingness to cooperate with the relevant plan.

The AER concluded that retailers varied in the level of proactive intervention and demonstrated 'soft skills'. The AER stated:[116]

> *We observed differences in retailers' practices for recognising and responding to the signs of hardship, which suggest that those with specialist staff training and documented processes in place tend to provide a higher quality response.*
>
> ...
>
> *Retailers with more effective approaches also benefited by being able to maintain a positive and cooperative relationship with customers dealing with hardship issues.*

3.1.2.2 Capacity to pay assessments

The NERR requires the retailer to have regard to a customer's capacity to pay, the amounts owed by the customer and the expected energy consumption when establishing a payment plan.[117]

The AER observed that retailers varied in how they establish a customer's capacity to pay and in how they responded if a customer could not afford to pay for their ongoing usage, let alone repay existing debt over time.

Capacity to Pay

The AER noted that there were generally two approaches adopted by different retailers to establishing a customer's capacity to pay although some retailers adopted a mixed approach. The two approaches were:[118]

- Accepting on face value the payment amount proposed by the customer as being affordable without probing into the customer's individual circumstances; or
- Actively exploring with the customer what they can afford to pay, having taken some note of the customer's individual circumstances.

The AER further noted that there seemed to be a preference amongst consumer representatives for the first option, with the consumer identifying what they could afford to pay. The benefit of this approach was that the consumer was empowered to make the decision. However, this approach incurs the risk that the customer may be 'too optimistic' in assessing what is affordable in their circumstances.

The majority of retailers reported that they adopted the second approach that relied on active discussion with the customer on the customer's financial situation. Such discussions usually began with an implicit or explicit assessment by the retailer of an optimal payment plan based on the level of debt and forecast consumption.

However, the AER noted that there was a significant variation in how retailers approached this discussion, and how much detail they sought about the customer's financial circumstances in order to confirm or modify their starting assessment.

Unless these discussions were managed with a high level of skill by the retailer's staff, there was a risk that the customer would not be adequately engaged in the process, would resist providing the appropriate information and resent the intrusion. It appears that retailers differed in the extent to which they invested in specialised training of suitable staff.

Managing customers whose capacity to pay is less than ongoing consumption

The AER identified significant levels of concern amongst retailers with the number of vulnerable customers who cannot afford to pay for current consumption.

Some retailers estimated that for customers on payment plans, there was a relatively small proportion that were paying more than their current consumption. In other words, any payment plan that was within the customer's ability to pay was less than required to recover historical debt as well as ongoing consumption.

Again, retailers varied along a spectrum in terms of their response to this situation. Over time, some individual retailers moved along the same spectrum.

The AER highlights that at one end of the spectrum, some retailers demonstrated "tolerance and empathy" and a "stronger commitment" to helping these customers.

At the other end of the spectrum, the AER reported retailers whose 'customs and practices' appeared to be "frustrated by the challenges and costs of managing

[116] ibid, p 13.

[117] NERR, 72(1)(a).

[118] See: AER, Review of Energy Retailers' Customer Hardship Policies and Practices, January 2015, p. 15.

hardship customers".[119] For these retailers, the management of the customers and the development and maintenance of their payment plans was focussed on "debt recovery" and "payments on time".[120] The payment plans implemented by these retailers therefore required, at a minimum, payment of current consumption even if the customer stated that they could not afford such payments.

The consequence of this latter approach was too often a failure of the customer to pay their energy bills and a reluctance to renegotiate terms given their initial negative experience with the retailer. Consequently, the customer's debt escalates and the risk of disconnection increases.

SACOSS also notes and agrees with the AER's view that the current suite of hardship program indicators does not provide a clear picture of the dynamics of the retailer-customer relationship and how that is driving outcomes.[121]

Negotiation, disputes and the role of financial counsellors

In developing suitable payment plans for vulnerable customers, the AER cites feedback from the consumer representatives and concludes that:[122]

> *... giving customers the opportunity to effectively negotiate for themselves provides an important sense of control and empowerment. Doing so also promotes a sense that the retailer is willing to listen and is approachable in a time of difficulty.*

The AER also notes that this finding is consistent with a study conducted for Ofgem on the implementation of their guidelines for the management of vulnerable customers.[123] This research study concluded that giving customers the opportunity to effectively negotiate for themselves "provides an important sense of control and empowerment".[124]

Similarly, the AER notes the findings of 2014 research by Financial Counselling Australia, which stated the ability to pay as being: "inextricably linked to human dignity".[125]

In the AER's own survey, financial counsellors indicated that the most positive outcomes could be achieved by empowering the customer to negotiate with the retailer. While it may be necessary to involve financial counsellors for some customers with high and/or complex needs, some stakeholders consider that retailers refer their customers to financial counselling services too readily. They observed that some retailers require the customer to speak to a financial counsellor before they can be put on a payment plan.

However, the AER also noted that retailers did not agree with this assessment.[126] The retailers claimed that referral to financial counsellors was to enhance the support for a customer with a "high level of need", rather than to enable the retailer to broker an agreement.[127]

Referral to financial counsellors can sometimes delay the process of establishing an agreed payment plan because of the time to make an appointment. This, in turn, increases the overall level of debt.

A referral can also take responsibility away from the retailer-customer relationship; the retailer is in effect "outsourcing" the relationship with their vulnerable customers. For these reasons, it may be better to reserve financial counselling referrals to specific cases of high need and in particular where the customer's payment plan is not covering their ongoing usage costs.

Further ways to assist hardship customers

The NERL sets out the minimum requirements for customer hardship policies.[128] These minimum requirements set out a number of additional requirements such as providing the customer with additional information on concessions, financial counselling resources, energy efficiency opportunities, and alternative tariff arrangements.

The AER considers that the most effective policies and procedures include actions that assist customers in paying not only their arrears but also paying for future consumption. Energy efficiency advice, tariff checks, information on government grants and concessions and referral to third parties are important in managing future vulnerability.

119. ibid.

120. ibid.

121. See ibid. The AER notes that indicators such as 'debt on entry' versus 'average debt' while on a hardship program, and the proportion of customers successfully completing a hardship program, provide some information but many factors other than the nature of the retailer's program may impact on this data. The indicators do not provide a longitudinal picture of the customer's struggle to manage energy debt and the competing demands on their limited financial resources.

122. ibid.

123. cited in ibid, p. 17:Consumer Futures (2013), Ability to Pay: Exploring the extent to which Ofgem guidelines regarding indebted consumers are followed from the consumer and debt advisor perspective; A report by RS Consulting for Consumer Futures, p. 41. 'Consumers Futures' was at that time the operating name of the UK's National Consumer Council.

124. ibid.

125. Cited in ibid, p. 18: Financial Counseling Australia and the Australian Communications Consumer Action Network (2014), Hardship policies and practices: A report on comparative hardship policies, p. 46.

126. AER, Review of Energy Retailers' Customer Hardship Policies and Practices, January 2015, p. 18.

127. ibid, p. 18.

128. NERL, s. 45 (a) and s. 44.

The AER's survey again indicated a mixed response from retailers. Some retailers appeared to go no further than the minimum requirements and had little in the way of: "extra initiatives and programs to assist hardship customers manage their energy usage and bills".[129]

Other retailers, however, were observed to go beyond these minimum requirements. These retailers had put in place strategies to engage hardship customers, including energy efficiency advice and financial incentives for committing to an agreed payment plan.

For example, the AER found that at one end of the spectrum, energy efficiency advice simply included a referral to the retailer's website which included a small range of "rather basic tips".[130]

At the other end of the spectrum, retailers were variously involved in promoting their online energy portals, telephone or home audits, appliance replacement programs, community workshops and the like.

However, the AER also reports there was mixed feedback from retailers on the success of some of these measures. For instance, retailers reported that home audits had a low take up as many consumers considered a home audit inconvenient and/or intrusive. Retailers increasingly preferred telephone audits.[131] Appliance replacement programs also did not necessarily reduce consumption.[132]

In its study, the AER considered the merits of various incentive schemes. For instance some retailers provided an incentive such as some form of bill relief or payment matching schemes. While consumer representatives supported this type of scheme, there were mixed views amongst retailers. The AER concludes that: "financial incentives are not necessarily the benchmark of best practice".[133]

The AER also suggested that best practice retailers provided a number of referrals and/or web-site links to third party service providers such as energy saving advice websites, financial counsellors, welfare organisations, legal aid, mental health, addiction services, domestic violence centres and emergency contacts for natural disasters.

Consumer representatives identified a number of best practice activities by specific retailers including:[134]

- Dedicated and accessible hardship team;
- Focus on solutions that are appropriate to individual customer needs;
- Wide range of incentive payment plans;
- Friendly, understanding and considerate consultants;
- Absence of long waits on the phone;
- Listens to counsellors advice on behalf of the consumer;
- Provision of a dedicated caseworker giving continuity to the hardship customer.

3.1.2.3 Centrepay Arrangements

The NERL requires retailers to offer flexible payment options, including Centrepay, to hardship customers.[135] One expected benefit of Centrepay is that having a regular amount deducted from a customer's Centrelink payments makes it easier for a customer to budget for their energy costs, particularly if accompanied by a bill smoothing arrangement with the retailer.

The AER highlights that there have been "numerous concerns" with the operation of Centrepay resulting in an independent review in 2013. The review recommended that the AER investigate energy retailers' practices with regard to Centrepay arrangements.[136]

As a result, the AER has included a review of Centrepay arrangements in the energy retail industry as a specific component of its review of customer hardship policies and practices. In particular, the AER was concerned to investigate how retailers promote, use and monitor Centrepay arrangements when establishing payment plans for hardship customers.[137]

Feedback from consumer representatives indicated to the AER that some retailers were not offering Centrepay, that it was not mentioned as a payment option and that some customers were told by their retailer that they cannot use Centrepay.[138] These representatives also questioned the extent of the positive balances being held in the customer's Centrepay accounts.

The AER found that there was no direct evidence of misuse of Centrepay facilities by retailers. It was more likely that the stakeholders' concerns reflected an underlying issue about the retailers' assessments of

129. AER, Review of Energy Retailers' Customer Hardship Policies and Practices, January 2015, p. 18.
130. ibid, p. 20.
131. ibid, p. 19.
132. ibid. Retailers advised the AER that sometimes customer retained the original appliance (such as an old refrigerator) as well as the new one. SACOSS is not aware of whether these claims are widespread and if they have been independently assessed.
133. ibid.
134. See also ibid, p 21.
135. NERL, s. 44(c).
136. ibid, p. 22.
137. ibid.
138. ibid.

customers' capacity to pay and the affordability of their customers' payment plans (whether managed through Centrepay or through other arrangements).

The AER, however, did accept that: "there was scope for some retailers to better promote the availability of Centrepay to eligible customers".[139] The AER also notes that its own retailer performance data suggests that Centrepay is not strongly promoted by retailers. For instance, the AER states that only 28 per cent of hardship customers use Centrepay, and that: "this varies markedly between retailers".[140]

3.1.2.4 AER Review of hardship policy documents

The AER approves a retailer's hardship policy on the basis that:

- The policy meets the minimum requirements set out in the NERL and the requirements in the NERR; and
- The AER is satisfied that the policy will or is likely to contribute to the purpose of identifying hardship customers and helping them manage their energy bills.[141]

However, while a retailer's hardship policy must be published on the retailer's website,[142] there are no requirements around the prominence, positioning or format of the hardship policy document(s).

The AER reports that most hardship policies could be reasonably easily found on the website, although they were called different names and were located in different areas of the retailers' websites. The AER noted some instances where the policy was placed under page headings that were not intuitively obvious to a consumer.[143]

The AER also found that the majority of hardship policies: "did not seem to be written for the benefit of residential consumers".[144] Rather they were written to meet the requirements of the NERL and NERR and using the nomenclature of the NERL and NERR. In addition, the documents were frequently quite long, ranging from five to fourteen pages.

As such, the AER observes that they appeared to be written for a customer with a fairly high level of literacy. It is important that the key points in the hardship policy are written in simple and direct language.

As such, the AER suggests that retailers consider producing a 'short-form' version of the hardship policy document that sets out the key requirements and sits alongside the longer document prepared with regulatory compliance in mind.[145]

3.1.3 Lessons from the AER's review

The AER concludes as follows:[146]

> *The review suggests that many community concerns about hardship assistance and payment plan affordability are not symptomatic of widespread non-compliance with the Retail Law and Rules.*

Rather, the AER considers that the issues identified by consumer representatives with hardship assistance and payment plan assessments and compliance are: "linked to broader issues of energy affordability and energy literacy".[147]

Also critical to the process, and not readily measured, is the quality of the retailer's initial communication with vulnerable customers and the effectiveness of the retailer's ongoing communication.

Consumer stakeholders, including SACOSS, place a high priority on establishing and maintaining respectful communication with vulnerable consumers throughout the process of resolving the customer's debt. This is not only beneficial to the customer, as SACOSS considers there is ample evidence that better communication will lead to more successful outcomes which benefits the retailer as well.

The AER review confirms the importance of 'respectful practice'. The AER states that:[148]

> *How a retailer engages with the customer to actively listen and validate their experience of vulnerability is very important in developing and maintaining longer term engagement.*

139. ibid.

140. See ibid, p. 23. The AER's figures are based on the AER's 2013-14 annual performance report: Annual report on the performance of the retail energy market 2013-14. The AER's 2014-15 retail performance report suggests the proportion of hardship customers using Centrepay has declined from 2013-14 across all jurisdictions (see Table 2.8, p. 27) although there may be a number of other factors causing this decline.

141. NERL, s. 45(1)(b).

142. NERL, s 43(2) and s. 43(3).

143. For instance, the AER found some policies were under page titles such as 'Privacy and Legal', 'Residential' or 'Resources'. See AER, Review of Energy Retailers' Customer Hardship Policies and Practices, January 2015, p. 26.

144. ibid.

145. ibid, p. 27.

146. ibid, p. 3.

147. ibid, p. 4. The AER defines 'energy literacy' as: "the consumers' ability to make informed decisions around selecting an energy offer and understanding their options and rights in relation to their energy supply".

148. ibid, p. 4.

Despite the review not identifying wide-spread non-compliance, the AER highlighted a number of concerns with some aspects of the retailers' implementation of the current regulatory requirements. The AER's concerns include:[149]

- Retailers reporting relatively high level of debt while having relatively low levels of customers on a payment plan or hardship program;
- Retailers reporting relatively high level of debt on entry to a hardship program;
- Disconnection of hardship customers arising because the retailer was unable to slow or stop the disconnection process even as the customer was entering a hardship program;[150]
- Relatively low number of customers using Centrepay;
- Lack of "intuitively locatable and easy to read information" on a retailer's website about the availability of assistance;
- Lack of additional measures to support a hardship customer, i.e. a hardship program is little more than a payment plan; and
- Incorrect reporting of performance data to the AER.

The extent of these issues varied across retailers, and over time. In turn, these differences can have a significant and disproportionate impact on vulnerable customers and on those consumer representatives and financial counsellors providing support to the vulnerable customers.

For instance, the lack of consistency in approach, both between retailers and within a retailer over time, complicates the financial counsellors' task of providing consistent and relevant advice to the vulnerable customers of each retailer.

Moreover, vulnerable customers are less likely to have the knowledge, skills and wherewithal to challenge a retailer or to change retailers in response to an inadequate or non-supportive retail service. Indeed, these consumers may not even know their 'rights' under the regulatory framework to challenge their retailer on such things as payment options, payment periods and so on.

It is essential, therefore, that vulnerable customers have access to information on their 'rights' and 'responsibilities' in the energy retail market and that this information is provided in an accessible and respectful manner.

If this can be consistently achieved across all retailers, then vulnerable customers are more likely to become their own 'agents', confident to represent their own interests, negotiate realistic payment plans, maintain continued communication with their retailer, and progressively adopt recommended actions to reduce their energy costs.

SACOSS, therefore, encourages the AER to establish a regulatory framework that will result in more consistent and equitable outcomes for vulnerable customers and a more sustainable and constructive relationship between retailers and customers.

As noted, SACOSS holds a firm view that if the customer is engaged in the process and can see that the retailer understands and will agree to realistic payment schedules, the customer is far more likely to complete the payment program.

Potential or actual disconnection for non-payment has a role, but only at the edges – as a 'last resort' when a customer has refused to meaningfully engage in the process. Similarly, severe penalties on retailers for wrongful disconnections have a role, but do not address the critical issue of the quality of the interaction between the retailer and the customer. Potentially, such severe penalties may act as a deterrent to innovation by the retailer and a focus instead on the strict 'letter of the law' rather than the intent of the law.

The intrinsically adversarial nature of both these negative actions only increases costs for all consumers over the long term and undermines the hope of achieving positive solutions to the difficult issues of customer vulnerability.

3.2 The ESC Inquiry into Best Practice Financial Hardship Programs

3.2.1 Background to the ESC Inquiry

In February 2015, the ESC received a request from the Victorian Government to conduct an inquiry into: "best-practice financial hardship programs of retailers".[151] In order to determine if energy retailers were adopting best practice, the Government requested the ESC to:[152]

> *[r]eview retailers' policies, practices and procedures in supporting customers experiencing financial hardship avoid disconnection. In doing so, the Commission should also assess whether the regulatory framework governing retailers' obligations in this regard, represents regulatory best practice.*

149. ibid, p. 4.

150. SACOSS has noted the impact of smart meters and remote disconnection in considerably reducing the time between the retailer issuing a disconnection notice and it being enacted upon by the distributor. This may contribute to the AER's observations.

151. See Minister for Finance & Cultural Affairs, "ESC Inquiry into the Financial Hardship Programs of Retailers, Terms of Reference", 4 February 2015.

152. ibid, p. 1.

This inquiry was to include an investigation of the different methods used by retailers to assist customers; the design and efficacy of regulatory obligations; the transparency of energy retailers' hardship policies and practices; cost effective options for improving how retailers assist customers, and developing a benchmarking framework to assess and report on the effectiveness of retailers' policies, practices and procedures.[153]

For the purposes of the inquiry, the Government provided a broad definition of 'customers in financial hardship' that included both actual customers unable to pay their energy bills and customers at risk in the future.

The Victorian Government's terms of reference state that customers in financial hardship include:[154]

- Residential customers with an inability to pay their energy bills in a timely manner; and
- Residential customers at risk of being unable to pay their energy bills in a timely manner.

In its Final Inquiry Report (ESC Final Report), the ESC explained that their Inquiry was focussed on how energy retailers support customers experiencing difficulty paying their energy bills including, i.e.: "how energy retailers account for the financial circumstances of individual customers when assisting customers experiencing payment difficulties"[155].

More specifically, the ESC's Final Report stated that the Inquiry was designed to: "examine how the regulatory framework around vulnerable customers operated in practice".[156]

Significantly, the ESC's inquiry did not investigate the broader socio-economic causes of financial difficulty or the drivers of energy costs. The ESC argued that these factors were "beyond the scope of the inquiry".[157]

A further important aspect of the ESC's inquiry is summarised in the following quote from the ESC's Final Report:[158]

> *Current regulation requires energy businesses to assist customers experiencing payment difficulties. The regulation will be efficient if it* ***reduces the social and economic cost of energy debt, disconnection and debt collection by more than the cost of providing that level of regulated support****. [emphasis added]*

Given the ESC's proposed extensive changes to the current regulatory model in Victoria, the emphasis on regulatory efficiency and net societal benefit is useful, even if it may be challenging to measure.

However, SACOSS has previously indicated in this report a concern that a thorough cost benefit analysis has not been undertaken by the ESC, including assessment of costs and benefits of alternative less drastic reforms.

The ESC also set out six more specific principles to guide the ESC in conducting the inquiry and which the ESC regards as 'standard tests of best practice regulation'[159] as set out below. They were:[160]

1. Effectiveness
2. Flexibility
3. Consistency
4. Efficiency and proportionality
5. Transparency and clarity
6. Accountability

The following sections will highlight some of the important findings of the ESC's inquiry.

3.2.2 Determining a Customer's Payment Difficulty

The current Victorian regulatory framework requires retailers to categorise vulnerable customers according to whether they are:[161]

- A hardship customer entitled to assistance under the retailer's hardship policy; or
- A customer who may be assisted outside of the hardship program, usually by a payment plan.

A customer who is categorised as a hardship customer is therefore entitled to a higher level of assistance from their retailer than a customer who may benefit from assistance but does not qualify as a hardship customer.

However, the ESC also noted that, despite the importance of the concept of customer hardship in terms of the assistance a customer should receive, there was no objective definition of 'hardship' in the regulations.

153. ibid, p. 1-2.
154. ibid, p. 2.
155. See for example, ESC, Supporting Customers, Avoiding Labels. Energy Hardship Inquiry Final Report, February 2016, p.2.
156. See for example, ibid, p.p. 1-2.
157. ibid, p. 2.
158. ibid, p. 4.
159. See for instance, paper by Dr Ron Ben-David, Chairperson of the Essential Services Commission: "Supporting Energy Customers in Financial Hardship: Untying the Gordian Knot", p. 13. Presentation to Credit Collections & Hardship Program in Utilities Conference, 11 May 2015.
160. ibid, p. 6. These principles were initially set out in an ESC Issues Paper: ESC 2015, Inquiry into the Financial Hardship Arrangements of Energy Retailers: Our approach, March 2015, Chapter 2.
161. ESC 2016, Supporting Customers, Avoiding Labels, Energy Hardship Inquiry, Final Report, February 2016, p. 13.

In other words, 'hardship' was what each retailer determined it was. The ESC's concern with the subjectivity of this assessment process is shared by SACOSS.

As the ESC highlights in its Final Report, a retailer's decision to classify a customer as a hardship customer is currently based largely on the retailers assessment of the cause of the payment difficulty[162]– and perhaps, implicitly, on the perceived 'worthiness' of that cause?

