

Submission to the Better Energy Customer Experiences Consultation

Submission to the Commonwealth
Department of Climate Change, Energy,
the Environment and Water

Submitted by:

DATE: 6/06/2025



Introduction

Today's retail market in energy is characterised by low levels of consumer confidence and trust, wildly differing customer experiences including in terms of access and cost, patchy protection of consumers – not least those in vulnerable circumstances, ever-growing complexity of both regulation and products/services, retailer behaviour that can confuse customers and exploit their loyalty, and serious and substantial breaches of consumer protection rules. The emergence of new energy products and services provided by both incumbent retailers and new entrants adds fresh challenges to this already problematic area.

The Australian Energy Regulator (AER) itself has observed that the regulatory status quo is not fit for purpose.¹ We consider that this is the case not only in relation to new energy services but in the existing retail market too. Experience demonstrates that simply creating more and more detailed, prescriptive rules in reaction to consumer harm is not the way to transform the culture of businesses in this market. A fundamental shift towards a more outcomes and principles-based regulatory model, in particular through the introduction of an overarching consumer duty, is needed to ensure the consumer protection framework is fit for purpose into the future.

We welcome the Better Energy Customer Experiences (BECE) process because it is an opportunity to tackle deeply ingrained retail market issues in a sustained, strategic way. We consider that there are opportunities for BECE to make some important changes quickly. While a much-needed overhaul of the framework for regulating retailers and protecting consumers will take longer, it is no less important.

While there are other important complementary reforms, our submission will focus largely on the value and urgency of introducing a consumer duty. We intend to write separately on other issues of note.

A consumer duty for energy

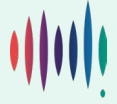
ECA supports the creation of an overarching consumer duty as a central component of an effective consumer protection framework for energy consumers. A revised consumer protection framework should be principles-based and outcomes-focused. While prescriptive rules will still be necessary to complement a consumer duty, the introduction of a duty should fundamentally shift responsibility for ensuring good consumer outcomes to energy providers – rather than requiring consumers to continue to bear primary responsibility for navigating an increasingly complex energy market and regulatory framework.

ECA has commissioned Professor Jeannie Paterson of Melbourne Law School to consider the potential for a consumer duty. Her initial report (Paterson report),² attached with this submission, outlines the rationale for introducing a consumer duty into the regulatory framework for energy. The report identifies a greater willingness across multiple consumer-focused regulatory regimes (such as financial services regulation) to impose responsibility on providers of goods and services to promote good consumer outcomes. This trend has two key elements, involving reliance on principles and standards rather than prescriptive rules, and outcome-based duties rather than conduct obligations.

Moves towards more principles-based and outcomes-focused consumer protection regulation are often in response to increasing complexity of consumer markets and represent a fundamental shift from

¹ AER, *Review of consumer protections for future energy services - Final advice*, November 2023 <<https://www.aer.gov.au/documents/aer-review-consumer-protections-future-energy-services-final-advice-november-2023>>

² Jeannie Marie Paterson and Evgenia Bourova, Melbourne Law School, *Outcomes-based regulation: Proposing an overarching 'consumer duty' within the regulation of essential services: Preliminary Report*, December 2024, available at <<https://energyconsumersaustralia.com.au/our-work/research/report-duty-care-essential-energy-services-preliminary>>.



responsible consumers to responsible providers. ECA considers the arguments for an outcomes-based regulatory framework underpinned by a general consumer duty apply equally, if not more so, to the consumer energy market.

Why a consumer duty is needed

A consumer duty is needed as a central component of a principles-based and outcomes-focused consumer protection framework because the existing prescriptive, rules-based framework governing energy markets is failing consumers today.

Introducing an outcomes-based duty will focus attention on the conduct of the provider, impose positive obligations on providers and require proactive steps for avoiding harm to consumers, providing useful advice and promoting beneficial outcomes for consumers.³ Similar duties have been introduced in a range of other sectors, including for essential services, in response to manifest failings by providers in managing conduct risk (see **Box 1**). Introduction of outcomes-based duties enables a focus on a genuine customer-centred design via reciprocal obligations rather than a one-way obligation from customer to retailer.