The ESC observed that the causes of a customer's payment difficulty may be hard to identify and may or may not meet that particular retailer's definition of 'hardship'. Ascertaining these causes may also require gathering personal information and may lead to customers feeling 'stigmatised' by the retailer.[189]

A retailer's categorisation of a customer as a hardship customer may also rely on more objective assessments of payment difficulties such as the duration and level of debt.

However, the ESC observed that there was a "continuum" of customers incurring payment difficulties characterised by "increasing duration and level of debt".[164]

Different retailers have different marker points along the continuum that they use to define a hardship customer or a customer requiring a payment plan. Again, therefore, even on these more objective measures, there is a degree of subjectivity and vulnerable customers will experience different outcomes depending on where their retailer draws the "cut off" point.

The ESC concluded that the subjectivity of the assessments by retailers resulted in inconsistent levels of service provision depending on the eligibility criteria applied by individual retailers.

The ESC summarised the problem of focusing on the cause of payment difficulties as follows:[165]

> *Typically, the assessment of eligibility focuses on the causes rather than the types of payment difficulties being experienced. To a large extent, this approach arises from the regulatory expectation that retailers will have regard to customers' capacity to pay when determining what assistance should be provided when payment difficulties are identified.*

It is for this reason that the ESC also concludes that it is better to classify customers by the 'type' of payment difficulty rather than the cause of the difficulty.

The ESC's proposal is discussed in more detail in Section 1.8. Table 5 below, provides a high level illustration of the ESC's alternative categorisation by type of payment difficulty.

The ESC considers that classifying the level of vulnerability by type allows the retailer to use a consistent framework based on objective information available in the retailer's billing systems, namely:[166]

- The amount the customer is required to pay at any point in time;
- The customer's actual payments; and
- The total amount a customer owes to the retailer.

Table 3: Types of Payment Difficulty

Type	Characteristic	Debt status
A	Customer has not yet missed a payment • And has not missed a payment in the past 12 months • But cannot meet their next payment.	Likely
B	Customer has missed a payment and therefore has an energy debt.	Commenced
C	Customer has energy debt • And is making payments to reduce debt • But not in accordance with their payment plan.	In arrears
D	Customer has energy debt • And is paying for their energy use • But is not reducing their debt.	Static
E	Customer has energy debt • And is not paying for their energy use.	Increasing

Source: ESC, *Supporting Customers, Avoiding Labels*. Energy Hardship Inquiry Final Report, February 2016, Table 2.2, p. 13.

162. ibid, p. 14.
163. ibid.
164. ibid, p 12.
165. ibid, p. 14.
166. ibid.

3.2.2 Other Outcomes of the Current Regulatory Framework for Vulnerable Customers

The following sections consider in more detail a number of the key findings of the ESC review. The ESC uses these findings in the development of its new regulatory framework for customers experiencing or expecting difficulties in paying their energy bills.

3.2.2.1 Assistance provided by retailers and access to this assistance

As highlighted by the ESC, and noted above, the current Victorian regulatory framework provides a significant degree of discretion to retailers in the way they choose to assist vulnerable customers.

As a result, in addition to the substantial differences in the criteria retailers use to classify customers (see above), there is also significant variation in how customers access assistance and what assistance is provided. The ESC notes that this includes the terms and conditions on which assistance is provided and on which it might be withdrawn from the customer.[167]

Moreover, the ESC's investigations indicated that information on the type and level of assistance each retailer would provide was not transparent nor readily available to customers in the hardship plans published by retailers on their web sites.

The ESC found that some policies are easier to find on the retailers' websites than others. Section headings such as 'Terms, prices and regulatory information', 'The legal stuff' or 'Resources' makes locating the hardship policies more difficult for the customer, and their counsellor.[168]

With respect to eligibility to assistance and the actual assistance received, the ESC noted the broad discretion of the retailers to determine eligibility, capacity to pay and actual payment plans.

The ESC acknowledges that the broad discretion provided to retailers was designed to provide scope for retailers to innovate and tailor their assistance programs so that they could be delivered efficiently to the customer. However, the ESC concludes that:[169]

> *Ten years of experience shows that this open-ended discretion has led to highly variable practices by retailers and inconsistent outcomes for customers.*

A number of the more significant areas where retailer discretion has led to inconsistent outcomes for consumers are summarised below:[170]

Eligibility criteria

The ESC states that retailers have significant discretion and insufficient "regulatory guidance" in two areas, namely:[171]

- The obligation to provide at least two payment plans to customers experiencing payment difficulty without sufficient regulatory guidance about the terms and conditions on which those plans are offered; and
- The obligation to assess a customer's capacity to pay without any regulatory guidance about the form of that assessment.

The outcome has been highly variable practices by retailers and inconsistent outcomes for consumers.

Use of indicators

Most retailers used 'indicators' to identify customers who may require assistance and, more particularly, customers who should be placed into the retailer's hardship program. These indicators typically relate to an assessment by the retailer's staff of the customer's financial or personal circumstances.

Different businesses will rate these factors differently depending on their business policies and processes. As a result, retailers will differ in which customers get access to hardship program assistance and which customers are placed on a short-term payment plan.

Access to assistance

The ESC states that while retailers must establish payment plans having regard to a customer's 'capacity to pay', retailers interpret this obligation differently.

The ESC's review found that half of the retailers in the study determined a customer's 'capacity to pay' based on what the customer tells them about the debt they can afford and over what timeframe. If a customer does not appear to be able to pay the debt over that timeframe the customer may be transferred to a hardship program.

The other retailers require the customer to provide significant financial and personal information in order to decide if the customer should have access to a hardship program. In some instances, failure to provide this detailed personal information may lead the retailer to deny access to the hardship program even when the customer would be otherwise eligible.

167. ibid, p. 17.
168. ibid.
169. ibid, p. 18.
170. For details see Ibid, p.p. 17 – 20.
171. ibid, p. 18.

These detailed investigations may also be used by the retailer to assess whether the customer has the 'intention but not the capacity to pay' or (in the retailer's view) the 'capacity to pay but not the intention to pay'.[172]

Other retailers have a standard practice of refusing vulnerable customers access to their hardship programs if they do not have a health care card even when this is not a formal criteria for entry to a hardship program.[173]

The ESC concludes that whether a customer is offered a payment plan or transferred to a hardship customer program depends on each retailer's internal policies and practices: **"Energy consumers as a whole are not being given consistent access to assistance"**.[174]

Alignment of Incentives

The ESC also noted that the regulatory framework in Victoria creates financial incentives for retailers to limit a customer's access to assistance.

In particular, the combination of prohibitions on disconnection and debt recovery for customers in hardship programs and the cost of supporting customers on the program act as incentives for retailers to minimise access to hardship programs.

However, the ESC also notes that retailers have found customers have insufficient incentives to engage with their retailer when they need support, particularly when the debt gets high.

The regulatory framework therefore, requires incentives on both retailers and customers to work together.

3.2.2.2 Form of Assistance Provided

Hardship program and payment plans

Retailers have significant discretion to determine the form of assistance to offer vulnerable customers. The ESC found that the form of the assistance primarily relates to whether a customer is included in the retailer's hardship program or is assessed as eligible for a payment plan but not for the retailer's hardship program.

Participation in retailer hardship programs has increased by some 40 per cent over a five-year period to 2013–14.[175] However, it is not clear if this reflects greater payment difficulties or changes in the policies and procedures of the retailer.

In any case, the ESC's review illustrates the importance of the classification process in terms of the types of service provided to a customer with payment difficulties. These differences in services according to the eligibility classification are illustrated in Table 4 below.

Table 4: Comparison of Assistance Potentially Available to Vulnerable Customers (Customers experiencing payment difficulty).

Support that may be offered	to PAYMENT PLAN customers	to HARDSHIP PROGRAM customers
Concession check	7 of 9 retailers	All 9 retailers
Utility Relief Grant	7 of 9 retailers	All 9 retailers
Tariff review	5 of 9 retailers	All 9 retailers
Payment deferral	All 9 retailers	None of the 9 retailers
Bill smoothing	7 of 9 retailers	None of the 9 retailers
Payment plan	All 9 retailers	All 9 retailers
Incentive payments [14]	None of the 9 retailers	Offered by 6 retailers on a case-by-case basis
Debt waiver	None of the 9 retailers	Offered by 1 retailer on a case-by-case basis
Review method of payment (Centrepay, direct debit etc.)	All 9 retailers	All 9 retailers
Energy efficiency advice over the phone	All 9 retailers	All 9 retailers
Energy efficiency field audit	None of the 9 retailers	6 of the 9 retailers on a case-by-case basis
Equipment/appliance replacement	None of the 9 retailers	2 of the 9 retailers on a case-by-case basis
Financial counselling referral	3 of 9 retailers	All 9 retailers

Source: ESC, *Supporting Customers, Avoiding Labels*. Energy Hardship Inquiry Final Report, February 2016, Table 2.4, p. 21.

172. ibid, p. 19. Clause 71B of the Energy Retail Code (version 11) requires a hardship policy to reflect that a customer in financial hardship has the intention but not the capacity to pay. Assessing a customer's 'intention' adds another layer of subjectivity to the process of assessing the capacity to pay and access to a hardship program.

173. ibid, p. 20. Kildonan Uniting Care identified this issue in their submission to the ESC's issues paper.

174. ibid, p. 20.

175. ibid, p. 20. Note, this figure understates the 2013-14 changes as it is not adjusted for correction of hardship data by one major retailer in August 2015.

Table 4 above also illustrates the ESC's observation that the form of support varied across retailers, although most offered the key customer supports for hardship program customers. The ESC's study also revealed that the forms of assistance provided by a retailer varied over time as demonstrated in the next section.

Payment Plans

Payment plans are by far the more common form of assistance provided by retailers to customers experiencing payment difficulties. The ESC defines a payment plan as follows:[176]

> *A payment plan is an agreement with a retailer that the customer will pay off an amount owed in regular instalments, in addition to paying for their ongoing energy use.*

Despite what would appear to be a relatively simple process, the ESC observed that the proportion of customers being offered payment plans varied across retailers.

Across all the sampled retailers, the average proportion of the total customer base on payment plans in 2013–14 was 3.5 per cent. However, this varied across different retailers, from 0.5 per cent to 7.5 per cent.[177]

Figure 4 illustrates both the differences between retailers and the changes over time for individual retailers. Between 2009–10 and 2013–14, the overall proportion of customers on payment plans decreased by some 21 per cent.[178]

However, three retailers largely drove this decline in the proportion of customers on payment plans. The proportions for other retailers remained static or even increased slightly over the five years.

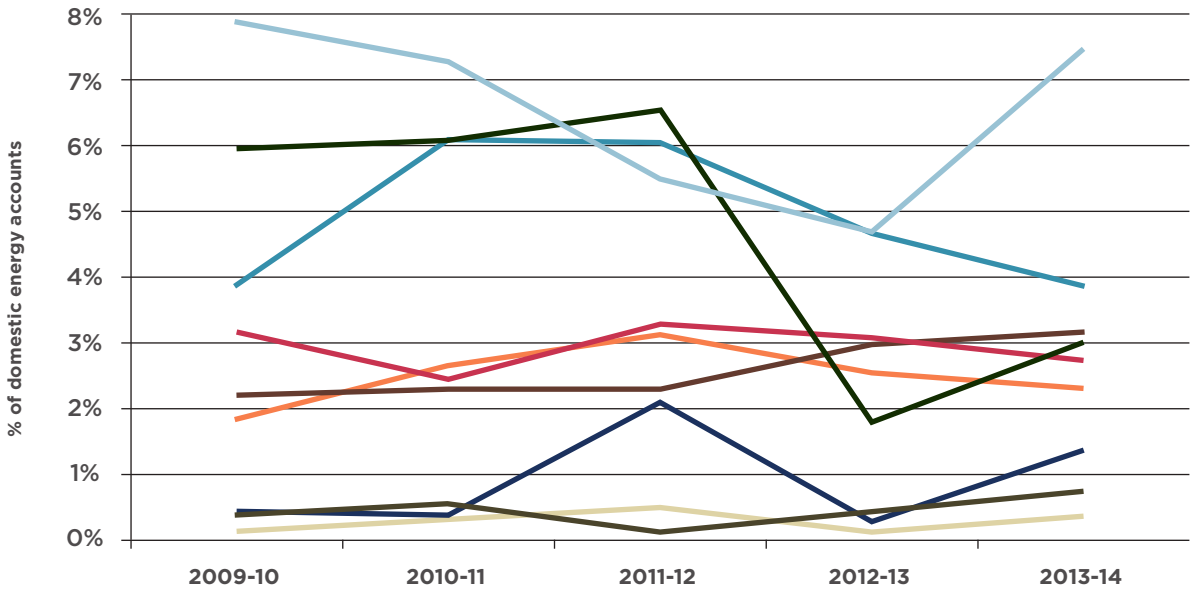
There are no obvious reasons why these figures should vary across retailers and over time. The ESC considers that this variation between and within retailers over time appears to reflect different retailer policies and changes in these policies over time, rather than external factors. The ESC concludes:[179]

> *These differences in, and changes to, internal policies across retailers and within individual retailers affect the likelihood that customers will be offered a payment plan.*

Payment plan design and duration

In the current regulatory framework, retailers have wide discretion over the terms and conditions of a customer's payment plan including the instalment amount,

Figure 4: Proportion of All Residential Customers on Payment Plans – Nine Retailers



Source: ESC, *Supporting Customers, Avoiding Labels*. Energy Hardship Inquiry Final Report, February 2016, Figure 2.1, p. 22.

176. ibid, p. 22.
177. ibid, p. 23. This figure of 3.5%, has been adjusted to 3.25 per cent following correction of data by one retailer.
178. ibid.
179. ibid, p. 23.

frequency of payments and therefore the overall duration of the payment plan.

Reflecting this level of discretion, the ESC's investigation found that there were considerable differences in both the design and duration of payment plans between retailers.[180]

While it might be expected that larger debt was associated with payment plans of longer duration, the ESC observed that in practice there did not appear to be any consistent relationship between the two.

Table 5 below illustrates the outcomes for customers who were on a retailer's payment plans but outside the retailer's hardship programs. Two retailers only offered one type of payment plan duration (retailer 1 and retailer 5). Another retailer (retailer 7) had an average debt of $1,512, but 29 per cent of the customers were expected to pay back their debt over a three month period as well as their ongoing usage. On the other hand this same retailer had 50 per cent of its customers on a payment plan of more than 24 months duration.

Unfortunately, the data in Table 5 do not tell us about whether this variation reflected different customer requirements or was more due to internal policies of the retailer and perhaps even individual staff perceptions of capacity to pay.

The ESC study and other research suggest that the variation in outcomes might well reflect differences in retailers' internal policies. For example, in its 2015 study of energy affordability, the Energy and Water Ombudsman (Victoria) (EWOV) stated:[181]

> *EWOV is concerned that some retailers are not providing effective and accessible assistance to customers with payment difficulties.*
>
> ...
>
> *[e]ach retailer has its own procedures and practices to implement these obligations. [the obligations in the Energy Retail Code]*

Energy Management Assistance

The Energy Retail Code requires retailers to offer hardship customers an option to purchase or replace electricity appliances. Hardship customers also have an option to receive an energy audit service.[182]

Table 5: Duration of Payment Plans for Customers Outside Hardship Programs (months and proportion of customers)

Retailer	Average debt	0-3	3-6	6-9	9-12	12-15	15-18	18-21	21-24	>24
Retailer 1	n/a					100%				
Retailer 2	n/a	44%	40%	4%		4%	4%			4%
Retailer 3	$244	2%	25%		42%					31%
Retailer 4	$156	21%	32%	3%	38%		1%		5%	
Retailer 5	$418				100%					
Retailer 6	n/a									
Retailer 7	$1512	29%	11%	6%	4%					50%
Retailer 8	$425	63%	21%	11%	5%	<1%				
Retailer 9	$411	46%	3%		1%					50%

n/a - Not available

Source: ESC, *Supporting Customers, Avoiding Labels*. Energy Hardship Inquiry Final Report, February 2016, Table 2.4, p. 21.

180. ibid.

181. Energy and Water Ombudsman (Victoria) 2015, A closer look at affordability : and Ombudsman's perspective on energy and water hardship in Victoria, March, p. 15

182. Retailers offer energy usage advice on their web-sites (of differing quality) but this section refers to an actual 'in-home audit' or a telephone audit.

The ESC study indicated that relatively few customers received any practical assistance to better manage their energy use. This is despite the fact that customers on payment plans use an average of 121 per cent more electricity than other customers in their postcode, and customers participating in hardship programs use 116 per cent more energy.[183] Similar results were found for gas usage.

Figure 5 illustrates the very low proportion of hardship customers who received a field audit or a replacement appliance in the ESC study. Less than 10 per cent of hardship customers received a field audit and only slightly more received an appliance replacement despite the real benefits the customer could receive from reduced energy use and energy costs.

This is particularly the case for hardship customers who may not have the ability to pay for their ongoing usage let alone repay the accumulated debt. For these customers, unless usage is reduced, the debt will continue to grow.

The AER also observed a low proportion of field audits for hardship customers. The AER explained this outcome in terms of customer resistance to a home visit and the cost to retailers of a home visit. The AER noted that customers and retailers generally preferred telephone energy audits. However, the effectiveness of a telephone audit in reducing energy usage is not yet known.

Debt and Disconnection

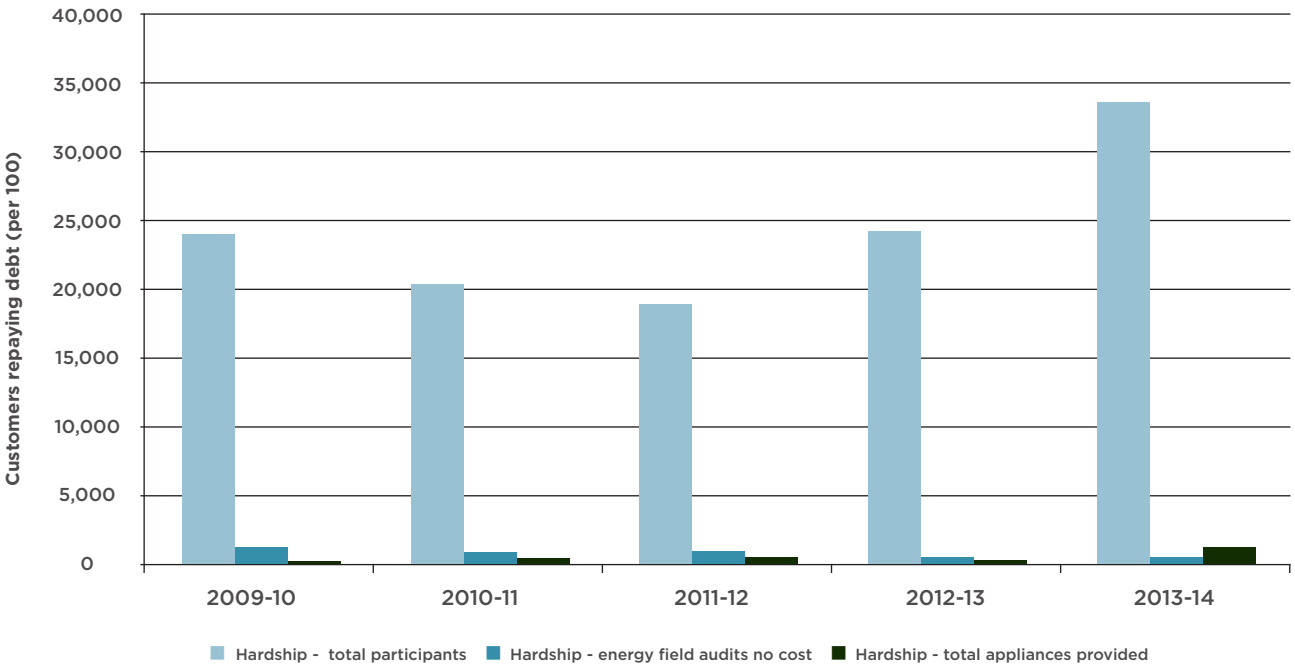
The ESC review also sought to identify the average level of debt on customers' entry to a payment plan and the average level of the customers' current debt. The review assessed the levels of debt for hardship customers and, separately, for customers on payment plans who were not categorised as hardship customers.

Table 6 below summarises the ESC's findings based on the results of nine retailers, including the three major retailers operating in Victoria. It is apparent from this table that retailers' payment arrangements differed in terms of the level of debt at which their customers entered a payment plan and the extent to which their activities were associated with a reduction in debt over time.

Notably, four of the nine retailers had allowed debt to accumulate to over $1,000 before entering a payment plan. Four retailers had let debt accumulate to over $1,000 on entry into a hardship program.

In most instances, customers entering a hardship program started the program on a level of debt that was significantly higher (around 53 per cent) than customers entering into a standard payment plan arrangement.

Figure 6: Energy Efficiency Assistance Provided to Customers in Hardship Programs



Source: ESC, *Supporting Customers, Avoiding Labels*. Energy Hardship Inquiry Final Report, February 2016, Figure 2.3, p. 27.

183. See ESC, Supporting Customers, Avoiding Labels. Energy Hardship Inquiry Final Report, February 2016, p.p. 25-26. See also footnote 23 in the ESC report.

Hardship customer debt averaged $947 on entry while payment plan customers debt averaged $620.

Considering that hardship customers are generally customers who are under the greater financial stress, the level of debt on entry is a matter of great concern and highlights the importance of early identification of these hardship customers.

In addition, for the majority of retailers, the customers on a hardship plan had not been able to reduce their debt. Rather, *average debt for customers on hardship plans had increased* by some 13%, i.e. from $947 on entry to $1074.

In the worst instance, the average debt for the hardship customers of a retailer had grown by some 58 per cent (retailer 1). Only three retailers saw a reduction in the debt of their hardship customers (retailers 4, 5 and 8).

For non-hardship customers on payment plans, however, average debt for customers on a payment plan (excluding hardship customers) was reduced by 33 per cent, i.e. from $620 to $414. All retailers saw a reduction in their customer debt although the amount ranged from 3.6 per cent reduction (retailer 2) to 60 per cent reduction (retailer 8).

Overall, it is clear that there were very significant differences in the outcomes for customers of different retailers, a fact that is particularly concerning for the most vulnerable customers.

SACOSS therefore agrees with the ESC's conclusion that:[184]

> *These findings indicate that retailers' assistance to customers experiencing the most severe payment difficulties (that is, those on hardship programs) is insufficient for those customers to avoid the accumulation of further debt and repay the debt they owe.*

Various submissions from consumer representatives to the ESC's Draft Inquiry Report also highlighted the issue of customers who cannot pay for their usage let along repay the existing debt. Their view is that the regulatory frameworks do not adequately address this group, yet this group sits at the core of the community challenge to achieve equitable access to energy.

The ESC also points to the profile of customer disconnections, which varies across different retailers and over time.

Customers cannot be disconnected while participating in a payment plan or in a hardship program. However, it is instructive to look at outcomes for customers after the programs are completed and, in particular, whether

Table 6: Comparison of Debt on Entry to a Payment Plan and Current Debt (Average $)

	Payment plans outside Hardship Programs			Hardship Program Payment Plans		
	Debt on entry	Current debt	Change	Debt on entry	Current debt	Change
Retailer 1				1100	1734	634
Retailer 2	1002	966	-36	915	942	27
Retailer 3	331	294	-36	642	670	27
Retailer 4	348	156	-191	393	268	-125
Retailer 5	541	468	-73	849	737	-112
Retailer 6				1036	1218	182
Retailer 7	1787	1512	-275	967	1070	103
Retailer 8	1053	425	-628	1239	1148	-91
Retailer 9	687	411	-277	1207	1211	4
Average (weighted)	**620**	**414**	**-206**	**947**	**1074**	**127**

Source: ESC, *Supporting Customers, Avoiding Labels*. Energy Hardship Inquiry Final Report, February 2016, Table 2.4, p. 21.

184. ibid, p 16.

these customers were subsequently disconnected for non-payment.

The ESC reports that over the period 2009–10 to 2013–14, disconnections for customers who had previously been on a *hardship program* rose by 202 percent. For customers who had previously been on a *payment plan*, disconnections rose by 37 percent.[185]

While the ESC could not reach definitive conclusions on why disconnections in general had increased, it did consider that assistance to customers was often "too little, too late".

By the time many customers are offered assistance, their debt is too large to be addressed by the retailers' assistance programs – the retailers' actions were doing "little to alleviate customers' risk of disconnection".[186]

The ESC also investigated the issue of 'wrongful disconnections' and associated wrongful disconnection payments (WDP). There was some evidence of an increase in WDPs after 2008. WDPs as a proportion of total disconnections have fluctuated from 1 to 3 per cent since 2008.

However, the ESC also notes that one factor behind the fluctuations in the disconnection rate may be the lack of 'objective standards' against which retailers and consumers can determine whether a disconnection was in fact wrongful. The ESC notes that both EWOV and the retailers have sought clarification of the relevant standards from the ESC.[187]

In EWOV's 2015 report on affordability, EWOV reviewed its data on WDPs for the period 2010–11 to 2013–14. EWOV concluded that:[188]

> *[e]nergy retailers are* ***not providing appropriate levels of assistance*** *to customers before disconnecting their supply.*
>
> *The proportion of paid WDPs suggests that* ***retailers often don't comply with the requirements of the Energy Retail Code*** *when disconnecting supply. Their non-compliance is mostly related to process issues, such as notice requirements, however we have also found many procedural shortcomings in the provision of hardship support to customers before disconnection. [emphasis added]*

3.2.3 Lessons from the ESC Inquiry

The ESC believes there is widespread support for the findings of its Inquiry (as summarised above) from both consumer representatives and retailers.

The ESC then concludes:[189]

> *The current regulatory framework cannot ensure that customers experiencing payment difficulty are provided with the assistance they need.* ***The framework is therefore in need of significant reform****. This is because it provides strong commercial incentives to limit both consumers' access to assistance and the scope of that assistance, whilst at the same time providing retailers with the discretion to determine which customers are eligible for assistance and what assistance they should receive. [emphasis added]*

More specifically, the ESC states that the regulatory framework for customers experiencing payment difficulties should have a "clear purpose that defines its goals and objectives".[190] Moreover, that purpose should have a focus on debt, as **it is debt that is the cause of disconnection** and a range of other legal and practical problems for customers.[191]

The ESC defines the purpose of the regulatory framework as follows:[192]

> *To assist customers experiencing payment difficulty to avoid long-term energy debt, and repay debt that does accrue, while wherever possible maintaining access to energy as an essential service.*

To achieve this purpose, and based on its investigation, the ESC proposes that regulatory reform of the regulatory framework should aim to:[193]

- Encourage and assist customers to self-identify and manage their payment difficulty as early as possible;
- Limit the capacity for a customer to accumulate energy debt prior to being offered assistance by the retailer;
- Set out clearly the assistance to which customers experiencing different levels of payment difficulty are entitled;
- Require retailers to show that the required assistance has been provided before disconnection can occur; and

185. ibid, p. 16.
186. ibid, p 17.
187. ibid, p. 31.
188. Energy and Water Ombudsman (Victoria) 2015, A closer look at affordability: and Ombudsman's perspective on energy and water hardship in Victoria, March, p. 30.
189. ibid, p. 39.
190. ibid.
191. ibid, 40.
192. ibid, p. 39.
193. See ibid, p 35-36 for details.

- Provide a safety net for customers in the most severe payment difficulty, to help them to remain connected to their energy supply.

SACOSS' response

SACOSS acknowledges that the issues that the ESC has identified, and is attempting to address in its revised framework, are real and have continued for many years without significant changes in the outcomes for customers experiencing payment difficulties.

This outcome is despite ongoing efforts by regulatory bodies to enhance the regulation of retailers and the services they provide to support customers experiencing payment difficulties.

SACOSS also notes that the issues that have been identified by the ESC are very similar to those found by the AER in its research and by a number of other studies including EWOV's 2015 study into affordability. The various consumer stakeholders in Victoria also agree with the ESC's assessments of the issues facing vulnerable customers in Victoria and the limitations of the current regulatory framework.

The findings of the ESC's investigations also align with SACOSS' understanding of the issues around equity in access to payment and hardship programs, consistency in the application of the programs, early identification of payment difficulties, capacity to pay assessments, continuity in the management of the customers over the payment period, and improving access to information and energy efficiency services.

The fact that so little progress has been made in terms of the outcomes of the regulatory frameworks both in Victoria and nationally is indicative of the complexity of the challenge.

In practice, energy payment difficulties are usually just one aspect of the financial challenges that the most vulnerable customers (i.e. the 'hardship' customers) are facing at a point of time or over an extended period.

And the causes of the issues identified by the ESC go well beyond the interaction between the retailers and the customers. A sustainable solution ultimately requires co-ordinated responses from regulators, governments, retailers, community stakeholders and customers.

Even best practice management of vulnerable energy customers – and SACOSS considers some retailers are already close to this – cannot resolve all the issues or satisfy all the customers or eliminate debt and disconnection.

In this respect, SACOSS agrees with the ESC's Chairman, Dr Ben David when he describes the problem as a "Gordian knot in manifold dimensions",[194] and one that many have tried to untangle but few have succeeded in a sustainable way. Cutting the Gordian Knot of financial hardship and essential services may well require some "thinking outside the box".[195]

One solution is to concentrate on refining the current processes under the NECF and the Energy Retail Code with a particular focus on enhancing the timeliness, consistency and general quality of the interactions between the retailer and the customer and thereby encouraging the customer to become more engaged and more confident in managing the issues they face.

This is the general thrust of the AER's Sustainable Payment Plan Framework (SPPF). The expected benefits of the SPPF include earlier identification of the customer, more appropriate payment plans, longer-term commitment to the plan and, ultimately, the payment of the outstanding debt and the avoidance of future debt.

Another solution is to strengthen the regulation and the enforcement powers of the regulator by establishing a more strongly rules based process that in turn limits the discretion of retailers to decide which customers have access to what benefits and when.

This is the general thrust of the ESC's proposed reforms to the Energy Retail Code and related regulatory instruments. The expected benefits would include more consistency and equity in the management of vulnerable customers albeit at the cost of early quality based intervention and individually tailoring payment schemes for the customer. The discretion of both the retailer and the agency of the customer are limited by the rules and formulas.

Given the intractable nature of the problems facing customers who are unable to repay debt and ongoing usage – and the evidence provided by both the AER's study and the ESC's study that suggest there is a persistent core of such customers – there is merit in considering the proposal by some consumer representatives in their submissions to the ESC.

For instance, the Consumer Action Law Centre (CALC) suggests that the varying customer experiences require greater flexibility in the retailer's response. CALC suggests that by focusing on debt, the ESC does not address the question of those who cannot pay the debt. CALC argues that a key objective of the ESC's project should be on retaining supply for all consumers who engage with the retailer.[196]

194. Dr Ron Ben-David, Supporting Energy Customers in Financial Hardship: Untying the Gordian Knot. Presented at the Credit Collections & Hardship Program in Utilities Conference, 11 May 2015.

195. see for instance, https://en.wikipedia.org/wiki/Gordian_Knot

196. See for instance: Consumer Action Law Centre, Submission to the Energy Hardship Draft Report, 12 October 2015, p.p. 2-3.

Section 4 will further consider the proposed reforms by the AER and by the ESC. SACOSS will assess both of the proposed reforms in the light of the issues identified and the objectives for the reforms.

3.3 Other research into vulnerability and payment difficulties

In this section, SACOSS will review other research that has been undertaken on the issue of 'financial vulnerability' and the financial barriers some households face in paying their energy bills.

In particular, this section will discuss the research that has been conducted in the UK by Ofgem. Ofgem's research adds a number of new dimensions to our understanding of vulnerability, how it arises and how energy regulators and retailers might best address it given the intractable nature of the problem.[197]

Ofgem's research also sheds light on the importance of 'empowerment' of consumers both in addressing their payment difficulties and in participating in, and receiving the benefits of, competitive markets and new technologies.

3.3.1 Office of Gas and Electricity Market (Ofgem)

Ofgem in the UK has conducted a number of studies on issues facing vulnerable customers. In response to these studies, and reflecting the importance Ofgem places on the issue, Ofgem has developed a multi-year Consumer Vulnerability Strategy (CVS) that is designed to provide robust research into the causes and effects of consumer vulnerability.

The discussion below looks at two aspects of Ofgem's CVS and associated research program. In the first instance, SACOSS summarises some of the findings of the 2010 report by Ofgem that reviews suppliers' approaches to debt management and prevention.

This 2010 report outlines some of the major issues identified by Ofgem in the management of vulnerable customers by the UK energy retailers. These findings influenced the subsequent establishment of the CVS.

The second section will consider the most recent progress report of the CVS (dated September 2015). This 2015 report provides a useful conceptual framework for understanding vulnerability in the energy market and the customer, situational and external factors that influence this vulnerability.

3.3.1.1 The 2010 DMP Review[198]

There are undoubted differences between the UK energy market and the Australian energy market. There are also differences in economic conditions generally and the 'social contract' assumptions that underpin the regulation of the energy markets.

Nevertheless, it is notable that the findings of Ofgem's DMP Review are quite similar to the findings of the AER and the ESC in their more recent reviews. Key observations by Ofgem in this 2010 study include the following:[199]

- *Progressive increase* in the amount of debt customers owe;
- *Limited level of proactive intervention by suppliers,* not necessarily offering assistance to the customer, even when there were 'early warning signals';
- Concern about the way in which energy suppliers *take into account a customer's ability to pay* when agreeing debt repayment rates;
- *Significant increase* in average weekly repayments;
- *Inconsistent approach* to assessing capacity to pay not only across energy suppliers but within them depending on the approach of individual customer service agents;
- *Lack of systematic way of gathering information* from the customer on their circumstances when establishing a payment plan;
- *Inadequate monitoring of customer's payment arrangements* to ensure they remain sustainable;
- *High charges for disconnection and reconnection* and lack of visibility of those charges to customers;
- The need for *early contact with vulnerable customers* before the debt becomes unmanageable;
- *Incentive mechanisms* for staff that may lead to outcomes that are not appropriate for the customer;
- *Limited access to various payment options* including linking customers to the UK "Fuel Direct" program[200] and suitability for prepayment metering; and
- *The way in which debt is followed up*, particularly by debt collectors, and whether this complies with the UK Office of Fair Trading guidance.

197. Ofgem uses the terms "vulnerable customers" and "vulnerability" rather than referring to "customers with payment difficulties" or "hardship customers" as commonly used in Australia. However, for the purposes of this report they can be regarded as equivalent terms.

198. Ofgem, Review of suppliers' approaches to debt management and prevention, June 2010. https://www.ofgem.gov.uk/ofgem-publications/57397/debt-review-report.pdf

199. See ibid, p.p. 1 – 2, for more detail.

200. The UK Fuel Direct scheme allows some bills, including energy bills, to be paid directly out of a customer's benefits payments. The scheme sets a maximum percentage of benefit payment that can be allocated to a bill (5% for gas, electricity and water). A person is protected from a 'final demand' while paying a bill under this scheme. See https://www.gov.uk/bills-benefits

In particular, Ofgem highlighted the importance of proactive and early intervention by the supplier. Ofgem considered that a proactive approach was preferable to a retailer just waiting for the customer to contact them.

This 'pre-arrears' intervention must, however, go beyond formal letters, texts etc. Rather, the intervention should involve more personal contact (by phone or visit) and *be more sensitive to the individual customer's situation.*

Ofgem's 2010 findings are remarkably similar to the AER's and the ESC's findings from their 2014–15 investigations. However, Ofgem's 'solution', which involves personal contact and understanding of the individual customer's situation, is in contrast to the ESC's approach that explicitly seeks to avoid 'capacity-to-pay' assessments by the retailer.

Ofgem's DMP review also served as input into the development of Ofgem's CVS in 2013.

3.3.1.2 Consumer Vulnerability Strategy (CVS)

Background to the CVS

Ofgem developed its CVS in 2013 in response to growing concerns by Ofgem and the UK government with the management of vulnerable energy customers and the level of disconnections.

Ofgem's report also highlighted the lack of any substantive conceptual or empirical analysis of financial vulnerability and the rights of consumers to access an essential service. There was also a concern that the consumer benefits of competitive retail energy were not being shared with vulnerable customers.

Given this, Ofgem sees the role of the CVS as twofold. The CVS research program will guide Ofgem's continuing conceptual and empirical work on consumer vulnerability. It will also guide Ofgem's expectations about the performance of the retailers and their assistance to customers experiencing payment difficulties.[201]

SACOSS considers that the work undertaken by Ofgem within the CVS program offers useful insights for the assessment of programs to manage vulnerable customers in Australia. It also points to the benefits of an ongoing research program that is specifically directed at issues around energy supply to vulnerable customers.

Ofgem has realised the importance of clarifying what, in practice, identifies a customer as a 'vulnerable' customer. Ofgem also contends that there needs to be more clarity on the responsibilities of a provider of an 'essential service' (such as an energy retailer) with respect to these vulnerable customers – what is the nature of the 'social contract'.

Ofgem's CEO explained the origin and importance of the CVS as follows:[202]

> *Energy is an essential service which makes a profound difference to all our lives.*
>
> *...*
>
> *But there is almost nothing more important to me, and to my fellow Board members and Ofgem colleagues than the work Ofgem does to protect consumers in vulnerable situations.*
>
> *Our mission is to make a positive difference for all energy consumers in Great Britain. Our regulatory approach reflects the fact that energy is an essential service, with a wider impact on health and participation in society.*
>
> *So we have a particularly important role in relation to people who may experience greatest harm when things go wrong, or are least able to present their own interests in the market.*

Defining vulnerability and a vulnerable customer

For the purposes of implementing the CVS, Ofgem defines a 'vulnerable consumer' as an energy customer who, when personal circumstances and characteristics combine with aspects of the market, is:[203]

- Significantly less able than a typical consumer to protect or represent their own interests; and/or
- Significantly more likely to experience detriment, or for that detriment to be more substantial.

Ofgem further explains that whether a customer meets one or other of these criteria depends not only on the personal characteristics of the customer, such as age or disability, but also the situation or scenario they are in and how the market responds to their needs. Ofgem states:[204]

> *Vulnerability is about the situations in which consumers are in, rather than about the individual per se. Risk factors can stem from individual circumstances and the market, and how they interact. The range of risk factors means that vulnerability can often be complex and multidimensional. Vulnerability can be transitory as circumstances change.*

Empowerment of vulnerable customers

Ofgem is concerned that: "(market) competition is not working as well as it could for consumers, not least those

201. See for instance, Ofgem, Consumer Vulnerability Strategy, 4 July 2015, p. 1.
202. Ofgem, Consumer Vulnerability Strategy Progress Report, September 2015, p. 3.
203. ibid, p. 67.
204. Ofgem, Consumer Vulnerability Strategy, 4 July 2013, p. 13.

in vulnerable situations".[205] To wit, Ofgem's CVS explicitly includes actions that empower consumers and enable all consumers to have better access to the benefits of a competitive retail market.

The empowerment programs might include more proactive provision of information about market offers to vulnerable customers, such as further education of third party intermediaries. It might also include the provision of a free telephone service so that vulnerable customers are not deterred by the cost of a call or delays in call answering. Ofgem states in the CVS Progress Report:[206]

> *We want to ensure that consumers can access telephone services easily and without incurring high call charges. We recognise that high charges can deter customers from engaging with their supplier or result in disproportionate financial detriment.*

Such a program of empowerment enables a vulnerable customer to more actively participate in negotiating the terms and conditions of a more realistic and sustainable payment plan. More generally, greater empowerment will facilitate a vulnerable consumer becoming a more active participant in the energy retail market, better able, in the future, to choose the retail product best suited to their needs.

A risk based model of vulnerability

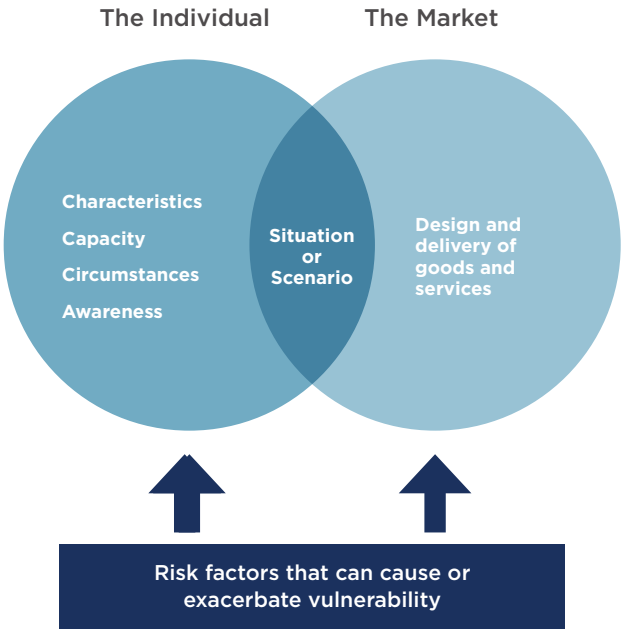
Figure 6 below illustrates this relationship between the individual, the market and the situation or scenario in determining the risks of a customer becoming a vulnerable customer or exacerbating existing vulnerability.

Table 7 below sets out in more detail some of the risk factors, although Ofgem notes that this list is not exhaustive and nor does it indicate that a consumer will always experience detriment even if they meet some of these risk factors.

Rather, these factors make a customer more vulnerable to detriment and the greater the number of these risk factors, the more likely it is that the consumer will experience such detriment.

Moreover, these risks may change over time for any individual customer. For example, vulnerability might be permanent or long-term (such as a vulnerability caused by chronic disease). However, vulnerability may also be transitory, albeit it may take the customer some time to recover and repay all debt. The response of the energy supplier should reflect and be tailored to these differences.

Figure 6: Risk Factors that might cause or exacerbate vulnerability



Source: Ofgem, *Consumer Vulnerability Strategy Progress Report*, September 2015, p. 67.

The CVS is built around this framework. In particular, the CVS aims to:[207]

- protect and empower consumers in vulnerable situations – to reduce the likelihood and impact of vulnerability; and;
- ensure all consumers can access market benefits – so that nobody is at a disadvantage due to their circumstances.

Together, these dual aims ensure that the CVS will take a much broader view of the interaction between vulnerable customers and the energy market in general. It is not just about focussing on debt levels and disconnections but empowering these same consumers to proactively participate in the energy market to find the product and services that best meet their needs.

Such an approach requires a deeper understanding of the complex interactions between the individual and the market place. However, as highlighted by Ofgem, the benefit of adopting a risk-factor approach is that it allows the regulator or retailer to better identify customers who are at financial risk and under what circumstances this is more likely to occur. Ofgem states:[208]

[205] Ofgem, Consumer Vulnerability Strategy Progress Report, September 2015, p. 4.
[206] ibid, p. 38.
[207] ibid, p. 10.
[208] Ofgem, Consumer Vulnerability Strategy, 4 July 2013, p. 19.