ECA considers a consumer duty is needed:

- to respond to – and ensure the regulatory framework can keep pace with – the increasing complexity of energy markets, services and products
- to refocus the regulatory and compliance culture from only following prescriptive rules towards providers proactively thinking about how to achieve good consumer outcomes
- to recognise the information asymmetry and imbalance of bargaining power in energy markets and shift responsibility for ensuring good consumer outcomes from consumers themselves to energy providers.

Box 1: Consumer-based duties in Australia and the UK

There are several existing examples of consumer duties that have been successfully implemented in other markets and the UK, as set out in the Paterson report (pp 14-20). These provide useful precedents in considering a consumer duty for energy. The AER's Final Advice Report also includes examples of principles-based regulation (Box 5.2).

Examples discussed in the Paterson report include:⁴

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

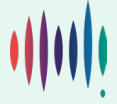
In Australia, financial advisers are subject under the *Corporations Act 2001* (Cth) to a duty to act in the best interests of their clients in providing personal financial advice. The duty is designed to ensure that 'retail clients receive advice that meets their objectives, financial situation and needs.' The duty is complemented by duties to provide appropriate advice, and to give priority to the interests of the client in case of a conflict of interest.

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

In Victoria, the Essential Services Commission has developed a Payment Difficulty Framework embedded in Part 6 of the Energy Retail Code of Practice (version 3, 1 October 2024). This is an example of a principles/outcomes-based approach. This is a hybrid framework specifying a positive

³ Paterson and Bourova (n 2), 7.

⁴ Paterson and Bourova (n 2), 14-20.



conduct standard (acting fairly) underpinned by prescriptive obligations (for example in relation to minimum forms of assistance that need to be offered to retail customers).

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

Some countries have moved towards a 'duty of care' on social media companies to take reasonable steps to ensure hosted content does not cause foreseeable harm. The UK *Online Safety Act* imposes a series of duties of care to protect users from harmful content and includes a requirement to undertake risk assessments. Similar duties have been proposed in Australia to require digital platforms to proactively keep Australians safe and prevent online harm.

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

Since 5 October 2021, Australian financial service providers have been subject to product design and distribution obligations requiring firms to meet the needs of consumers and distribute their products in a more targeted manner, focusing on suitability of products. Providers are required to review their determinations for ongoing suitability of products in the market (i.e. are required to engage in ongoing monitoring of their own performance in meeting regulatory expectations).

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

Australian financial services licensees have a general obligation under the *Corporations Act 2001* (Cth) to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'. This can cover failures to comply with obligations under the regulatory regime and also contractual breaches. Contraventions of the duty can attract civil penalties.

f. The Consumer Duty in financial services (UK)

Since 31 July 2023 financial services providers in the UK have been subject to a consumer duty requiring providers to 'deliver good outcomes for retail customers', underpinned by principles-based expected outcomes. This is a more encompassing obligation than duties and obligations for financial services in Australia and is closest to the reforms envisioned in the AER Final Advice Report.

Proposals for an energy duty of care in the UK

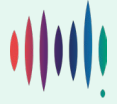
While the UK has not yet legislated a consumer duty of care for energy, Ofgem is currently considering implementing a consumer duty for energy customers. There are narrower duties that apply to specific groups of vulnerable consumers (for example, Ofgem has a statutory duty to have regard to the interests of people who are disabled, chronically sick, of pensionable age, on low incomes or living in rural areas), obligations on energy suppliers in respect of vulnerable customers, and licence conditions require energy providers to identify and respond to the needs of customers in vulnerable situations and treat all domestic customers fairly.⁵

Duties in other contexts

There are several examples of duties-based regulation in other contexts, particularly in regulatory schemes that regulate risk to prevent harm to people or the environment. For example: occupational health and safety (OHS) duties in model OHS laws in Australian jurisdictions; general environmental duties in Victoria and other jurisdictions (as noted in the AER Final Advice Report); and electricity safety duties such as in Victoria's *Electricity Safety Act 1998*. These duties are likely to have useful design features that should be considered in designing a consumer duty for energy.

These issues are summarised in the Paterson report:

⁵ Paterson and Bourova (n 2), 14-15.