Table 7: Risk factors identified by Ofgem

Characteristics & capacity	Circumstances - personal	Circumstances - general	Market risk factors
Ill-health	Living alone	Living in rural area	Lack of affordable phone access
Mental health	No internet access	Living off gas grid	Complex product information
Literacy/numeracy	Unemployment or redundancy	Living in private rental accommodation	Access for customers with hearing, sight or speech impediments
Speech impairment	Full time carer	Living in a cold, energy inefficient home	Limited market options available to vulnerable customers
English skills	Lone parent	Having a certain meter type (e.g prepayment)	Cost to serve vulnerable customers
Confidence /social skills	Leaving care		Risk assessment for this customer class
	Relationship breakdown		
	Bereavement		

Source: Adapted from Ofgem, *Consumer Vulnerability Strategy Progress Report*, September 2015, p.p. 68-69.

> *...which consumers are more likely to face detriment, in which scenarios and why. It aims to avoid a 'tick box' approach that can over-simplify vulnerability and it will help us target interventions at those in greatest need.*

Ofgem also considers that understanding these risks factors is central to its regulatory efforts and must be considered as an ongoing and evolving exercise for the regulator. It provides a better understanding of the needs and experiences of customers in vulnerable situations.

Importantly, it also provides a conceptual framework to better understand the 'distributional impacts' of Ofgem's decisions and those of industry and government.[209]

What can we learn from Ofgem's CVS program?

At a policy level, Ofgem's CVS highlights the value of a strong commitment by the regulator to the principle and practice of managing vulnerable customers, supported by a substantial program of theoretical and empirical research.

More specifically, the CVS program illustrates the importance of having a clear understanding of what is meant by a vulnerable customer and what are the obligations on the regulator, the retailer and the consumer regarding the provision of an essential service to ensure vulnerable customers retain equitable access to the essential services.

The CVS also provides an extensive and ongoing body of work that provides greater insight into the risk factors that increase the probability that a consumer is or will become a vulnerable consumer. The CVS illustrates the importance of taking a broader view of vulnerability including the wider social context in which vulnerability can be reduced or exacerbated.

Regulators and retailers who take this into account will be in a better position to identify customers at risk early in the process and to manage these customers before their debt becomes too great.

Finally, but importantly in the Australian context, the CVS places an emphasis on empowering the vulnerable customer. This includes incorporating strategies and policies that empower a vulnerable customer to negotiate payment plans that can be sustained in their own personal circumstances.

Empowerment also includes empowering a vulnerable customer to participate actively in the competitive market to ensure that the customer has access to the products and services most suitable for their needs.

SACOSS notes the tension here between ensuring consistency between retailers in terms of the outcomes for customers (reduced debt, avoid disconnection) while allowing the flexibility to implement programs that respond to the individual circumstances of the customer. A program such as the CVS supports a more empirically evidence based approach to resolving this dilemma.

[209] See: ibid, p. 14.

4. New AER and ESC frameworks

4.1 Overview

As noted previously, SACOSS supports the extensive investigations of the current hardship programs that were undertaken by both the AER and the ESC in 2014–15. SACOSS also notes the important research by other bodies that shed further light on the issues confronting the regulatory bodies.

Following their investigations, and after further consultation with key stakeholders, both the AER and ESC have proposed to further develop their respective regulatory frameworks.

In 2016, the two regulators each published new arrangements for the energy retail industry as set out in the following key documents:

- AER: *Sustainable Payment Plans – A good practice framework for assessing customers' capacity to pay Version 1,* July 2016.
- ESC: *Supporting Customers, Avoiding Labels, Energy Hardship Inquiry Final Report",* February 2016.

In section 3 of this report, SACOSS highlighted that the AER's and ESC's research findings were very similar and are also reflected in other research reports and in the performance reporting by the regulators.

Despite the similarities in their research findings, however, the AER and ESC have adopted quite different approaches to the reform of their regulatory approach to managing customers facing difficulties in paying their energy bills.

In brief, SACOSS suggests that the AER has adopted an "evolutionary" approach. That is, the AER's approach is to encourage retailers to improve their management of vulnerable customers by developing a further voluntary 'best practice' guideline for energy retailers. The focus of the AER's framework is around early intervention and the quality of the retailers' interactions with their customers, particularly when determining the 'capacity to pay'.

In contrast, SACOSS considers that the ESC has adopted a "revolutionary" approach, reworking much of the current hardship policies and approaches to the management of hardship customers.

The ESC's approach is relatively detailed and prescriptive, relying on an 'automated' process to identify customers with payment difficulties and mandating key aspects of the payment plan.

Moreover, the ESC explicitly seeks to avoid retailers initiating 'capacity-to-pay' conversations with the customer facing payment difficulties. It sees these conversations as ineffective and intrusive. The ESC therefore replaces these conversations with what it sees as objective measures of a customer's 'payment difficulties'.

Individual customer management will only occur when and if the customer is designated as a 'hardship customer', using predefined criteria again based on a customer's consumption and payment history rather than an assessment of 'capacity-to-pay'. The process will be set out in the Energy Retail Code and it will be mandatory for all retailers to comply with the Code requirements.

As such, the ESC's approach reflects the view of the ESC that the current process is 'broken' and that 'flexibility' for retailers means, in practice, 'inconsistency' in service standards and outcomes for customers.

The ESC's approach also represents a significant divergence from the national approach and will impose changes to retail billing processes that are likely to impact on a much broader range of customers than just the "hardship" customer.

The following sections provide further details on the proposals by the AER and the ESC to drive the energy retailers towards best practice management of vulnerable customers experiencing payment difficulties.

4.2 The AER's Approach: Sustainable Payment Plans Framework (SPPF)

4.2.1 Overview of the SPPF

The AER's guidance to retailers and the AER's Sustainable Payment Plans Framework (SPPF) have been developed within the context of the NERL and NERR.

Specifically, the NERL requires retailers to establish payment plans for customers having financial difficulties taking into account:[210]

- A customer's capacity-to-pay;
- Any amount the customer owes; and
- How much energy the customer is expected to use over the next year.

While the retailer can objectively assess the last two requirements, assessing the first requirement – the customer's 'capacity-to-pay' – is a far more subjective process. For instance, a customer's capacity-to-pay reflects individual household circumstances (such as household income, the number of dependents, health status of household members and so on); a point that was discussed above and highlighted by the Ofgem analysis of vulnerability.

[210] NERR, r. 72.

The customer needs to be willing and able to discuss these more personal factors with their energy retailer. However, many customers may find such a process intrusive and may not feel comfortable discussing their personal circumstances with a retailer.

It also requires both the retailer and the customer to make 'value' judgements. For example, the retailer will have to make value judgements about the customer's willingness-to-pay and to cooperate with their retailer over the course of the program. Likewise, the customer will be making value judgements on the retailer's trustworthiness and willingness to listen to their concerns.

Much will depend therefore on the quality of the initial interactions between the retailer and the customer. Given the importance of this initial interaction, the AER's approach is focussed on improving the quality of these initial discussions.

The intent of the AER's SPPF is to identify best practice in identifying a customer's capacity-to-pay and thereby encourage retailers to adopt practices that will benefit the customer and the retailer. The AER states:[211]

> *The Framework is intended to* ***improve the quality of capacity to pay conversations****, while still allowing flexibility and encouraging retailers to offer* ***extra assistance to customers****. Its aim is to achieve better outcomes by helping customers and retailers agree to payment plans that are affordable and sustainable. [emphasis added]*

To achieve this end, the AER states that its Framework comprises two elements summarised below and discussed further in sections 4.2.2 and 4.2.3. The two elements of the SPPF are:[212]

- A set of principles to guide retailers' conversations with customers about their capacity-to-pay; and
- A flow chart that sets out good practice actions and considerations at different stages of a payment plan, that is, good practices that can assist the customer in remaining on the payment plan over an extended time period.

SACOSS agrees with the AER's emphasis on establishing a set of principles that are designed to ensure the quality of the initial conversations between the retailer and the customer. SACOSS also supports the concept of the flow chart as set out in the SPPF with its emphasis on continued engagement.

There is a strong emphasis in both elements on the quality of the conversations between the retailer and the customer, the emphasis on customer empowerment, and on proactively working with the customer until the completion of the payment plan.

SACOSS considers that in the past, there has been limited attention paid to the processes that follow after the initial capacity-to-pay assessment. This gap is reflected in the very poor – and unacceptable - completion rates of customers on payment plans, particularly hardship customers. It is also likely to be a factor in the frequency with which these customers fall into debt again.

Given this, SACOSS agrees with the AER, that a range of benefits will potentially flow to both the retailer and customer under the best practice framework, including:[213]

- An increase in customers successfully completing payment plans;
- A reduction in customers failing payment plans;
- An increase in customers who proactively take steps to contact their retailer and discuss problems or changed circumstances; and
- Preventing a customer's debt from growing more than necessary while not causing an unsustainable financial burden on the customer.

Notwithstanding SACOSS' support for the principles and the flow chart set out in the SPPF and our agreement with the AER on the associated benefits to both retailers and customers, our view is tempered by the voluntary nature of the SPPF.

That is, adopting the SPPF is voluntary. Retailers are not obliged to adopt the SPPF so SACOSS remains concerned that some retailers will simply comply with the minimum standards in the NERL and NERR without striving for 'best practice'.

The AER states that if a retailer chooses to adopt the SPPF, it is the retailer's responsibility to ensure they apply the SPPF and have the appropriate policies and processes in place. There will be no formal compliance auditing.

Instead, the AER will publish a list of retailers who have committed to the SPPF. If the AER becomes aware that a retailer is systematically not applying the SPPF standards and policies, then the AER may remove their name from this list.

Because of this voluntary best practice guidance, SACOSS regards the AER's approach as 'evolutionary'. The AER is, in effect, relying on 'moral suasion' to improve the performance of the retail industry overall.

The clear risk remains, however, that those retailers already lagging behind in their management of

[211] AER, Sustainable payment plans; A good practice framework for assessing customers' capacity to pay, Version 1, July 2016, p. i.

[212] AER, Sustainable Payment Plans Framework, AER response to consultation issues, July 2016, p. 7.

[213] See: ibid, p. 7.

customers with payment difficulties will be the ones that don't sign up to the SPPF. Will 'moral suasion' be sufficient to change their behaviour; will the retail competitive market drive these retailers to adopt the SPPF? These are questions that the AER will need to monitor carefully over the coming years.

4.2.2 SPPF: Good Practice Principles

The SPPF sets out three principles that should guide a retailer's interactions with customers when discussing payment plans. The AER's three principles, and associated actions, by the retailer, are set out in Table 8 below.[214]

4.2.3 Good practice guide - flow chart

The good practice guide flow chart is in effect a flow chart that sets out a sequence of steps and options and describes the manner in which these steps should be taken by the retailer and the customer over the life cycle of a customer's payment plan.

The aim is to ensure there is continued positive engagement with the customer in line with the principles listed above until the debt is paid off. Importantly, however, the flow chart allows for flexibility in these steps so that the retailer and the customer can mutually agree to adjust the plan in response to changes in the customer's circumstances. The AER correctly sees the payment plan as a dynamic and responsive process.

The flow chart also provides for constructive engagement at the completion of the payment plan. Again this is an area that SACOSS considers has been neglected and should form part of standard best practice.

For instance, SACOSS notes the relatively high number of hardship customers who get disconnected within 12 months after being on a payment plan. It is to the benefit of the retailer and the customer to introduce policies that reduce the incidence of this poor outcome.

The AER's four-step flow chart is summarised below.[215]

First step: Identifying the customer's circumstances and capacity-to-pay

The first step in the process involves the retailer having a conversation with the customer by discussing their circumstances to determine what they can afford.

Initial assessment:

The AER prefers that the initial assessment of capacity-to-pay is led by the customer albeit with feedback from the retailer on whether the customer's initial proposal will also cover ongoing usage and how long the payment program will need to continue based on the customer's initial plan. The retailer may suggest alternative plans at this point.

Clarifying the customer's needs:

If it is not clear what the customer wants, then a deeper conversation about the customer's financial situation follows. However, this conversation must be undertaken

Table 8: Good practice principles and actions

Principle	Action
Empathy and respect	• avoid blame and judgement • act in good faith and assume customer is too • recognise the power imbalance between retailer & customer • listen to customer about their circumstance & capacity to pay • explain the consequences of the repayment schedule • give customer opportunity to fully consider the proposal
Flexibility	• treat customers as individuals/apply discretion when appropriate • offer customers a choice of payment method and frequency • understand some customer may not be able to make sufficient payments to cover ongoing usage and/or debt • accept customer's circumstances can change • work with customer to find a mutually acceptable solution, which may take some 'trial and error' • recognise a missed payment is not necessarily a sign of non-engagement or unwillingness to pay • be flexible and supportive when communicating with the customer
Consistency	• provide a consistent person whenever possible, particularly for customers on a hardship program • maintain thorough notes of all conversations, avoid requiring customers to repeat information • fully train all staff dealing with payment plans to ensure consistency in the standards of assistance • follow through on any commitments made

[214] For more details, see: AER, Sustainable payment plans, a good practice framework for assessing customers' capacity to pay, Version 1, July 2016, p.p. 1-2.

[215] For details see: AER, Sustainable payment plans; A good practice framework for assessing customers' capacity to pay, Version 1, July 2016, p. 3.

with the consent of the customer. For instance, the AER suggests the retailer may ask the customer if the customer is 'comfortable' with discussing this type of information.

Accessing further advice:

At this point the customer may propose, or be encouraged to, contact a budget planning website or financial counsellor to assist them in this process. The retailer should be willing to accept the advice of the counsellor about what the customer can afford to pay.

If the customer agrees to meet with a financial counsellor (or similar), then the retailer should discuss establishing a temporary payment plan to avoid growth in debt while waiting for access to a counsellor.[216]

Second step: Defining repayment options

The AER's Framework sets out three repayment options (as nominated by the customer) that in turn indicate to the retailer if additional support might be needed and the extent of that additional support.

The AER also highlights that these options are not restrictive in the sense that the retailer is free to offer any additional support to any customer. However, it does highlight that some customers are more likely to need higher levels of support such as those linked to the formal 'hardship' program. Notably, the customer is still in some control of the process and the repayment schedule.

Option A:

The customer nominates an amount that will cover ongoing usage and repayments of the debt within 12 months.

Option B:

The customer nominates an amount that will cover ongoing usage and repayments of the debt within 12 – 18 months. A retailer may want to consider if more support is required such as the support provided under the retailer's hardship program.

Option C:

The customer nominates an amount that is less than the amount needed to cover their ongoing energy usage and reduce any debt.

If the customer's suggested repayment amount is less than that required to meet ongoing usage, then this is a strong indication that the customer would benefit from an even more 'tailored' support program such as that available under the retailer's hardship program.

In addition, if the retailer agrees to payments less then ongoing usage, then the payment amounts should be reviewed at least every three months and there should be ongoing discussion on ways to reduce the debt (e.g. reviewing tariffs, assessing rebates, tailored efficiency advice, incentive payments, referral to a financial counsellor).

Third step: Monitoring usage and payments

Monitoring usage:

The retailer should monitor the customer's usage and their payments to regularly assess if the payment plan continues to be suitable. If not, the retailer needs to engage with the customer to develop an alternative plan. However, the retailer should not change the payment plan unilaterally.

Routine checks:

Even if the customer's usage doesn't change and payments are being made according to the plan, it is still good practice for the retailer to occasionally follow up with the customer, for instance, to see if the customer would like to accelerate their repayments.

Customer misses payments or claims payments are unaffordable:

The retailer should have another conversation with the customer about what they can afford and whether there should be another repayment plan established.

Retailers should follow up on missed payments (allowing a few days). If there are multiple missed payments, then the customer may be referred to a financial counsellor for further support.

Fourth step: Final Stages

Customer successfully completes the repayment plan:

The retailer and customer should discuss whether another payment plan or more frequent billing (for example) will help the customer in the future.

Customer is not engaging with the plan and/or the retailer:

The retailer may then commence the disconnection process in accordance with the NERL and NERR.

4.2.4 SACOSS' assessment of the AER's SPPF

4.2.4.1 SACOSS' assessment criteria

Based on the research and the results of the regulators' performance measures (cited above), SACOSS considers that improvements in customer outcomes will come from the following actions and processes:

- *Early identification* of the customer experiencing payment difficulty;
- *Improving the quality of the initial conversations between* the retailers and the customers including ensuring the customer is engaged in the process and has some sense of control or agency;
- Ensuring *customers have access to relevant information* on assistance that can be provided, rebates,

[216] Kildonan and other customer advocates have highlighted the long delays faced by customers in accessing financial counselling.

concessions etc., and assist in the customers obtaining access to these services if required;

- Having *flexibility* to respond to customer's requests and changing circumstances;
- *Regular monitoring* of the customer's energy usage, debt levels and the customer's repayment pattern over the course of the payment plan;
- *Regularly providing encouragement and other feedback* to the customer during the course of the plan (including incentives);
- *Improving the level and quality of the additional measures* for hardship customers including practical and effective energy efficiency advice;
- *Appropriate referral of customers to third parties,* including financial counsellors and collaboration with these third parties;
- *'Checking in' with customers at the completion of the payment plan,* including discussions on how payments might be managed in the future (shorter payment cycles, etc.);
- *Cost effective mechanisms*; programs that have lower net costs provide more room for retailer innovation; large scale system changes tend to increase risk and inhibit innovation as capital has been diverted to IT development, testing and maintenance with a focus on minimum standards for regulatory compliance;
- *Process is adaptable* to changing energy market conditions.

SACOSS considers that these measures will assist customers to be placed on the most appropriate payment plans and successfully complete the plans. It will also minimise future payment 'crises' for these customers. In other words, a program that satisfies these criteria will address the observed issues with the current outcomes, namely:

- Establish a plan that reasonably reflects the customer's capacity-to-pay;
- Improve the unacceptably low completion rates for customers on payment plans (particularly the most vulnerable customers); and
- Address the issue of customers finding themselves in a cycle of repeated debt.

4.2.4.2 The AER's three best practice principles

There are many positive features about the AER's SPPF when assessed against these criteria listed above.

In the first instance, SACOSS supports the AER in defining the basic principles for best practice interactions between the retailer and the customer, and the flow chart that sets out how these principles would be applied in practice; from the initial conversations with the customer to the completion of the payment plan program.

The three principles set out in the AER's Framework of "empathy", "respect" and "flexibility and consistency" underpin all the subsequent stages in the interactions between the retailer and the customer.

Importantly, these principles provide the basis for a customer developing a sense of control, or agency, over the process. In addition, this sense of agency is reinforced throughout the AER's process flow chart. For example, the AER's 'flow chart' illustrates that the customer has some control from the start. It states:[243]

> *Avoid starting the conversation by asking whether the customer can afford the retailer's preferred amount ...* ***Asking the customer what they can afford is often the ideal starting point****.*

And

> *[if customer is not clear on what they can afford] Specific questions about a customer's income and expenses may be asked* ***if the customer is comfortable*** *discussing this type of information. [emphasis added]*

For instance, a customer who is treated with respect and empathy and who has some sense of agency over the process and the agreed repayment plan is far more likely to commit to a realistic plan and remain with that plan over a 12-month (or so) period.

Moreover, and perhaps equally as important, if the quality of the customer's initial contact is respectful and positive, then the customer is more likely to contact the retailer if their circumstances change to discuss their repayment schedule. This may involve lower or more frequent payments or it may involve agreement for higher payments and a shorter repayment period. Either way, the customer is in control and has confidence in contacting the retailer.

The SPPF also provides some clear indicators about if and when it is appropriate for a customer to be placed on a more tailored hardship program with more intensive support from the retailer and/or referred to a third party such as a financial counsellor.

SACOSS notes, for instance, that some retailers were requiring customers to first see a financial counsellor before they could be admitted to a hardship program. Another retailer appeared to place all customers experiencing payment difficulties directly on their hardship programs, without testing whether simpler payment plans would be more effective for both parties.

[217] Sustainable payment plans; A good practice framework for assessing customers' capacity to pay, Version 1, July 2016, p. 3.

SACOSS considers it important to the integrity of the overall system that hardship programs and financial counsellors do not become a 'catch-all' for any and all customers with payment issues. Rather, retailers and customers should be encouraged to initially work constructively together to design the most appropriate level of support.

Hardship programs and referrals to financial counsellors clearly have a place but should be used wisely and parsimoniously, recognising the overall community cost of these more intensive customer management schemes. The AER's good practice guide supports this approach.

SACOSS also strongly supports the AER's framework in terms of the ongoing monitoring of customers usage and payments, and the early intervention by the retailer if things change. As suggested by the AER's Framework, SACOSS considers it is good practice for a retailer to informally contact a customer even if they have not changed their usage patterns and are keeping up with the payment plan. This is particularly important if the payment plan has a longer duration (over 6 months).

SACOSS notes that the SPPF provides opportunities for retailers to tailor their programs throughout the repayment cycle. While this may result in some differences in the treatment of individual customers, the benefit of tailoring the programs outweighs the risk, *providing that the fundamental principles set out by the AER and the engagement steps continue to be applied by the retailer*.

Another important component of the AER's SPPF is the recommendation that retailer's follow up with customers at the completion of the payment program.

This follow-up process provides an opportunity to reinforce the success of the customer in completing the program. It also allows a discussion on whether billing arrangements can be changed (e.g. a permanent move to smoothed monthly payments) or usage reduced.

The fact that having completed a payment plan, so many vulnerable customers (particularly hardship customers) will face further payment difficulties within the next 12 months; provides strong support for this element of the AER's good practice guide.

SACOSS' major concern with the AER's approach is that it is voluntary. It is not clear to SACOSS that being on a list of retailers adopting good practice will be sufficient to lift the conduct of the more inexperienced, less resourced or the recalcitrant retailers.

Nor does SACOSS consider that the 'competitive retail market' will act as a driver for voluntary improvements, at least with respect to vulnerable customers. Indeed some retailers may be happy to leave the work of managing such customers to other retailers. Evidence has been cited by consumer advocates of such behaviour by some retailers.

Further, a major weakness identified in both the AER's and the ESC's reviews is the inconsistent treatment by retailers of customers who are having difficulty paying their bills.

Customers of an essential service do not want, or deserve, a two-tier system. The challenge for the AER is to translate its very constructive Framework into the provision of a quality retail service for all customers experiencing payment difficulties.

SACOSS recognises that the AER must work within the parameters of the NERL and NERR and has no regulatory mandate to enforce conduct by retailers, beyond the minimum standards set out in the NERL and associated regulatory instruments.

However, it is important for the integrity of the SPPF, and its overall effectiveness in reducing disconnections and poor service to customers with payment difficulties, that all retailers move towards the 'good practice' guidelines.

SACOSS encourages the AER to consider additional avenues it can pursue in order to persuade all retailers to commit to the SPPF. In this way, the SPPF can better meet the objective of ensuring that consumers maintain supply of energy even in the face of financial challenges.

4.3 The ESC's Approach: Supporting Customers, Avoiding Labels (Hardship Inquiry Final Report)

4.3.1 Overview of the ESC's Hardship Final Report[218]

In initiating this inquiry in February 2015, the Victorian Government was particularly concerned with the apparent increase in the number of disconnections and the impact this might have on vulnerable customers in the Victorian community.

Reflecting this, the Government's terms of reference (ToR) required the ESC to investigate whether energy retailers were adopting 'best practice' in supporting customers who were experiencing financial hardship to avoid disconnection. The ESC was also asked to assess whether the current regulatory framework governing retailers' obligations in this regard represented best practice.[219]

The regulatory framework in Victoria consisted of the industry acts (EIA and GIA), the ESC Act, the Energy Retail Code and associated regulations and guidelines. The Minister's ToR therefore provided scope for the ESC to propose amendments to the legislation and regulations/or make amendments to the Energy Retail Code and guidelines.

The ESC's initial investigation found that:[220]

- There was *no consistency* in what assistance a customer in payment difficulty could expect to receive; and
- There was *no consistency* in the actual assistance a customer received.

As discussed in Section 3 of this paper, the ESC reported that many customers were "falling deeper and deeper into debt", often with "little hope" of avoiding disconnection or other forms of recovery action initiated by their energy retailers.[221]

The ESC attributes these outcomes to what it sees as the retailers' broad discretion concerning how it implements the regulatory requirements. Specifically, the ESC states:[222]

> *We attributed these outcomes to the retailers' **very broad discretion** under the current framework to determine who is entitled to assistance, the level of the assistance that they provide, the timing of that assistance, and the terms on which they amend or withdraw that assistance. [emphasis added]*

The ESC concludes that the current framework, therefore, is "no longer fit for purpose",[223] and in need of "significant reform".[224]

The findings of the ESC's investigations are hardly surprising and similar problems have been found in other studies including in the AER's review of retailer hardship programs. Moreover, the ESC claims that: "there is broad stakeholder support and acceptance of the Commission's diagnosis of the problems with the current framework".[225] SACOSS agrees that stakeholders have confirmed this aspect of the ESC's Inquiry.

Thus, the issues with the current framework are not new, nor are they disputed. However, the ESC's response to the issues is one of rejecting the whole basis of the current regulatory model and proposing an alternative regulatory model to address the issues identified in its investigations. As such, the ESC's approach as set out in its Final Report represents a significant departure from the past and from the national regime and Victorian harmonisation objectives.

Other regulators (including the AER) and customer stakeholders have responded to these same issues by investigating different ways to improve the current regulatory framework. For instance, the AER has focussed on improving the quality of the "conversations" between the retailer and the customer and promoting effective 'capacity to pay' discussions.

These quality 'conversations' in turn set the basis for the retailer to better design payment plans and other services in line with the customer's needs. As such, the AER's approach suggests that best practice can be based around early engagement, flexibility in responding to the customer's expressed needs, and a reliance on retailer discretion to adapt, improve and innovate. Ofgem has come to a similar conclusion and has sought to increase its understanding through additional research.

The ESC takes a more 'revolutionary' approach based on its view that retailer discretion has led to a situation where there is no consistency in the treatment of customers. The ESC concludes that the framework is in need of significant reform:[226]

> This is because it provides **strong commercial incentives** to limit both the consumers' access to assistance and the scope of that assistance, whilst at the same time **providing retailers with the discretion to determine which customers are eligible for assistance and what assistance they should receive**.[emphasis added]

The ESC then justifies its alternative framework by stating that the focus of the framework should be on avoiding long-term debt and ensuring debt is repaid, thus avoiding customer disconnections. The ESC states this purpose as follows:[227]

> *To assist customers experiencing payment difficulty **to avoid long-term energy debt, and repay debt that does accrue**, while wherever possible maintaining access to energy as an essential service.*

The ESC also argues that the current approaches rely on 'capacity-to-pay' discussions that are intrusive and subjective and are not the role of energy retailers. The ESC's approach is to define customer requirements by considering 'objective' measures of consumption and payment histories.

220. Essential Services Commission 2016, Supporting Customers, Avoiding Labels, Energy Hardship Inquiry, Final Report, February 2016, p. ii.
221. ibid.
222. ibid.
223. ibid, p. 37.
224. ibid, p. 39.
225. ibid, p 38.
218. Essential Services Commission 2016, Supporting Customers, Avoiding Labels, Energy Hardship Inquiry, Final Report, February 2016.
226. ibid, p. 39.
219. See Minister for Finance, "Terms of Reference – Inquiry into best-practice financial hardship programs of retailers", February 2015.
227. Essential Services Commission 2016, Supporting Customers, Avoiding Labels, Energy Hardship Inquiry, Final Report, February 2016, p. 60.

The ESC believes that their proposed new framework will better meet this purpose than the existing approach.[228] In its view, the new framework will better align the incentives of retailers and customers to work together.[229]

The ESC also states that the framework will ensure assistance is proportionate to the payment difficulty, will encourage engagement by customers and innovation by retailers, and will give clarity to all stakeholders on the obligations and expected standards from retailers.[230]

Stronger enforcement powers for the ESC will also support more consistent compliance with these new measures.

SACOSS does not dispute the intent or purpose of the ESC's framework. The question SACOSS asks is whether the 'solution' proposed by the ESC will deliver on the intention to assist customers avoid long-term debt, repay debt and maintain access to energy wherever possible.

SACOSS' view is that the ESC's new framework means that the processes of identifying customers experiencing payment difficulty, establishing an initial payment plan and determining if and when other assistance will be required, will all become highly automated.

For instance, as noted above, identifying a customer as a vulnerable customer[231] will not rely on a conversation between the customer and the retailer or even necessarily on the customer's self-identification.

Rather a customer is *deemed to be in payment difficulties* as soon as they have missed a payment. A payment is considered missed *if it is not paid by the end of the reminder notice period*[232] and will therefore be highly automated in retailers' billing systems thus casting a broad net including customers who do not see themselves as being in payment difficulties.

This change in emphasis from the quality of the initial conversations between the retailer and the customer, to a process of deeming customers to be having payment difficulties and automatically defining repayment plans based on the type of difficulty, represents a major change in the fundamental features of the regulatory processes and retailers' practices.

SACOSS considers that there is a very real risk that this initial automated process will alienate customers and discourage ongoing interaction with the retailer.

The ESC is currently working through the consequential changes to the Energy Retail Code and other relevant regulatory instruments including the retail licences and the operating procedures relating to Wrongful Disconnection. The ESC will also seek to address the multiple implementation issues in consultation with consumer and industry stakeholders.

The ESC states that it will also seek to integrate its framework with third parties that include government agencies and other non-government service providers that have been accredited by the ESC. The ESC does not, however, discuss the implications for harmonisation of the Victorian regulatory framework with the national framework.

4.3.2 Principal elements of the ESC's proposed framework

As noted above, the unique feature of the ESC's proposed framework is that it focuses on the objective definition of customers in payment difficulty (or vulnerable customers), automated classification of the type of customers and the associated assistance plans and the rights and responsibilities of both the retailer and the customer.

The ESC states that it has designed the new framework around a set of policy principles and the concepts of 'shared responsibility', 'proportionate' response, limiting growth in debt and minimising the number of disconnections due to payment difficulties.

More specifically, the ESC describes the main features of its new regulatory framework for customers experiencing payment difficulties, as follows:[233]

- **Codifying** the requirement for retailers to provide all these customers with payment plans, energy management support and information and referrals to third parties;
- The retailer's assistance is based on the **type of payment difficulty** not the cause of difficulty;
- Retailers and their customers have **'shared responsibilities'** for implementation and completion of the plan;
- The level of individual engagement of the retailer with the customer should be **proportional and reflect the level of assistance required**;
- Retailers will have **new obligations** such as establishing self-service options, and the automatic placement of customers on a payment plan if they miss a payment, and if debt continues to grow, providing a 'pay-as-you-go' payment plan;

228. The existing approach is reasonably aligned with the AER's approach following the 2014 Victorian regulation harmonisation program.

229. ibid.

230. See: ibid, p 60.

231. The ESC does not use the term vulnerable customers or hardship customers. The framework defines a customer by the type of payment difficulty as assessed by objective criteria that have been defined by the ESC.

232. Essential Services Commission 2016, Supporting Customers, Avoiding Labels, Energy Hardship Inquiry, Final Report, February 2016, p. 80. The ESC states that this was based on feedback from retailers and on concern to limit accrued debt.

233. ibid, see p. iii. Emphasis is added.

- **New quarterly and annual reporting** obligations;
- Providing **opportunities for retailers to innovate** and progress to best practice.

The ESC also argues that the new requirements will deliver a range of benefits that go beyond limiting the debt that a customer can accumulate and helping the customer remain on supply.

These additional benefits include the removal of labels such as 'hardship customer' and the removal of the obligation for a retailer to assess its customers on the basis of subjective criteria such as the 'capacity-to-pay'.

The ESC states that the new framework will ensure the customer receives at least a 'minimum standard of assistance', however, the level of this assistance will be based on the objectively defined 'type' of payment difficulty rather than the customer or retailer's subjective assessment.[234]

The minimum standards act as a 'regulatory safety net'; however, retailers should have flexibility to provide other additional forms of assistance.[235] The flexibility does not, however, extend to a retailer defining when a customer is facing payment difficulties or what form of payment plan the customer will be placed on (unless and until the customer moves to a hardship plan, although there are rules around the this too).

4.3.3 Structure of the ESC's proposed framework

4.3.3.1 The overall framework

The ESC states that the proposed framework will replace the current hardship and payment difficulty provisions of the Energy Retail Code.

The new requirements in the Energy Retail Code will be extensive and will cover three broad areas, i.e.; the scope of assistance; the delivery of assistance; and the retailers' monitoring and reporting requirements.

Notably, however, the ESC's Framework will not extend to addressing the wider more fundamental causes of payment difficulties.[236] As the ESC states in defining the scope of the framework:[237]

> *[t]he causes of payment difficulty are unique to each customer but the types of payment difficulty are not. The* ***scope of assistance that a customer can expect from their retailer should depend, therefore, on the type of payment difficulty that they are experiencing****. [emphasis added]*

The ESC's framework is, therefore, less concerned with or responsive to the causes of a customer's payment difficulty, whether this is caused by short or long-term customer characteristics or broader socio-economic factors.

The ESC's focus is on the type of payment difficulty where payment difficulty is defined by set criteria that are claimed to reflect the degree of risk of a customer not completing a repayment plan and not being able to pay for ongoing usage.

Figure 7 below illustrates these three dimensions (scope, delivery and monitoring/reporting) and associated elements of the ESC's proposed new framework.

The ESC regards this framework as the basis for setting a minimum level of service for each category of customer, i.e. the 'safety net' requirements (see also Figure 7 which illustrates these 'safety net' requirements). The ESC states:[238]

> *[r]etailers will have the flexibility to decide both what assistance they provide to customers and how they provide it, as long as the assistance meets the minimum requirements of the customer safety net.*

However, this 'flexibility' should be seen in the context of what are very prescriptive minimum requirements.

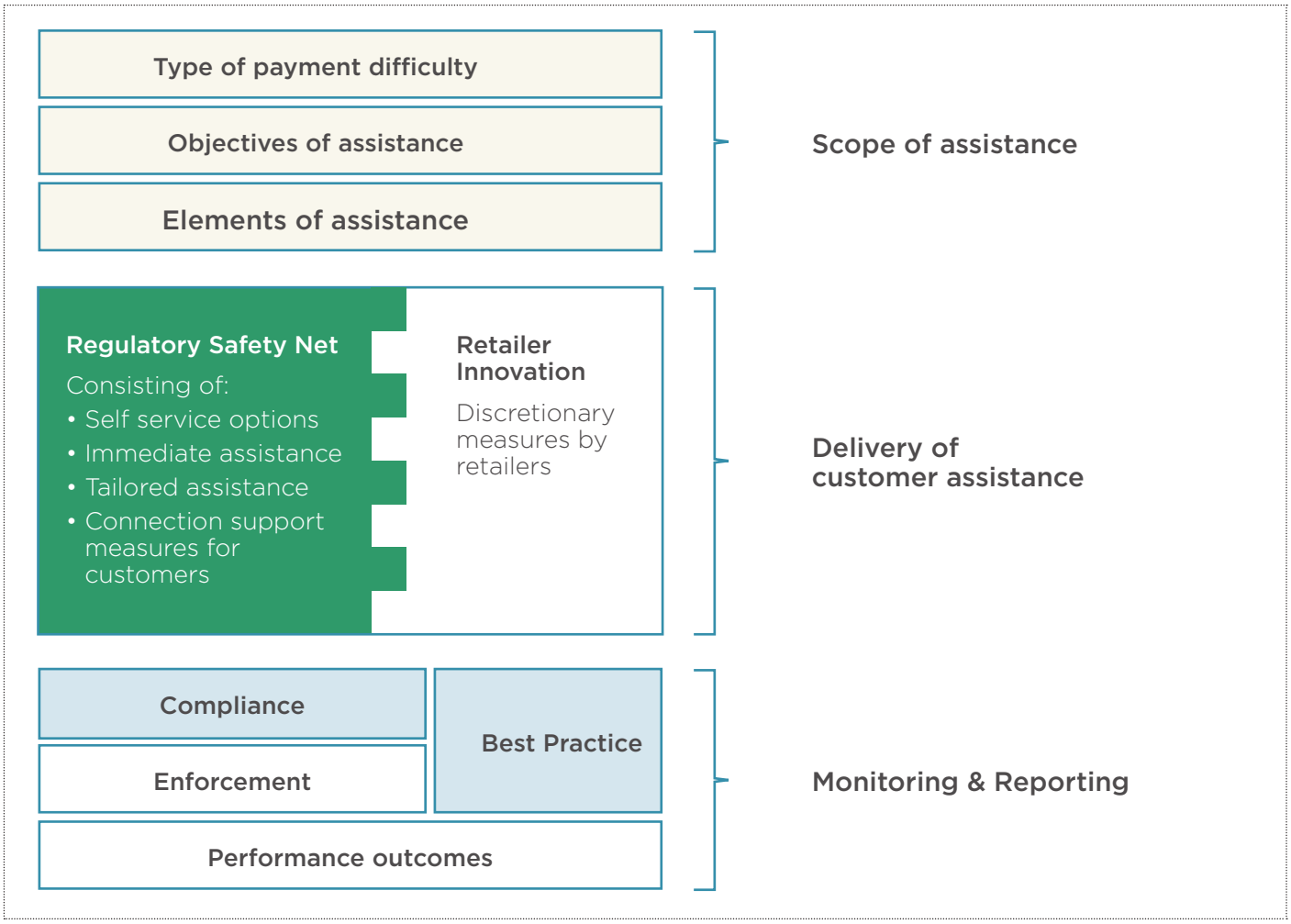
The ESC is currently codifying these requirements in the Energy Retail Code and amending related regulatory instruments such as licences. Once this process is completed, the requirements will become mandatory and enforceable.

If a customer is disconnected without the retailer having worked through all the requirements for that 'type' of customer, the customer may be eligible for a Wrongful Disconnection Payment (WDP). Retailers who consistently fail to comply with the requirements may be subject to penalties under the ESC's enhanced enforcement powers.[240]

It is important, therefore, to consider the dimensions and related elements in some detail. Further details on each of the three areas are also set out below.[241]

234. ibid, p. 61.
235. ibid.
236. ibid, p.p. 42-44.
237. ibid, p. 64.
238. ibid, p. 66.
239. The amendments to the ESC Act 2001 enables the ESC to issue a WDP Notice of $5,000 per incident with effect from 1 June 2016.
240. The amendments to the ESC Act 2001 provided for the ESC to have greater enforcement powers, effective from 1 June 2016. See: Essential Services Commission 2016, Energy Compliance and Enforcement Policy – Final Decision, July 2016, p. 2.
241. However, there are many specific details that are currently being consulted on by the ESC. Therefore, the description in this report should not be regarded as final or definitive.

Figure 7: The Proposed ESC Framework



Source: ESC, *Supporting Customers, Avoiding Labels*, Final Report, February 2016, Figure 4.2, p. 64.

4.3.3.2 The scope of retailer assistance

Type and objective of assistance

The scope of retailer assistance extends to consideration of the type of payment difficulty, the objectives of assistance and the elements of this assistance. In terms of the type of payment difficulty, the ESC's proposal sets out five types (levels) of payment difficulty – [A] to [E] – as illustrated in Figure 8 below.

The type of payment difficulty can be defined by reference to the cost of energy, the amount of money actually paid for that energy use and the amount of energy debt that the customer has accrued.

The ESC claims that when defined in this objective way, the customer's payment difficulty can be determined: "without value judgement or intrusive assessment, and without unwelcomed labelling of the customer".[242]

A further benefit of defining the type of assistance in this way is that a retailer can readily identify the type of assistance from its customer billing system – it is not dependent on any initiative or judgement by the retailer nor does the retailer need to collect new data on the customer.

Figure 8 illustrates this relationship and the progressively more intensive management of the customer. The dimensions and elements of the safety net assistance.

The ESC sets out minimum requirements for retailers' assistance programs (the 'safety net' assistance measures) for each type of customer payment difficulty. Similarly, for each category of assistance, the ESC sets out the obligations on customers to comply and engage with their retailer.

The form of this 'safety net' assistance involves four categories of retailer assistance: self-service, immediate

[242] ibid, p. 65.

assistance, tailored assistance and connection support depending on the type of difficulty as set out in Figure 8 below.

Each category is linked to the particular objective of the assistance program. For example, the 'self service' category is derived from the objective of encouraging customers to avoid debt by taking up a self-service option to reschedule payments. The obligation on the retailer is to provide a range of self-service payment options, available on its website.

Elements of retailer assistance

According to the ESC's new framework, any assistance plan provided to a customer must include three elements:[243]

- A payment plan;
- Energy management assistance; and
- Information and referral to other support services.

These three elements are discussed briefly below. While these elements are common in the existing policies, the ESC attempts to make the requirements significantly more specific with less retailer discretion.

Payment Plans:

The ESC states that payment plans will vary depending on the type of payment difficulty and the objective of assistance for that particular type.

For example, for customers experiencing Type B and Type C payment difficulties (as per Figure 8), debt repayment will be required over the short to medium term. For customers experiencing the more severe Type D and Type E payment difficulties, longer-term payment plans will be required.

For customer Types B to D, there should be no increase in the customer's debt levels. However, for customer Type E there is likely to be an increasing level of debt as the customer cannot pay for their ongoing energy consumption. For these customers:

- The payment plan will allow a three-month period of below cost payments while the retailer and customer work intensively on energy management options;
- If the customer is not meeting the ongoing cost of energy after three months, pre-payment for energy use ("pay-as-you-go") is required if the customer is to remain connected.

Figure 8: Overview of the scope of retailer assistance and payment type

Debt status	Payment difficulty	Payment difficulty (Type)	Objectives of Assistance	Safety Net Assistance
Likely	Customer has not yet missed a payment • and has not missed a payment in the past 12 months • but cannot meet their next payment.	[A]	**To encourage customers to avoid debt by taking up self-service options to reschedule energy payments.**	Self Service
Commenced	Customer has missed a payment and therefore has an energy debt	[B]	**To provide immediate assistance to customers who miss a payment to repay their energy debt.**	Immediate Assistance
In arrears	Customer has energy debt • and is making payments that reduce debt • but not in accordance with their payment plan.	[C]	**To assist customers to better manage their energy use to help repay energy debt.**	Tailored Assistance: Assisted Repayment
Static	Customer has energy debt • and is paying for their energy use • but is not reducing their debt.	[D]	**To reduce the cost of energy use to enable debt to be repaid.**	Tailored Assistance: Active Assistance
Increasing	Customer has energy debt • and is paying for their energy use.	[E]	**To reduce energy use to an affordable level.**	Correction Support

Source: ESC, *Supporting Customers, Avoiding Labels*, Final Report, Figure 4.3, p. 66.

243. ibid.

Energy Management, Information and Referral

Retailers are required to provide energy management information, advice and assistance to all customers experiencing payment difficulty. The nature of this assistance, however, varies with the type of payment difficulty.

All retailers will be required to provide practical energy management information on-line for all customers. As payment difficulty increases, the intervention will need to be more intense and the advice more specific.

For customers in the most severe category, Type E, the objective is to: "reduce energy to an affordable level".[244] Therefore, the ESC's framework requires the retailer to provide practical in home advice, the cost of which may be borne by the retailer or shared with the customer.

Similarly, the level of information on the assistance available from governments and other third parties will vary with the type of payment difficulties. In the earlier Types B to D only general information is required, albeit of increasing specificity to the customers' circumstances.

For Type E customers, however, a retailer will need to demonstrate that the customer has received information from an independent third party accredited by the ESC. The customer must receive this information before the retailer can place them on a 'pay-as-you-go' plan.