‘Changing markets and increased complexity have led to recognition of a need to shift greater responsibility to providers for ensuring that consumers obtain products suitable for their needs, and receive the ongoing support required to enjoy those products along with maintaining a basic level of energy security. Consumers do not have the skill to assess the risks associated with different energy choices or the time to make use of disclosure materials in informing their choice of products. Moreover, behavioural tendencies, such as optimism bias, often work against prudent decision-making by consumers. Yet the harms associated with poorly suited products can be significant.

The risks of harm arising from poor choices in complex consumer products are especially concerning for consumers experiencing vulnerability but are relevant to all consumers dealing with new technologies in complex and rapidly changing markets. These concerns are amplified in markets such as energy for services that are essential; in a real sense, consumers simply cannot walk away from transacting with essential service providers, and even optional choices involve considerable sunk costs. In the face of significant asymmetries of information and bargaining power, providers rather than consumers are being increasingly made responsible for consumers obtaining products that meet their expectations and promote their best interests. In energy markets, this approach may additionally support innovation by building trust in the market and in new products and technologies.’⁶

ECA considers that introducing a consumer duty as part of a principles-based and outcomes-focused regulatory framework will have significant benefits compared to current arrangements. A consumer duty will:

- be more adaptable to changing market practices, rapid technological innovation and social expectations
- provide a consistent baseline level of consumer protection, reduce legislative complexity and will be less constrained by slow processes for regulatory reform
- provide a greater degree of flexibility and accountability for energy companies to deliver good consumer outcomes in a way that best aligns with their own systems and product and service offerings.⁷

The ECMC, AEMC, AER and other regulators today are required spend an enormous and disproportionate amount of time working on detailed rule changes to fix the retail market, amending and adding to the many rules already in place. While the volume of rules is indicative of the wide range of consumer protection matters that appropriately require regulation, regulators and policymakers cannot keep pace with the rate of change and emerging consumer protection issues through this approach. General conduct obligations on providers, such as through a consumer duty, would alleviate this burden and ensure an enduring baseline level of protection for energy consumers.

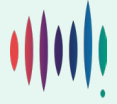
There is growing evidence that the existing regulatory framework is not delivering effective protection for consumers and is contributing to a range of harmful outcomes. For example:

- **Breaches of energy laws:** In recent years energy companies have paid millions in penalties for thousands of proven or alleged breaches of energy laws. These include contraventions that can cause significant harm to energy consumers, such as failing to meet obligations to hardship customers and customers reliant on life support equipment.⁸ The ECA welcomes regulators

⁶ Paterson and Bourova (n 2), 6.

⁷ Paterson and Bourova (n 2), 8-9.

⁸ E.g. Australian Energy Regulator, [AER reports on latest compliance and enforcement activities](#) | Australian Energy Regulator (AER), Essential Services Commission (Victoria), [Register of enforcement action](#) | Essential Services Commission.



taking strong action to respond to breaches of the law. However, the volume of contraventions indicates that the current prescriptive rules-based regulatory regime has not resulted in a mature and consumer-focused compliance culture among energy businesses.

- **Loyalty tax:** According to the ACCC, 2.6 million customers who are paying prices at or above the default offers may benefit from switching offer or retailer,⁹ and yet 54 per cent of households say they just want a basic relationship with the energy system.¹⁰ Customers start incurring a loyalty penalty after less than one year of not engaging in the market, and the size of the penalty continues to grow the longer they do not switch. The ACCC concludes that *'the regularity with which customers switch offers will have a significant impact on their pricing outcomes.'*¹¹ Consumers should not be required to shop around to get a fair deal for an essential service.
- **Confusopoly:** Retailers now create numerous tariffs and routinely re-use tariff names, undermining the impact of regulated 'best offer' and 'better offer' messages. The recent designated complaint by Choice estimates that this is costing consumers \$65 million per year.¹² Rather than competing straightforwardly on price, many instead are offering customers lower priced cinema tickets,¹³ discount cards,¹⁴ airline points,¹⁵ streaming service subscriptions¹⁶ etc, as well as a complex range of sign-up bonuses,¹⁷ making real comparisons harder. Just 28 per cent of consumers say they definitely know which retail tariff they are on, while 14 per cent say they are very confident they are on a competitively priced energy plan.¹⁸ Customers under financial pressure are more likely to have considered switching energy retailer but not done so, and more likely to say it was too complicated, confusing and time consuming.¹⁹
- **Lack of help for households in energy stress:** Many households in energy debt are not receiving assistance. Over 75,000 households are in energy debt but are not receiving any assistance from their retailer in the form of either a hardship program or non-hardship payment plan.²⁰ Consistently over the past several years, around 60% of consumers on a payment plan have had that plan cancelled for non-payment, with too many customers disconnected within 12 months of being on a payment plan (35.7% of electricity, 29% of gas in 23/24).²¹