4.3.4 Delivery of Retailer Assistance

4.3.4.1 Overview of minimum safety net requirements

Having defined the scope of assistance (including customer type), the ESC then prescribes the forms of delivery of assistance based on the type of customer. Figure 8 above illustrates the relationship between the type of payment difficulty and the minimum assistance level required.

As discussed above, the ESC claims that it is setting the minimum 'safety' net requirements and retailers have the flexibility to decide "what assistance they provide to customers and how they provide it"[245] - providing the retailer meets the minimum safety net requirements set out by the ESC.

The following discussion provides a brief overview of the categories of safety net assistance envisaged by the ESC and the minimum requirements.[246]

For each category, the ESC outlines the obligations that apply to both retailers and customers, and the consequences if a retailer or a customer does not comply with these obligations and/or a customer fails to engage with the retailer.

For example, a retailer cannot disconnect the customer if the customer follows the payment plan and/or engages with the retailer to negotiate a revised plan. A customer who is disconnected for non-payment when that customer is following the payment plan or engaged with the retailer, will be eligible for a Wrongful Disconnection Payment (WPD) from their retailer.

Generally the customer must be allowed to retain a retail product discount, such as a 'pay-on-time' discount, if they comply with the agreed plan. Alternatively, if the customer has lost that discount because of non-payment, it must be restored if and when the customer complies with an agreed payment plan.

The retailers' interests are also protected, reflecting the ESC's view that outstanding debt should, in almost all circumstances, be paid by the customer. In general, if a customer fails to comply with the relevant assistance plan and has failed to engage with the retailer to discuss options, the retailer has sufficient cause to initiate the disconnection process.[247]

Figure 9 illustrates the different levels and how a customer might 'progress' through those levels. It also demonstrates the points at which a retailer may lawfully initiate the disconnection process for non-payment of bills as set out in the Energy Retail Code.

The four 'types' of retailer assistance to customers experiencing different levels of payment difficulty are briefly described below.

4.3.4.2 Self-service option – for payment Type A

Customers classified as Type A have not necessarily contacted their retailer. Type A customers do not have a current debt but for whatever reason anticipate that they may experience payment difficulties in their next bill.

The aim of this stage is to help customers from incurring energy debt in the first place by enabling them to self-select from a range of options a different payment arrangement. The ESC, therefore, sets a minimum requirement that retailers make a number of 'self-service' options available for Type A customers.

The self-service options would be on the retailer's website and would not require the customer to personally contact the retailer. However, the retailer must accept the customer's self-selection option irrespective of whether the customer is on a market or standard contract.

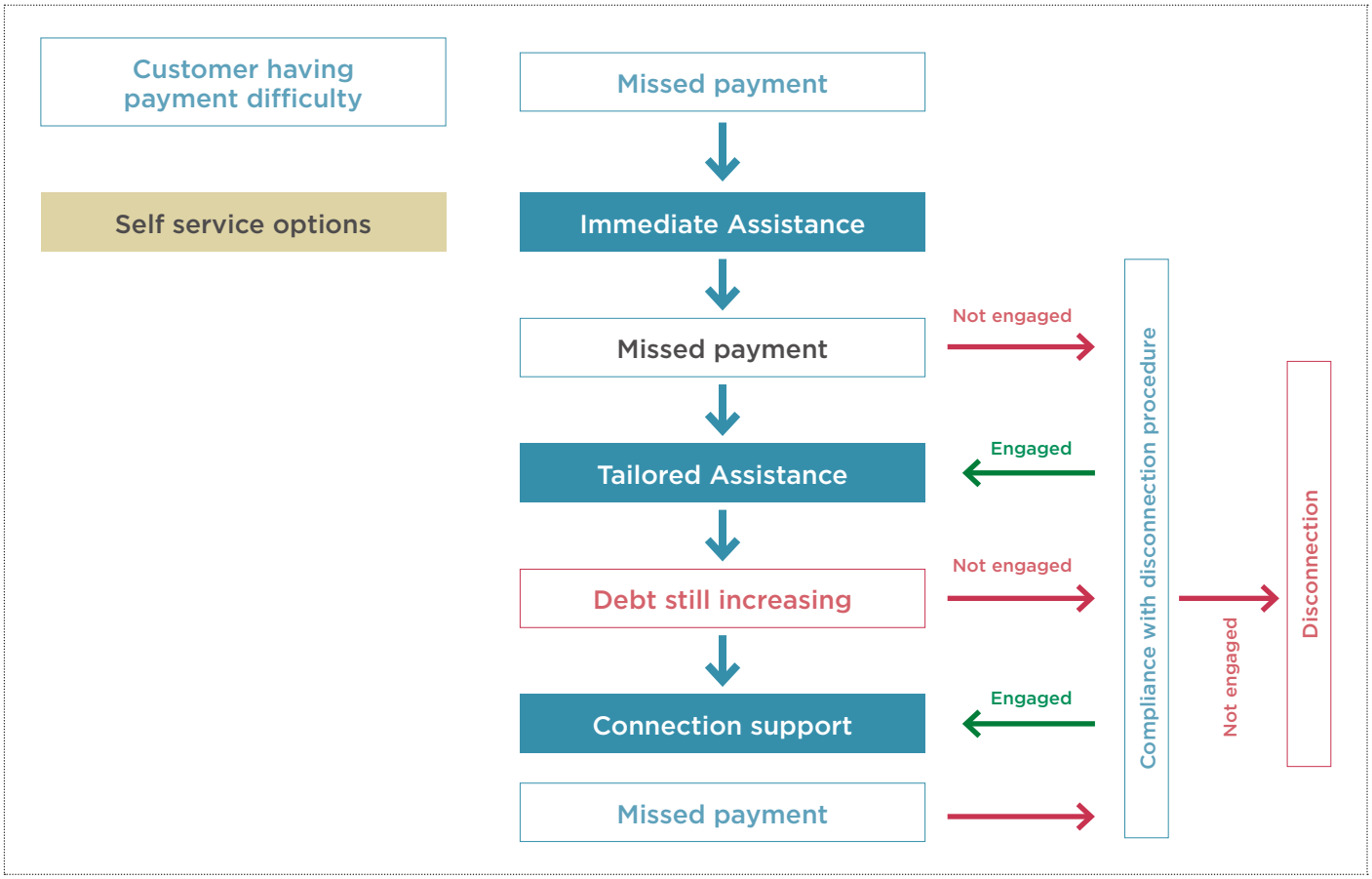
244. ibid, Figure 4.3, p. 66.

245. ibid, p. 66.

246. Note, this is a summary of the main requirements rather than a comprehensive list of all components. Details can be found in ibid, Chapter 4.

247. Subject to certain customers who cannot be disconnected (such as life-support customers) or criteria set by for instance jurisdictional governments (hot days etc).

Figure 9: Customer Engagement, Non-engagement and Disconnection



Source: ESC, *Supporting Customers, Avoiding Labels*, Final Report, Figure 4.6, p. 71.

The ESC's framework also sets out the three minimum self-service options that a retailer must provide as follows:[248]

- **Bill smoothing** across monthly or fortnightly payments;
- **Deferred payment** for up to four weeks for customers who have not missed a payment in 12 months; and
- **Shortened payment cycle** where customers can choose to pay smaller amounts more frequently.

A customer is expected to make the payments set out in the plan in full, and on time. If the customer cannot manage this, the customer is expected to contact their retailer to discuss other options.

A customer who complies with their selected self-service option will not lose any 'pay-on-time' discount entitlements providing that they pay according to the self-service plan.

4.3.4.3 Immediate assistance plan – for payment Type B

Irrespective of whether the customer takes up a self-service option, if the customer misses a payment, the retailer will automatically place them on an 'immediate assistance' plan (payment Type B). This plan will require monthly repayments **irrespective of the customer's current payment cycle**.

> **Note: A payment is considered 'missed' if it is not paid by the end of the reminder notice period.**[249]

Because the process is automatic, the retailer does not have to label the customer as being in hardship or discuss in advance with the customer. Assistance in the form of a **standardised payment plan** is provided on the basis of a missed payment rather than relying on a subjective assessment of the customer's capacity-to-pay.

The retailer must advise the customer that they have been placed on an automatic monthly payment plan and provide customers with energy management advice (e.g. a link to the web-site) and other relevant information on government and non-government assistance including rebates, concessions and financial counselling services.

This automatic monthly payment plan has standard terms and conditions and the customer must pay at least the ongoing energy usage costs and a **prescribed portion** of the outstanding debt. It is not clear how

[248]. ibid, p. 78.

[249]. See ibid, p. 80 including footnote 92.

various retail products such as 'pay-on-time' discounts will operate during this period. Presumably these details will be worked out during the technical workshops prior to the finalisation of the Energy Retail Code.

Repayments of the debt will occur over a three, six or nine month period depending on the customer's current payment cycle. For customers on monthly billing for instance, the debt must be repaid over three months.[250]

If a customer misses an immediate assistance plan payment and has not engaged at all with the retailer, then the retailer may issue a disconnection notice.

4.3.4.4 Tailored assistance plan – for payment Types C and D

If the customer misses a payment under an immediate assistance payment plan, the retailer will be required to provide the customer with a tailored assistance plan.

In the tailored assistance plan, the retailer and the customer are expected to work together to lower the customer's energy costs and to plan for the repayment of outstanding debt.

The tailored assistance plan comes in two forms:

- **Assisted repayment plan** (for Type C customer): the customer is making payments to reduce the debt but not in accordance with the payment plan.

Under this plan, the customer pays for ongoing energy and up to 15 per cent of the outstanding debt. This repayment plan does not therefore require the retailer to 'probe' into the customer's particular circumstances. In addition, if the customer makes the payment then they will be entitled to the benefit of any discounts that may have been lost.

The retailer also has an obligation to provide more personalised advice on energy management and on information about rebates or concessions and details of third party referral services.

A disconnection warning notice may be issued if the customer does not comply with the plan and does not contact the retailer to discuss.

- **Active assistance plan** (for Type D customer): the customer is paying for ongoing usage but is not repaying any of their debt.

Under this plan, the customer pays equal monthly payments that cover the cost of their energy use while the retailer and customer work together to reduce the cost of the customer's energy consumption.

The retailer must also advice the customer about relevant government and community programs. Any pay-on-time discount must be continued as long as the customer meets the agreed payments and engages with the retailer.

However, if the customer does not make the agreed payments and has not engaged with the retailer, a disconnection warning notice may be issued.

4.3.4.5 Connection support - for payment Type E

The final step, 'connection support', is offered as a 'last resort' to a Type E customer, that is, a customer who has an energy debt and is also not paying the cost of their on-going energy use. In this instance, the customer's debt continues to increase.

The aim of the customer support plan is therefore to first attempt to reduce the customer's energy use to an affordable level and to also ensure that the customer has access to all available forms of government and non-government support.

The connection support is available for up to two years and in two phases, as follows:[251]

- In the first three months a customer can pay a **fixed monthly payment** that is below the cost of their energy use while working with the retailer to reduce the cost of their energy use;
- If after three months the customer is still not able to pay for their energy use, they will be required to make **monthly pay-as-you-go payments**[252] of their energy use in order to remain connected. This ensures no further growth in debt.

The ESC also states that a customer cannot transfer to another retailer in the first three months, as their usage cost is greater than the repayment amounts. A customer that is on a pay-as-you-go plan can switch retailer but the original retailer is entitled to recover outstanding debt through normal debt collection processes.[253]

A retailer must allow the customer to stay connected through this period including when a customer moves to a pay-as-you-go arrangement. The customer is also

[250] The prescribed amount depends on the previous billing cycle (monthly, bi-monthly or quarterly) as well as the amount of debt owed. If a customer is on monthly billing, then debt repayment will be limited to a third of the amount each monthly bill, paid in three equal installments. Quarterly payment customers will be automatically switched to monthly payment cycle and repayment of debt will be limited to a ninth of what is paid for each of the next nine months.

[251] ibid, p. 90.

[252] The ESC states that the 'pay-as-you-go' arrangement must not involve the use of pre-payment meters. See ibid, p. 92 and the associated footnote 105.

[253] ibid, p. 91. However, the ESC also states that it would expect retailers will only engage debt collectors who adhere to the ASIC-ACCC guideline on

entitled to discuss the pay-as-you-go arrangement with an independent third party before commencement of the pay-as you-go monthly payments.

However, a customer who misses a payment in either phase of the connection support plan may be issued with a disconnection warning notice. A retailer must reconnect the customer if the customer agrees to the pay-as-you-go amount plus any costs incurred in the interim.

The customer is expected to engage with their retailer throughout the process, including notifying the retailer if they are unable to make the agreed payments. A customer will not be disconnected for non-payment if they are making repayments under the agreed plan, or are actively engaged with their retailer to make new or alternative arrangements.

If a retailer disconnects a customer without providing, or endeavouring to provide, the relevant level of assistance, then the retailer must make a Wrongful Disconnection Payment (WDP) to the customer.

However, if the customer does not engage actively with the retailer through the process, then the framework will operate in conjunction with the disconnection procedures set out in the Energy Retail Code.

Notably, the ESC's process in this Type E circumstance does not appear to involve discussions between the retailer and the customer on the customer's capacity-to-pay, even if these customers are clearly facing longer-term entrenched payment difficulties.

The risk of disconnection at the end of the process, even if the customer engaged with the retailer in the process, remains. In effect, as the process can keep looping around, there appears to be no circuit breaker other than disconnection or, perhaps, intervention by support agencies.

4.3.4.6 Reconnection Under the 'Safety Net' provisions

The ESC's framework specifies that any customer who is disconnected for non-payment will be entitled to reconnection if they meet the conditions of the form of assistance they were receiving under the customer safety net prior to disconnection.[254]

For instance, if a customer on an Active Assistance plan is disconnected by the retailer, the customer is entitled to reconnection if they pay the cost of their energy use in full.

The ESC considers this is an improvement from a customer's perspective over the current framework as this current framework allows a retailer to require any debt repayment as a condition of reconnection. The ESC's proposed framework will limit the retailer to reconnection on the basis of the customer's existing repayment obligations based on the type of payment plan that they were on prior to disconnection.

4.3.5 Monitoring and Reporting

The ESC has acknowledged the importance of monitoring and reporting the outcomes of the proposed framework and process. The ESC's monitoring and reporting will include:[255]

- Monitoring compliance through retailer reporting and auditing;
- Enforcing the regulatory framework;
- Assessing and reporting on best practice; and
- Reporting on customer outcomes.

With respect to the monitoring of compliance, the ESC states that it requires retailers to: "maintain records of their exchanges with customer to demonstrate customers are informed about their options".[256] This is in addition to the retailers providing aggregate data for the ESC's reports, including data on the new obligations, and retailers reporting any breaches of the payment plan obligations.

The ESC also notes its new enforcement powers under the *Victorian Energy Legislation Amendment (Consumer Protection) Act* 2015 includes increases in various penalties on retailers for wrongful disconnections and non-compliance with the Energy Retail Code and licence. Penalties of $500 per day and $5,000 per breach of the Code up to a maximum of $20,000 can be imposed on retailers depending on the incident of non-compliance.[257]

The ESC intends to review the operation of the customer safety net Framework every two years, with the review providing an assessment of any retailer policies, practices and procedures that exceed the Framework's minimum requirements. The review will complement the role of the ESC's regular performance reporting.

Clearly, therefore, the measurement of performance outcomes is an important dimension of the ESC's proposal. The ESC proposes to replace the existing hardship program indicators with new indicators that focus on outcomes for customers with payment difficulties.

debt collection.

254. ibid, p. 95.

255. ibid, p. 72.

256. ibid, p. 99.

257. Essential Services Commission 2016, Energy Compliance and Enforcement Policy – Final Decision, July 2016, p. 2. This provides a list of the range of financial penalties and other orders available to the ESC under its new enforcement powers.

The specific areas of focus for the ESC's performance reporting include:[258]

- The level of payment difficulty such as the number of customers with Type A to Type E payment difficulty;
- Retailer innovation, for example: amount and form of additional assistance measures above the safety net;
- Level of debt owed, for example, average level of debt for customers with Type B to Type E payment difficulty;
- Level of disconnection, for example, total number of disconnections, number by cause, duration of disconnections; and
- Reconnection, for example, the number of customers making pre-payments and average reduction in consumption achieved.

4.3.6 SACOSS' assessment of the ESC's framework

4.3.6.1 Assessment overview

The ESC sees the current framework as no longer fit for purpose and in need of substantial reform. As a result, the ESC has sought to recast the regulatory framework regarding the management of vulnerable customers that forms part of the national approach and the historical Victorian approach.

The first question to ask, therefore, is whether the current framework needs an evolutionary approach (as per the AER) or a revolutionary approach (ESC) or if there are other options that tread a middle road.

SACOSS accepts that the current framework for managing customers with payment difficulties, as set out in the NERL and NERR has limitations. Similar limitations apply to the current Victorian framework as it largely parallels the national framework.

Moreover, SACOSS agrees that there is an unacceptable lack of consistency in the interpretation and application of the current framework arrangements by retailers, albeit that both the AER and ESC state that there is generally compliance with the existing minimum standards.

Clearly some retailers are strongly investing in improvements to achieve best practice. Other retailers take a minimal compliance approach. For instance, it is unacceptable that some customers are entering payment plans and hardship programs with debts of over $1,500.

The prospect of this debt ever being settled is small. The observed level of average debt in the programs and the poor completion rates of customers on repayment plans or hardship programs support this conclusion. The chronic nature of debt for at least some customers is also demonstrated by the frequency of these customers facing further debt crises even within the same year.

SACOSS therefore agrees with the ESC that it is not in the interests of customers that there is such a level of variation between retailers. SACOSS also agrees that it is important to give a strong focus on outcomes.

The failure of current regulatory requirements to improve the level of debt accrued by customers with payment difficulties and to reduce disconnection rates, despite years of investment in improving outcomes, does mean that a fresh examination of the issues is necessary.

As noted previously, SACOSS is concerned that the AER's voluntary sustainable payment plan approach may not provide sufficient impetus to improve overall energy retail industry standards towards best practice and ensure equality of treatment of all customers experiencing payment difficulties, irrespective of the retailer.

A further consideration is that generally, customers with payment difficulties are less likely to benefit from the competitive retail market either because they are not sufficiently aware of, or confident in, seeking competitive market offers or they have been effectively refused competitive market offers based for instance, on credit histories.

Taking into account these and other issues identified in this paper, SACOSS agrees with the ESC that further reform is required.

However, SACOSS' review suggests that the ESC's approach will increase costs and such a significant change may not be in the long-term interests of customers, if adopted across the national electricity and gas markets. Discussions with various Victorian stakeholders suggest that this may also hold for Victorian consumers.

SACOSS' concerns with the process outlined in the ESC's Final Report are discussed below and include a number of interrelated factors, namely:

- The automation of the key steps in the process;
- The lack of early engagement between the retailer and the consumer;
- The lack of customer control over the process;
- Whether process is effective given changes in technology and retail products;
- The likely implementation costs and ongoing costs;
- The risk that disconnections will increase rather than decrease.

Linking most of these factors is the potential delay in a retailer establishing any level of meaningful engagement

[258] See ibid, p.p. 101-102. The ESC notes that further work will be undertaken to develop these performance measures.

with the customer, as well as the detailed prescriptive approach to defining the assistance package for each customer type without the opportunity for the retailer to understand the customer's individual concerns.

The following sections consider a number of these issues in more detail.

4.3.6.2 Customer engagement with the process

Effective engagement of the customer with payment difficulties in the process of resolving outstanding debt is central to successful completion of the repayment program without resorting to the threat of disconnection.

That is, for a customer to want to work with a retailer over a period of 6 to 12 months or more, the customer must believe that they have been involved in, and have some control over the payment plan. The customer must also believe that they are respected and their individual circumstances recognised and acknowledged by the retailer.

SACOSS' experience suggests that in the absence of engagement and a sense of understanding and control early in the process, the customer will more likely than not seek to minimise any ongoing relationships with the retailer.

Under the ESC process, this customer disengagement can, in turn, result in the retailer commencing the disconnection process; thus further breaking trust between the two parties. It is highly unlikely, for instance, that a customer will seek or accept energy management advice following a series of negative interactions with the retailer in which their individual circumstances seem less important than the automated processes.

As a result, SACOSS is not convinced that the ESC process will reduce debt and disconnection, particularly for the most vulnerable customers.

4.3.6.3 The automation of key steps in the process

Defining customer by 'type' based on objective criteria such as whether a bill payment has been missed, has the superficial appeal of removing subjective assessments and ensuring more consistency across different retailers.

SACOSS accepts that more consistency is desirable. However, the ESC is using the very blunt instrument of automating the classification of customers and prescribing in the Energy Retail Code, the minimum features of the payment plan.

For example, the ESC's approach will, inevitably, 'catch' many customers who do not want and do not need a payment plan.[259]

The retailer's time may well be taken up explaining to these customers why they are on a plan when they did not seek to be so. Will the retailer be able to reverse the payment plan in these circumstances, and what are the billing system issues of multiple customers being billed and then rebilled?

The link between automation of the process and customer engagement was well expressed by Yarra Valley Water in their submission to the ESC's Draft paper. YVW is generally regarded as having one of the most successful programs for managing customers in financial hardship. Its submission to the ESC stated:[260]

> Our experience has shown that **early and continued customer engagement** has been a key to the success of hardship programs. Respectful communications coupled with tangible support options offered up-front, have proven extremely successful. **The automation and stepped nature of the current proposal runs the risk of a decline in customer engagement.** [emphasis added]

4.3.6.4 Changes in energy technologies and retail product design

It is also not clear if and how the ESC has taken into account the changes in technology, particularly smart meters and the associated time-of-use or demand based retail tariffs.