ECA considers a fundamental change in the approach to consumer protection is required to address these issues and the introduction of a consumer duty should be central to that change.

⁹ ACCC Inquiry into the National Electricity Market, December 2024 <https://www.accc.gov.au/system/files/accc-national-electricity-market-december-2024-report.pdf>

¹⁰ ECA Consumer Energy Report Card December 2024 <https://energyconsumersaustralia.com.au/consumer-energy-report-card>

¹¹ ACCC Inquiry into the National Electricity Market, December 2024 <https://www.accc.gov.au/system/files/accc-national-electricity-market-december-2024-report.pdf>

¹² The Power of Confusion: CHOICE designated 'super' complaint on energy plans May 2025 <https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2025/may/energy-plans-complaint>

¹³ E.g. <https://www.originenergy.com.au/for-home/campaign/origin-movies/>

¹⁴ E.g. <https://engie.com.au/residential/product/engie-perks>

¹⁵ E.g. <https://www.velocityfrequentflyer.com/partners-offers/everyday-essentials/aql> and <https://www.redenergy.com.au/campaign/shareqantaspoints/>

¹⁶ E.g. <https://www.agl.com.au/residential/energy/netflix-plan>

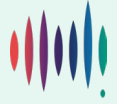
¹⁷ E.g. <https://www.canstarblue.com.au/electricity/latest-energy-promotions/>

¹⁸ ECA Consumer Energy Report Card December 2024 <https://energyconsumersaustralia.com.au/consumer-energy-report-card>

¹⁹ ECA Consumer Energy Report Card December 2024 <https://energyconsumersaustralia.com.au/consumer-energy-report-card>

²⁰ AER Review of payment difficulty protections in the National Energy Customer Framework: Findings Report, May 2025 <https://www.aer.gov.au/industry/registers/resources/reviews/review-payment-difficulty-protections-national-energy-customer-framework>

²¹ Ibid.



Model and design considerations for a consumer duty

We acknowledge that for a consumer duty to be successfully implemented, significant further work and consultation will be required on determining the appropriate model and design for the consumer duty. ECA offers the following preliminary views on key design considerations for a consumer duty, drawing on the Paterson report.

Establishment and implementation of a consumer duty will need to consider:

- (i) The scope and framing of a consumer duty
- (ii) Relationship with existing consumer protection obligations
- (iii) Specified key consumer outcomes
- (iv) A tiered structure
- (v) A commitment to principles-based regulation
- (vi) Rule-making powers to support the duty
- (vii) Requirements for governance and monitoring by firms
- (viii) Requirements for reporting by firms
- (ix) Consumer advocates and civil society groups should be involved in the design process.²²

Scope and framing of a consumer duty

Determining the appropriate scope and framing of a consumer duty will be important to ensure the duty meets its consumer protection objectives and can practicably be implemented. Equally, we caution that the BECE process could spend considerable time formulating the exact wording of the duty, and there is a danger this will take up time and energy that would be better focused on tackling other challenges. We strongly encourage officials to seek to establish a degree of consensus around the scope and framing of a consumer duty quickly, and we consider that this is best done by drawing on existing consumer duties that have been successfully implemented in other markets. There is no need to try to reinvent the wheel.

ECA supports the proposal in the AER Final Advice Report that a consumer duty ensures a focus on achieving favourable consumer outcomes.²³ This is similar to the consumer duty in financial services in the UK that requires financial service providers to ‘deliver good outcomes for retail customers’, underpinned by principles-based expected outcomes.²⁴

As highlighted in the Paterson report and in the AER Final Advice Report, there are several existing examples of provider duties in consumer protection contexts (see **Box 1**). A well-established example of a consumer duty in Australia is the requirement on financial services licensees to, ‘do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.’