Smart metering in Victoria has facilitated the introduction of monthly billing by many retailers, thus shortening both the payment cycle and the disconnection time lines.[261]

It is not yet clear how a monthly payment cycle will impact on the number of customers failing to pay their monthly bill by the 'due' date (reminder notice date), but it is reasonable to expect that with a faster billing cycle, the number of customers who are not in payment difficulty (as usually defined) find themselves automatically placed on a 'payment plan' that they neither requested or needed. The excessively wide net of Type B category customers may be cast even wider.

Similarly, it is not clear how the retailer will conduct the required tariff assessments and energy efficiency assessments, taking into account the various options

[259] These are customers who have missed a reminder notice due date, but would otherwise pay their bill and have no need of additional support.

[260] Yarra Valley Future Water, "Response to Essential Services Commission's Energy Hardship Inquiry Draft Report", October 2015, p. 5.

[261] That is, while the reminder notice and disconnection process follows the timelines set out in the regulations, monthly billing means that this timeline has 12 starting points per year rather than 4 or 6. The potential for overlapping bills and repayments is significantly increased and is potentially more confusing for the customer. At this stage, most retailers have not moved pensioner recipients to monthly billing. However, this is likely to change and in any case does not cover many other customers facing payment difficulties.

and preferences for tariff types such as time-of-use and demand tariffs in advising their customers.

Traditional energy management activities may have an impact on energy usage (although this is by no means clear for customers in hardship), but with cost-reflective pricing, the savings are only available if peak usage is reduced. In addition, seasonal variation in bills is likely to be exacerbated, and it is not clear how this will affect the efficacy of the payment plan process given the very specific requirements in the ESC's approach.

4.3.6.5 The Victorian framework and national consistency

SACOSS is also disturbed that the ESC appears to have given little consideration to the impact of moving the Victorian regulatory framework further away from the national program contrary to the previous Victorian harmonisation process.

SACOSS strongly believes there is a long-term benefit to all energy customers, and to the energy retailers and the market in general, in having nationally consistent systems and processes. The previous harmonisation project to improve the alignment of the Energy Retail Code with the NECF illustrates that Victoria had accepted the value of national consistency (albeit with some derogations).

A nationally consistent approach[262] allows policy makers and retailers to focus their attention on the quality of the service to their customers absent the distraction of establishing and maintaining different systems and processes.

For a jurisdictional regulator to move in another direction therefore requires a very strong business case for drastic change. However, the ESC does not appear to have conducted a thorough and comprehensive cost-benefit study of their approach for Victorian and interstate stakeholders to scrutinise.

It is also widely noted that the causes of payment difficulty for customers go well beyond the retailer-customer interface and no process, including the ESC's process, can address the situation where the customer simply cannot afford to pay for ongoing energy usage let alone repay debt from previous periods.

Addressing these fundamental economic and social issues requires multiple stakeholders working together. While the ESC correctly states that it cannot address these matters, it should nevertheless take them into account when designing its framework. By ignoring the impact of these factors on individual consumers, the ESC's process is risking a continued debt cycle for the most vulnerable consumers.

The mapping of disconnections conducted by St Vincent de Paul and Alviss Consulting also provides important clues to the systemic issues that drive disconnection rates across the NEM. SACOSS would encourage the ESC to consider this research before finalising the detail of its Energy Retail Code and regulations. Similarly, the study provides important data for the AER in further development of its Sustainable Payment Plans Framework.

A framework that is state centric, and which departs so substantially from the national policy development process, risks losing influence over national policy on the important social issues of access to energy. In the long run, Victoria's isolation from the national policy development process is not in the long-term interests of either Victorian energy users or energy users across the nation.

SACOSS therefore finds it surprising that neither the Victorian Government nor the ESC appear to have taken this issue seriously or addressed the potential costs to Victorian energy consumers of this divergence.

4.3.6.6 SACOSS' assessment criteria – a summary

SACOSS has set its assessment criteria based on the research and the results of the regulators' performance measures and the work of third parties including Ofgem, EWOV and Victorian consumer advocates.

These measures cover the quality of the conversations, provision of relevant information, flexibility, regular monitoring, feedback to customers, improved measurement, referrals to third parties and regular 'check in' with customers to follow up post payment plan completion and cost efficiency.

In Table 9 below, SACOSS sets out its view of the ESC framework against these criteria. SACOSS has also summarised its view on additional factors such as level of change from the current process, level of disconnections, support from stakeholders, and consistency with the national processes.

262. This does not mean jurisdictional arrangements must all be exactly the same – the process should respect different jurisdictional priorities. However, the ESC's framework represents a level of change well beyond that and may well delay Victorian joining the NECF.

Table 9: SACOSS Assessment Criteria & ESC Framework

SACOSS Assessment Criteria	AER: Sustainable Payment Plans Framework	ESC: Supporting customers avoiding labels	Comment
Mandated actions	No (voluntary)	Yes	ESC requirements will be included in Energy Retail Code, et al with penalties for non-compliance
Change from current approach	Designed to enhance current process	Substantial changes	ESC emphasises automation of processes and prescribed formulas to achieve consistency across retailers
Earlier identification of customer experiencing payment difficulties	Likely: Early identification is more likely if experience has been positive	Yes early identification a feature of the model	Risk that the ESC's model sweeps up many customers who do not need and do not want payment plan. Lead to high dissatisfaction & consumer resources to address
Improve quality of communications to identify risk (respect, understanding..)	Yes	Not a major theme	ESC categorises types of customers using objective billing/usage data rather relying on customer communications. Risk that customers who do not want or need assistance are captured in payment plan
Ensure consumer engagement & control	Yes, explicit purpose of the AER's approach	Not initially; greater engagement for hardship customers in later steps	Automation of early stages in the process and design of assistance programs risks that customers becoming disengaged & do not respond proactively/may even be negative.
Ensure customers have relevant all information (rebates etc.)	Yes	Yes for all customers	ESC process supports requirements to provide information on tariffs etc., with information available to all customers with payment difficulties
Ensure customers have access to energy management (EM)	Yes for hardship customers	Yes for all customers	ESC proposal creates strong obligation to provide EM. Value of EM is not certain given tariffs and social-economic factors.
Flexibility to vary plan to respond to changing needs	Yes	Limited	Automation means that it is difficult for a retailer to tailor offer to the customer and their situation early in the process.
Regular monitoring	Yes	Yes	ESC proposal is strong on regular monitoring and reporting of compliance & performance outcomes.
Encouragement & feedback to customers	Yes	Limited	Automatic process to categorise customers and detailed prescribed payment plan features limit the opportunity for retailers to provide additional services
Improve measurement of outcomes & compliance incentives	Yes – improve measurement No compliance incentives (non-mandatory)	Yes	ESC proposes significant improvement in the measurement of outcomes and reporting...ESC has enhanced enforcement powers
Appropriate referral of customers to 3rd parties	Yes	Yes	ESC intends to formalise the use of 3rd parties. ESC requires accreditation of 3rd parties & that may be beneficial to customers
Post plan completion 'check-in'	Yes	No	ESC does not identify any follow up with customer in the process although this will assist in reducing future payment 'crises'.

Table 9: SACOSS Assessment Criteria & ESC Framework

SACOSS Assessment Criteria	AER: Sustainable Payment Plans Framework	ESC: Supporting customers avoiding labels	Comment
Cost efficient	Yes	No cost benefit analysis provided	Implementation of ESC's proposal will be more expensive & shared over smaller customer base. Ongoing costs higher due to more consumer calls, monitoring & reporting obligations Adds costs to other national consumer stakeholder organisations.
Impact on disconnections	Positive given improved communications	Uncertain	ESC process means debt identified earlier, but lower consumer engagement and confidence may reduce cooperation
Process is adaptable to changing market conditions	Yes, focus is on improving quality of interactions	No	High investment costs in systems and automation of processes means changes are expensive and slow
Supported by stakeholders	Yes	Reservations	Stakeholders concerned with cost and complexity of the ESC's proposal and the lack of flexibility/rule driven rather than customer driven.
National harmonisation	Yes	No	Victoria will be less aligned with NECF. Not clear if this will have a negative impact on Victoria signing up to NECF.

5. SACOSS Conclusions about New Regulatory Frameworks

5.1 Overview

It is appropriate at the outset of any assessment of the two proposals to express SACOSS' support for the work of both the AER and ESC in critically evaluating the existing regulatory frameworks for vulnerable energy customers.

SACOSS also shares the concern of both the AER and the ESC that, despite all the efforts to improve services to these vulnerable customers, including regulatory reforms and the efforts of some retailers, very little has changed in terms of the overall outcomes.

Both the AER's and the ESC's retail performance reports indicate that many customers are not completing the repayment plans, and the most vulnerable customers are generally not able to eliminate their historical debt. In some cases, the level of debt is increasing.

This is an unacceptable burden on these vulnerable customers, and on the community as a whole. Ultimately, the cost of unpaid debt is passed on to all customers.

However, it appears that this has not necessarily translated into increasing levels of disconnection. Overall, disconnection rates suggest that disconnection is a 'last resort' for most retailers.[263]

A second area that is unacceptable to SACOSS is the finding by the AER and by the ESC that there are significant differences between retailers in their treatment of vulnerable customers. Some retailers also appear to change their approaches over time leading to inconsistent outcomes for their customers.

While the AER and the ESC state that there was no evidence of any systematic non-compliance by retailers with the existing regulatory regimes, it is clear that these current regimes leave scope for retailers to comply with the letter of the law while their customers are experiencing very different outcomes.

The relatively low level of vulnerable customers, including 'hardship customers', receiving advice from their retailers on how best to manage their usage also indicates a gap in the retailers' management of vulnerable customers and in the regulatory frameworks and enforcement policies.

It is acknowledged that there are a number of obstacles to providing effective energy efficiency advice to individual households. However, improved energy efficiency is an essential component of enabling a customer to better manage their energy bills and SACOSS considers all efforts should be made to overcome these obstacles.

In summary, SACOSS agrees that there is a need to 'rethink' the current regulation of retailers' programs for vulnerable customers and we support the AER and the ESC in conducting these reviews.

Customer representatives in general have also been very committed to the review processes and SACOSS has initiated or participated in a number of multi-disciplinary conferences on the topic.

SACOSS therefore has some sympathy with the views of the ESC's Chairman, Dr Ron Ben-David, at the commencement of the ESC's review of the regulatory frameworks for customers experiencing payment difficulties. At a conference in May 2015, he stated:[264]

> *...dealing with financial hardship is perhaps the most vexing of problems we face as a regulator charged with promoting the long term interests of all consumers.*
>
> *This is a Gordian knot in manifold dimensions. A knot of issues and consequences; rights and obligations; choices and capacities; customers and retailers. This knot sits in a rope with no free ends; no obvious starting point from which we might begin to unravel its entangled mesh of concerns.*

However, having recognised the complexity of the issue of ensuring ongoing and adequate energy supply for vulnerable customers experiencing financial hardship, the ESC's final response is to implement a highly structured framework with automated stages and mandated payment plan options.

The ESC's framework relies heavily on system-based solutions to identify customers and less on early engagement with customers and empowerment of these customers to better manage their payment difficulties.

SACOSS questions whether a system-based, automated process is the most appropriate method to manage the complex problems identified by the ESC, or to resolve the 'manifold dimensions' of the Gordian knot.

Perhaps an alternative is to start with the insights of Tolstoy, namely:

> *Happy families are all alike; every unhappy family is unhappy in its own way.*

SACOSS would argue that every vulnerable customer is vulnerable in their own way. It follows that any process to better manage these customers, particularly those customers with long-term debt, must take account of the specific circumstances facing that customer.

263. SACOSS has identified some anomalies in recent disconnection data and is seeking clarification from the relevant regulator.

264. Dr Ron Ben David, "Supporting Energy Customers in Financial Hardship: Untying the Gordian Knot?" 11 May 2015, p. 23. Paper presented at the Credit Collections & Hardship Program in Utilities conference.

However, SACOSS also concludes that while the ESC's proposed framework as set out in its Final Determination has significant limitations, the AER's more evolutionary approach has limitations too.

SACOSS does acknowledge that there are still many uncertainties around the effective 'best practice' management of vulnerable customers, particularly when this is defined in terms of outcomes such as the level of debt and the rate of disconnection.

However, this uncertainty should not delay an immediate focus on improving the quality of the experience for vulnerable customers through respectful communications, better engagement and customer empowerment while the search for better and more comprehensive and sustainable solutions continues.

5.2 The reasons for the conclusions by SACOSS

5.2.1 The importance to the customer of 'agency' and control

SACOSS places a strong emphasis on processes that demonstrate respect and empathy for the customer and the situations they find themselves in.

SACOSS also emphasises the importance of the vulnerable customer having a sense of engagement and control over the process, and that the customer is genuinely empowered to make appropriate decisions on the management of their debt and their future energy use.

This is not to say that the vulnerable consumer should not be supported in their decision-making. The AER's framework, for instance, encourages the retailer to provide information and advice to the customer in coming to this decision.

Nor does granting the customer some degree of empowerment and agency in the process mean that the customer has no obligations to the retailer. SACOSS considers that true agency also means the customer accepting that there are mutual obligations. The retailer has responsibilities to listen, advise and inform, and the customer has responsibilities to communicate with the retailer and, ultimately, work with the retailer with the aim of repaying their debts for the services rendered to them.[265]

However, by empowering the customer, the retailer is providing the consumer with the personal resources to better manage their current situation and in the future to the benefit of both the retailer and the customer.

From a broader policy perspective, empowerment enhances the confidence of the consumer to actively participate in the competitive market in the future.

SACOSS' view on this is supported by both practical experience and social theory as captured in the following quotation:[266]

> *Marketing and policy responses must be against discrimination, against promoting or facilitating learned helplessness and for empowerment by assisting individuals to develop skills that foster optimal functioning and individual agency... Public policy should be based on consumer perspectives of vulnerability, not on well-meaning third parties' evaluations of their situations. Being treated like someone else wants to be treated may well not be appreciated.*

In this context, SACOSS considers that the ESC's approach set out in its Final Determination is overly automated and prescriptive. Further, it is too broad in its definition of customers needing assistance from their retailer.

In particular, the ESC's framework as set out in its Final Determination suggests that any customer who has missed a payment must be automatically placed on a monthly repayment plan. This 'decision' involves no discussion with the customer.

As a result, many customers who are not vulnerable will end up on monthly payment plans that the customer has neither requested nor required. Retail resources will in turn be tied up in dealing with complaints from these customers and in resetting their billing arrangements.

An automated process with a standardised payment plan is not necessarily beneficial to the more vulnerable customer either.

In particular, the extent of automation and standardisation built into the early stages of the process will mean that the customer will have little if any sense of personal control over the process. Both the process and the payment plan will depend only on the 'type' of customer debt, as defined by a computerised algorithm, rather than by the individual customer's needs at the time.

The disempowered customer is likely to also be a disengaged customer unwilling to work constructively with the retailer or to contact the retailer in times of difficulty.

Moreover, there is no flexibility for the retailer to respond to the individual circumstances of the customer. The billing machine and the algorithm are in control!

[265] Subject to a decision by the retailer to forgive all or part of the debt.

[266] Baker SM, Gentry JW & Rittenburg TL, "Building Understanding of the Domain of Consumer Vulnerability". Journal of Macromarketing, Vol 25 No. 2, December 2005, p. 10. https://www.researchgate.net/profile/James_Gentry2/publication/258153302_Building_Understanding_of_the_Domain_of_Consumer_Vulnerability/links/5592d42f08ae1e9cb4297cfa.pdf

It is only at Stage D and E that the ESC's Final Determination framework appears to focus on the retailers having meaningful conversations with the customer to understand the customer's energy use and capacity to pay and thereby tailor a payment plan more aligned with the customer's situation. SACOSS considers that by this time, the customer is likely to have become disengaged from the process and is unlikely to feel committed to any payment plan whether tailored or not.

In marked contrast to the ESC's automation of the initial stages of the process, the AER's framework is very much focussed on enhancing and personalising the initial contact between the retailer and the customer.

That is, the AER's framework is designed to engage and support the customer at the very outset; it is the customer together with the retailer who identifies whether there is a payment difficulty and the extent of this difficulty.

By enhancing the customer's sense of control and agency early in the process, SACOSS believes that the AER's Sustainable Payment Plan Framework offers a more effective pathway towards improving the outcomes for vulnerable customers.

SACOSS also considers that by specifically discounting the value of early conversations and capacity to pay assessments, the ESC's process fails to recognise the importance of understanding the broader context in which the customer experiences this vulnerability.

While the ESC is correct in saying it is not its task to evaluate these situational factors, this does not mean that these factors are unimportant in establishing effective communication between the retailer and the customer. Understanding of these factors will facilitate the development of a sustainable payment plan while also enhancing the customer's capacity to manage future payments and, eventually, participate in the competitive market.

5.2.2 Are there potential benefits of more prescriptive regulation?

Despite SACOSS' view that the conversation with a customer must commence at the start of the process not the end, SACOSS also recognises that some aspects of the ESC's proposed changes are worthy of further consideration in the national framework.

For example, SACOSS would support the ESC's focus on early intervention and we consider that the ESC tackles 'head on' the troubling observation of increasing levels of consumer debt and uncompleted payment plans, particularly for the most vulnerable customers.

The ESC's approach also imposes a specific obligation on retailers to provide additional advice and energy management services to all customers with payment difficulties. The ESC's approach mandates further, more proactive intervention to manage consumption levels for those customers in the most need and who cannot pay for either their current debt or future consumption.

Ultimately, when rebates, concessions and the like are exhausted, finding ways to effectively reduce usage (without negative impacts on health and wellbeing) may be the only long-term solution for these most vulnerable sectors.

There is no doubt that there are many barriers to improving the efficiency of energy use, particularly for low-income households or those with special needs. However, by mandating a high standard for retailers to provide energy efficiency services to these customers, the ESC process has the potential to give some relief in the longer term.

There is, however, a real need for further research on what programs have the best effect over the longer term for vulnerable customers. To date, the results are very mixed, reflecting in many cases the wider situational factors these customers face.

While SACOSS supports the intent of this aspect of the ESC's program, we reiterate our view that for an energy management program to succeed, the recipient must feel engaged and empowered in the decision-making from the outset. Energy management forced on a client simply for the sake of ticking the compliance box with the ESC's regime will have high costs but deliver little long-term benefit.

5.2.3 Are there risks in relying on a voluntary framework such as the AER's approach set out in its Sustainable Payment Plans framework?

SACOSS has some concern that the AER's Framework is both voluntary and aspirational. There is already evidence accepted by both the AER and the ESC of good practices by some retailers. These same retailers will no doubt be the first to sign up to the AER's voluntary Framework.

However, it is a leap of faith that other retailers who are currently only meeting the minimum standards will sign up to a Framework that will require them to provide more services and in a more consistent way to support their customers experiencing payment difficulties.

Will these industry laggards be sufficiently motivated to move towards and commit to better practices? Or will their customers continue to receive a lower, minimalist level of support when facing payment difficulties? Will these retailers seek to save costs by 'pushing' these customers towards the standard retailers?

The AER appears to believe that it can promote widespread adoption of the Framework by having a

public list of all retailers who have signed up to the Framework and by removing retailers from the list if they fail to meet the higher standards.

This is a 'moral suasion' argument. If moral suasion is to be used as a means of lifting the standards of all retailers, then it is essential that the AER strongly promote the existence and import of the 'list' of retailers signed up to the Framework.

More generally, however, given the characteristics of many households experiencing higher degrees of difficulty paying their bills, it is not sufficient for the AER or policy makers to rely on the competitive market to drive the quality of retailers service offerings to these consumers.

5.2.4 The potential benefits of enhanced monitoring and reporting

SACOSS is pleased to see the formalisation of the processes for monitoring and reporting outcomes. This provides the basis for ongoing improvement in the management of customers, although it is only in the last few years that the data has been strategically analysed by the regulators.

Customers' circumstances change and the environment changes. For instance, the advent of smart meters has enabled remote disconnection and reconnection of residential customers in Victoria.

This in turn 'accelerates' the turn-around between a retailer ordering a disconnection and the distributor disconnecting the customer[267] and increases the incidences of multiple disconnections of the same customer in a year, as demonstrated in the recent report by St Vincent de Paul Society and Alviss Consulting.[268] The report also highlights the relationships between remote disconnection and the observed increased incidence of multiple disconnections for the same customer.[269]

Enhanced monitoring and reporting has the potential to flag issues such as this early in the process, thus providing time for the regulator to assess and adjust the regulatory requirements.

The benefits also include a greater capacity for the regulator to apply 'moral suasion' to achieve improvements and increase competitive pressures on retailers.

5.2.5 The need for a better understanding of the customer and the situational context

Ofgem has revealed the importance of a more global understanding of the customer, the market and the situational context facing the customer.

Yet neither the AER nor the ESC discusses the implications of these external factors in the management of vulnerable customers. The focus is on the retailer – customer interactions, but these do not occur in isolation and to ignore these factors is to underestimate the challenge and the solutions.

As SACOSS has noted above, for instance, the evidence from the Alviss Consulting study suggests that the advent of smart meters with remote disconnection and reconnection capability has directly led to increases in the number of disconnections in Victoria. There have also been increases in the number of multiple disconnections of the same customer.[270]

The study found a clear downward trend in Victoria in the number of disconnection orders that were not completed. The Victorian trend in 'completed disconnections' parallels the roll-out of smart meters as summarised below:[271]

- **2012-13:** 53 per cent of disconnection orders by the retailer were *not completed* by the distribution company;
- **2013-14:** This figure had dropped to 27 per cent;
- **2014-15:** Only 20 per cent of retailer initiated disconnection orders were not completed by the distributor.

In contrast, the proportion of disconnection orders that were not completed by the distributor in other states that required a site visit to complete a disconnection ranged from 33 per cent up to 53 per cent.[272] This reflected the significant time delays between the raising of the retailer's disconnection order and the response by the relevant distribution company together with (perhaps) the distributor's reluctance to disconnect customers in some areas.

It would therefore be easy, but far too simplistic, to look at an increase in disconnection rates in Victoria and attribute this solely to the limitations of the retailers' management of their vulnerable customers.

267. In Victoria, only the distributors can physically disconnect a customer even though in almost all circumstances it is the retailer requiring the disconnection.

268. See: St Vincent de Paul Society & Alviss Consulting, Households in the dark; Mapping electricity disconnections in South Australia, Victoria, New South Wales and South East Queensland, May 2016, p.p. 4 & 6. In the non-Victorian states there may be up to 2-3 weeks between the time the retailer raises the disconnection request and the completion by the distributor (ibid, p 26). In the meantime, a significant number of customers will have paid their invoice and the retailer cancels the uncompleted disconnection request.

269. ibid, p. 7.

270. ibid.

271. ibid, p. 17.

272. ibid, Chart 5, p. 15. Note there may be some timing differences between this data and the information in the Victorian data tabled above.

The case for greater, more prescriptive regulation is not clearly made when external factors are likely to be the cause of, or contribute to, the observed increases in disconnection rates.

5.2.6 Do the frameworks support adaption to change and innovation?

The discussion above on smart meters is just one example of the changes occurring in the energy market. It is essential that the frameworks are flexible and encourage innovation so that vulnerable consumers can benefit from these changes.

By empowering vulnerable consumers to take control of their own energy payments, the AER's framework facilitates this participation. Because it is principle based rather than tied to specific actions (beyond the minimum requirements), it also provides scope for retailers to innovate in how and when they deliver different forms of assistance.

SACOSS has already noted that the ESC's more prescriptive framework as set out in the ESC's Final Determination, may reduce a customer's sense of control and empowerment. SACOSS is also concerned that the prescriptive nature of the ESC's frameworks will limit opportunities for innovation.

This issue has been raised by a number of stakeholders during the ESC's consultation process and the ESC considers it has addressed this issue in its Final Framework.

In reality, however, the ESC's approach may well hinder retailers adopting innovative practices even if in theory such practices are allowed. The significant costs, complexities and risks of implementing the ESC's multi-stage process may well lead to a focus on compliance rather than innovation. Retailers, conscious of the need to rigorously comply with each step in the ESC's multi stage process, may not be willing to take on further costs and risks by introducing innovations in the process.

This is particularly the case in Victoria because, in parallel to the introduction of the new Framework, the penalties for wrongful disconnection have been substantially increased,[273] as have the ESC's compliance assessment and enforcement responsibilities.[274]

5.2.7 Have the costs and benefits of the frameworks been adequately assessed?

SACOSS considers that reducing the level of customers' energy debts and the rate of disconnections will have benefits to customers and to the wider community. However, like all new regulation, there must be a careful assessment of both the benefits and the costs of implementing and operating the new frameworks.

The cost to retailers of implementing and operating the AER's Sustainable Payment Plans Framework is likely to be small relative to the benefits. Firstly, participation is voluntary. Secondly, the Framework builds on existing processes, the aim being to enhance the quality of these processes rather than to fundamentally change them.

The experiences of other essential service providers, such as Yarra Valley Water (YVW), confirm the benefits to customers and to the business of improving the quality of the processes and the interactions with the customers. YVW is widely recognised as a leader in developing programs for customers experiencing payment difficulties that benefit both the customer and the business.

For example in its submission to the ESC's Draft Determination, YVW states:[275]

> *The most recent review of the cost effectiveness of our current support program in the hardship case model, continues to produce a substantial business case. Therefore, whilst we continue to protect the health and wellbeing of our most financially vulnerable customers, our hardship program continues to achieve a positive financial outcome.*

YVW's approach to managing vulnerable customers, therefore, does not rely on highly structured and automated processes. Rather, it relies on a strong and consistent commitment to improving the quality of the consumer's experience and maintaining positive lines of communication with the customer and with other partner agencies. These feedback loops in turn allow YVW to test ideas and progressively enhance its services.[276]

The YVW hardship customer is also encouraged to determine what they can afford to pay rather than the retailer determine it for the customer. As YVW states

[273] The wrongful disconnection payment was increased to $500 per day via amendment to the Energy Legislation Amendment (Consumer Protection) Act 2015 (Vic) and the ESC was granted new powers to impose a $5,000 penalty for each breach of the Energy Retail Code that has led to a wrongful disconnection.

[274] Effective from 1 June 2016, the ESC has a new compliance and reporting function and new and updated enforcement powers following amendments to the Essential Services Commission Act 2001 and associated regulations. See: http://www.esc.vic.gov.au/project/energy/30280-interim-approach-to-energy-compliance-and-enforcement/

[275] Yarra Valley Future Water, Response to Essential Services Commission's Energy Hardship Inquiry Draft Report, October 2015, p. 12.

[276] See for instance, Kildonan Uniting Care, Response to Energy Hardship Inquiry Draft Report, October 2015, p. 5.

in its submission with respect to its "Arrange and Save" program:[277]

> *The program has an underpinning philosophy of behaviour change and assists in building positive, trusted and stronger relationships between the retailer and the customer. Yarra Valley Water reported a payment compliance of 94% for customers who are participating in the Arrange and Save program last year which shows the effectiveness of this engaging model.*

The AER's Sustainable Payment Plans Framework incorporates many of the elements of the YVW model by emphasising the quality of the interactions and the customer's ability to engage in the process.

In contrast, the ESC's new framework (as set out in its Final Report) will require substantial changes to retailers' processes and systems and will have implications for other parties such as the community sector, financial counsellors and perhaps the Ombudsman (given the changes to the disconnection and billing procedures).

The ESC has stated in its Final Report that it has altered some aspects of its proposed framework in response to feedback from retailers on the costs of implementation. The ESC states that it has made these significant changes: "in response to feedback about how the framework would need to build on the national framework rather than duplicate it".[278]

Nevertheless, the changes to current processes are substantial and will involve extensive changes to retailer systems, staff training, customer communications, rewriting of market contracts, market transfer systems[279] and so on.

Retailers, for instance, have identified issues with the ESC's final framework such as the need to track in 'real time' customer debt levels and matching these debt levels with forecast consumption profiles, in order to assess the customer's 'type' of payment difficulty and the appropriate mandated payment plan.

AGL described the impact of the ESC's "highly stratified approach to categorising customers" as follows:[280]

> *Large system costs as retailers track various debt accrual thresholds through the system. Also added complication for customers who may move between 'Types' or levels. No clarity on how this will be addressed... Increased bills due to system changes. Over-reliance on system solutions as opposed to engagement with customers.*

Not only does the ESC appear to underestimate the overall costs of its proposed scheme, the ESC also claims that the costs of its approach will relate largely to the implementation stage and ongoing costs will be small. SACOSS is not convinced and considers that ongoing costs could be substantial.

For instance, the initial automated processes are likely to 'sweep up' many non-vulnerable customers who do not need and do not want to enter some form of repayment plan.[281] This in turn is likely to impose ongoing costs on retailers in terms of rising customer complaints, customer messaging, resetting billing cycles (as customers move to and from monthly billing) and so on.

It is also likely that these increased concerns will flow through to increases in the Ombudsman's costs associated with these complaints, and increased costs for the community sector and financial counsellors.

It will be up to the ESC to explain to energy users why energy retailers in Victoria have this unique obligation to place customers on monthly payment plans without the customers consent or engagement, simply because they have not paid their bill 'on time'. The move by many retailers to a standard monthly billing cycle for electricity by many retailers will accelerate the billing and missed payment cycle, potentially exacerbating the problems.

The ESC's changes will also create a different regime in Victoria than the national framework with all the attendant additional costs for Victorian consumers. Currently, each of the retailers appear to have established a common customer hardship program process and reporting protocols that apply across all states including Victoria.[282]

However, given the features of the ESC's proposal in its Final Report, the retailers will now require a separate and complex change to processes and reporting protocols to apply to Victorian customers only. The Energy Retail Association of Australia (ERAA) in its submission to the ESC explains this issue as follows:[283]

277. ibid, p. 10. The Arrange and Save program is directed at customers who are unable to afford the cost of debt along with the ongoing usage.

278. Essential Services Commission 2016, Supporting Customers, Avoiding Labels. Energy Hardship Inquiry, Final Report, February 2016, p. 103

279. This is because certain customer categories will not be able to transfer to another retailer until the outstanding debt issues are resolved.

280. AGL Energy, "ESC- retailer perspective", 17 March 2016. Presentation to the National Consumer Roundtable.

281. This arises as a result of the ESC's proposal that all customers who have not paid their energy bill by the due date on the reminder notice, and who have not contacted the retailer, will be automatically placed on a three, six or nine month payment plan (depending on their billing cycle).

282. Particularly since the Victorian Energy Retail Code Version 11 which reflected the previous policy of harmonisation with the NERL, NERR and the AER's guidance.

283. ERAA, Letter to ESC re: "Supporting Customers, Avoiding Labels – Energy Hardship Inquiry Draft Report", 2 October 2015, p. 2.

> *The costs of implementing an alternative framework will be significant … Maintaining and operating two different hardship frameworks to cater for different jurisdictional requirements is expensive and inefficient. Retailers have incurred significant costs in developing systems and processes that meet both the National Energy Customer Framework (NECF) and the harmonised Energy Retail Code in Victoria. To promote efficiency and competition in the NEM [National Energy Market], nationally consistent frameworks are necessary.*

These additional costs of a stand-alone Victorian process will also be incurred by the community sector as they too will need processes and procedures that align with the ESC's process in Victoria.

While the ESC has claimed that its Final Report introduces a number of changes that better align it with the national arrangements, the fact remains that there are significant differences with significant cost implications.

It is of concern that the ESC does not appear to have systematically investigated the totality of the costs to retailers and other stakeholders.[284] Nor has the ESC indicated how these costs might be recovered – presumably, the ESC is willing to accept that costs will be passed through to all residential customers, but this is not stated.

Nor does the ESC appear to have compared the costs and benefits of its proposal to the costs and benefits of other approaches that might address the issues and be more aligned with the national approach and Version 11 of the Energy Retail Code.

To be clear, however, SACOSS recognises the deficiencies in the current arrangements and the need for some change. It is the nature of the change and the lack of any transparent cost/benefit evaluation process undertaken of the proposed approach versus alternatives that is of concern here.

5.2.8 Consultation Processes

SACOSS has not been closely involved in the development of the ESC framework but SACOSS does acknowledge the investment that the ESC and consumer representatives in Victoria have made to date in an attempt to improve outcomes for vulnerable customers.

SACOSS has, however, interviewed a number of consumer stakeholders who have been closely involved in the ESC's development process. As noted by the ESC, the consumer representatives generally supported the ESC's assessment of the issues with the current hardship policy framework. Stakeholders also supported the general principle of early intervention to reduce the customer's debt and the removal of stigma associated with this debt.

Nevertheless, in its discussions with the Victorian consumer representatives, SACOSS found a common frustration about the direction the ESC was taking in revising the framework.

Most particularly, the consumer representatives were concerned that the ESC's approach was not promoting solutions that involved better communication and understanding between retailers and their vulnerable customers, particularly the most vulnerable customers who faced significant difficulties in paying back debt and paying for ongoing usage.

There was a clear view that early respectful conversations with consumers, including assessments of the customer's 'capacity to pay', were required in order to find sustainable solutions.

The consumer representatives considered that the automated process and prescriptive assistance measures contradicted the best practice principles of engagement, agency, and respect.

These representatives argued that the ESC's framework would take away customers' sense of control and limit the ability of retailers to respond with flexibility to the particular issues facing a vulnerable customer.

SACOSS understands that prior to and following the publication of the Final Report, the ESC is continuing to consult with all stakeholders regarding the implementation of the scheme. SACOSS hopes that the ESC will address the real concerns with the ESC's process and outcomes expressed by retailers and by consumer advocates who have had many years of experience with assisting energy customers.

5.3 Summary

Table 10 below summarises SACOSS' current views on the AER and the ESC approaches (as set out in their respective final reports) against the evaluation criteria set out previously in this report. For instance, the ESC has undertaken some further revisions to its approach since publishing its Final Report.[285]

In making this assessment, SACOSS is well aware that the two approaches are not yet implemented and that the ESC's approach in particular will evolve as the implementation issues are worked through.

[284] However, SACOSS has received informal advice that these costs were sought by the ESC but not provided until relatively late in the review process.

[285] The ESC held two short seminars in September 2016 to provide a high level explanation of the changes it has introduced since the publication of the Final Report.

In addition, the regulatory framework that underpins the reviews of both the AER and the ESC are quite different. The AER is more restricted in some ways, as it must develop its program within the NERL and NERR. On the other hand, the ESC can amend the Energy Retail Code and place new obligations on retailers.

However, the ESC is also bound by the industry laws and by the terms of reference set by the Victorian Government.

Nevertheless, and recognising these limitations, SACOSS uses its considerable experience with policy development and assessment to evaluate the two proposals. SACOSS believes that such an evaluation is an important step in the process of improving the management of vulnerable energy customers.

Table 10: Summary of SACOSS response to the AER and ESC proposals

SACOSS Assessment Criteria	AER: Sustainable Payment Plans Framework	ESC: Supporting customers avoiding labels	Comment
Mandated actions	No (voluntary)	Yes	ESC requirements will be included in Energy Retail Code, et al, with penalties for non-compliance
Change from current approach	Designed to enhance current process	Substantial changes	ESC emphasises automation of processes and prescribed formulas to achieve consistency across retailers
Earlier identification of customer experiencing payment difficulties	Likely: Early identification is more likely if customer expects a positive experience	Yes early identification a feature of the model	Risk that the ESC's model sweeps up many customers who do not need and do not want a payment plan. Lead to high dissatisfaction & consume resources of retailers and others to address these issues
Improve quality of communications to identify risk (respect, understanding.)	Yes	Not a major theme	ESC categorises types of customers using objective billing/usage data rather than relying on customer communications. Risk that customers who do not want or need assistance are captured in payment plan
Ensure consumer engagement & control	Yes, explicit purpose of the AER's approach	Not initially; greater engagement for hardship customers in later steps in the process or if self-identify to retailer	Automation of early stages in the ESC process, and design of assistance programs, risks customers becoming disengaged & not responding proactively/may even be negative.
Ensure customers have all relevant information (rebates etc.)	Yes	Yes for all customers	ESC process supports requirements to provide information on tariffs etc., with information available to all customers with payment difficulties
Ensure customers have access to a variety of energy management (EM) services	Yes, for hardship customers	Yes, for all customers	ESC proposal creates strong obligation to provide EM. Value of EM is not certain given tariffs and social-economic factors. Further research required on this.
Flexibility to vary plan to respond to changing needs	Yes	Limited	Automation means that it is difficult for a retailer to tailor a payment plan to the customer and their particularly situation at least early in the process.
Regular monitoring	Yes	Yes	ESC proposal is strong on regular monitoring and reporting of compliance & performance outcomes. Important that it is timely. AER should also provide early feedback on participation in its voluntary scheme.

Table 10: Summary of SACOSS response to the AER and ESC proposals

SACOSS Assessment Criteria	AER: Sustainable Payment Plans Framework	ESC: Supporting customers avoiding labels	Comment
Encouragement, rewards & feedback to customers on their progress	Yes, built into the best practice approach including feedback at the end of the repayment period.	Limited to the most vulnerable customers	Automatic process to categorise customers and detailed prescribed payment plan features limit the opportunity for retailers to provide additional services at least in the early stages of the process.
Improve measurement of outcomes & compliance incentives	Yes – improve measurement No compliance incentives (non-mandatory)	Yes	ESC proposes significant improvement in the measurement of outcomes and reporting...ESC has enhanced enforcement powers. Important that these reports are more timely than the current ESC Performance Reports
Appropriate referral of customers to 3rd parties	Yes	Yes	ESC intends to formalise the use of 3rd parties. ESC requires accreditation of 3rd parties & that may be beneficial to customers
Post plan completion 'check-in'	Yes	No	ESC does not identify any follow up with customer in the process although this will assist in reducing future payment 'crises'. However retailers could introduce this step as part of their program
Cost efficient	Yes	No cost-benefit analysis provided	Implementation of ESC's proposal will be more expensive & shared over smaller customer base (Victoria only). Ongoing costs higher due to more consumer calls, monitoring & reporting obligations likely to add costs to other national consumer stakeholder organisations and the Victorian Energy & Water Ombudsman.
Impact on disconnections	Positive given improved communications	Uncertain. Some stakeholders consider disconnections will increase.	ESC process means debt identified earlier, but lower consumer engagement and confidence may reduce cooperation with the retailer. Disengagement leaves disconnection as the only resort if bills not paid.
Process is adaptable to changing market conditions	Yes, focus is on improving quality of interactions	No	High investment costs in systems and automation of processes means changes are expensive and slow with relatively high implementation risks
Supported by stakeholders	Yes	Reservations	Stakeholders concerned with cost and complexity of the ESC's proposal and the lack of flexibility. Stakeholders consider the process is rule driven rather than customer driven.
National harmonisation	Yes	No	Victoria will be less aligned with NECF than currently. Not clear if this will have a negative impact on Victoria signing up to NECF as it would require a significant derogation.

5.4 Some recommendations for governments

5.4.1 Victorian Government

SACOSS understands and supports the Victorian Government's concerns in establishing the broad ranging Hardship Enquiry given the increases in the rate of disconnections.

In the first instance, however, before embarking on wholesale changes to the current Energy Retail Code (Version 11), SACOSS considers it is important to understand exogenous influences such as the impact of smart meters and remote disconnection and reconnection on the reported number of disconnections and on the experience of consumers.

Table 11 illustrates the potential influence of the increased 'disconnection completion' rates, enabled by remote disconnections capabilities, on the apparent disconnection rates in Victoria. The 'adjusted' figures for disconnections and disconnection rates per 100 customers are based on maintaining the same completion rate as observed in 2012–13, the base year in this analysis.

The table suggests that if completion rates had stayed the same in 2013–14 and 2014-15 as in 2012-13, then disconnections would actually be declining or at least not rising to the degree that underpinned the Government's initial concerns. Moreover, the disconnection rates would be (if completion rates remained at 2012–13 levels) similar to those observed in other states.[286]

It is reasonable, therefore, to argue that it was the increase in disconnection completion rates (controlled by the distributors) that was driving the jump in actual disconnections in 2013–14. SACOSS notes that they appear to have stabilised in 2014–15 in line with the near completion of the smart meter roll-out.

SACOSS would also welcome the Victorian Government investigating in detail the costs of the ESC's proposal to Victorian consumers relative to the incremental benefits, particularly given the analysis above. This should include consideration of the immediate and longer-term costs of Victoria moving further away from harmonisation with the national regime.

5.4.2 Commonwealth Government & COAG Energy Council

SACOSS is concerned that despite supporting many industry workshops on consumer vulnerability, the CEC has not demonstrated sufficient leadership on the issue.

Nor has the CEC formally acknowledged the importance of the issue in its current work program despite that fact that changes in the energy market can have a disproportional negative impact on vulnerable customers if not proactively managed.

As noted in one report by Financial Counselling Australia:[287]

> *Financial difficulty is often the result of a change in circumstances…Poverty is also a major cause of financial hardship…Financial difficulty is also correlated with (or may cause) other problems. It can affect physical and mental health, relationships and children…*

Table 11: Disconnection levels and levels adjusted for changes in completion rates

Victorian Data	Base Year 2012-2013	2013-2014	2014-2015
Number of disconnections (Note 1)	25,254	34,496	34,418
Disconnections per 100 customers (%) (Note 2)	1.07	1.47	1.45
Disconnection orders completed (%) (Note 3)	47%	73%	80%
Adjusted number of disconnections (Note 4)	25,254	22,210	20,221
Adjusted disconnections per 100 customers (%) (Note 5)	1.07	0.95	0.85

Note 1: See Table 4.1 in ESC, 2014-15 *Comparative Performance Report –Customer Service*, May 2016 p. 41.
Note 2: ibid, Table 4.1
Note 3: See St Vincent de Paul Society & Alviss Consulting, *Households in the dark*, May 2016, p. 17. The data in the report is estimated as described in the report and should be regarded as indicative only.
Note 4: Figures for 2013-14 and 2015-16 adjusted to align with the completion rate observed in 2012-13. That is, if retailers retained the same processes in 2013-14 and 2015-16 as they had in 2012-13, and completion rates continued at 47%, what would be the estimated number and rate of disconnections

[286] Based on ESC, 2014-15 Comparative Performance Report – Customer Service, May 2016, Table 4.2, p. 42.

[287] Financial Counselling Australia 2014, Hardship Policies and Practice: A Comparative Study, Australian Communications Action Network, Sydney. The study was sponsored by the telecommunications industry body.

> *Whatever the reasons for financial difficulty, appropriate action could mean the difference between financial recovery and financial oblivion. If financial problems can be minimised or rectified, there are obvious benefits for individuals and families as well as industry and the wider community.*

SACOSS would, therefore, strongly recommend that COAG and the CEC put the issue of vulnerable customers squarely 'back on the table'. The impacts of the CEC's policy decisions on vulnerable customers should be considered as a specific topic in each major policy area.

While there has been debate about rising energy prices, there has been little recent policy discussion on the corollary of increasing price rises, that is, the increasing challenge facing vulnerable customers in affording essential services such as energy.

The current focus of these bodies on the Power of Choice fails to recognise the limited choice that is available to these customers. Nor does it recognise that with the increasing complexity of the market, vulnerable customers risk being left further behind and missing the benefits of competition and technology change.

SACOSS also recommends that COAG investigate the possibility of establishing Australia's own Customer Vulnerability Strategy program under the auspices of the AER or the AEMC. The need for good quality, independent research to support policy decisions has never been more important.

SACOSS

South Australian Council
of Social Service