This provision now sits in the *Corporations Act 2001*²⁵ but dates from well before that legislation.²⁶ There are decades of jurisprudence and practical experience about how a business can satisfy this duty, much of which is relevant to energy markets. Key amongst these is that ‘efficient, honest and fair’ is a single,

²² Paterson and Bourova (n 2), 21-26.

²³ AER (n 1), 30.

²⁴ Paterson and Bourova, 18.

²⁵ Section 912A(1).

²⁶ Paul Latimer, ‘Providing Financial Services Efficiently, Honestly and Fairly: Part 2’, (2020) 37 *Companies and Securities Law Journal*, 382-402 https://researchbank.swinburne.edu.au/file/4ecae104-27c3-4f87-9324-88b2e6631597/1/2020-latimer-providing_financial_services.pdf



composite concept that businesses do the right thing, and that its meaning can be influenced by evolving community expectations.

'Fairness' is also already established as a key principle in other jurisdictions' energy regulation regimes. The energy regulator for Great Britain, Ofgem, has put in place an overarching licence condition for retailers called the Customer Objective, requiring that 'each Domestic Customer, including each Domestic Customer in a Vulnerable Situation, is treated Fairly.'²⁷

While we recognise further detailed consideration of the precise framing of the duty will be required, ECA considers that a best-practice consumer duty could potentially adopt elements of the financial services duties in Australia, the consumer duty in financial services in the UK, and meet the outcomes noted in the AER Final Advice Report.

For example, a consumer duty could require that duty-holders act efficiently, honestly and fairly to deliver good outcomes for consumers. ECA notes this also aligns with the intended outcomes of a general consumer duty for providers of consumer energy resources being considered by the Victorian Department of Energy, Environment and Climate Action (DEECA).²⁸

The scope of the duty will also require careful consideration. ECA considers that the duty should have broad coverage so that it provides a baseline level of protection for energy consumers regardless of where they live or how their energy is supplied. ECA supports the suggestion in the Consultation Paper that the duty, 'could be universally applied across all entities captured under the framework, both traditional energy supply contracts and also new energy services'.

Relationship with existing consumer protections

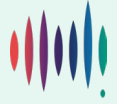
A consumer duty should be a central component of a revised regulatory regime – one that is principles-based and outcomes-focused.

While we anticipate a consumer duty will, in time, reduce the need for a large volume of prescriptive rules, the duty should complement, not replace, prescriptive rules where these are necessary to ensure that consumers are protected from harm. We anticipate many prescriptive rules will still be required, particularly on matters where failure by a retailer could result in significant harm, such as disconnections, concessions and life support matters, or where it is important that all retailers operate in the same way – for example, tariff comparisons.

However, even where prescriptive rules are retained or added, there is scope to reframe these to be more outcomes-focused in the context of a more principles-based regulatory regime. This review should also look for opportunities to provide greater clarity to retailers on the outcomes that consumers should receive and reframe many rules so that they are more focused on consumer outcomes.

²⁷ SLC 0. <https://www.ofgem.gov.uk/sites/default/files/2023-03/Electricity%20Supply%20Standard%20Consolidated%20Licence%20Conditions%20-%20Current.pdf>

²⁸ The proposed duty would require that, 'providers act efficiently, honestly and fairly to deliver positive customer outcomes': Department of Energy, Environment and Climate Action, *Consumer Energy Resources (CER) Consumer Protections Review*, December 2024, p 31, available at <https://engage.vic.gov.au/CER-consumer-protections-review>.



Specified key consumer outcomes

We support the suggestion in the AER Final Advice Report that the proposed consumer duty 'could be complemented by clearly defined consumer outcomes that regulated entities will need to achieve'.²⁹ This is an essential component to ensure that the duty has the intended consumer protection benefits.

We are supportive of the proposed outcomes in the AER Final Advice Report that:

- contracts must meet consumer needs
- consumers should get access to their energy supply when needed and providers should clearly explain the implications of controlling their assets
- consumers have access to free, timely and fair dispute resolution
- consumers are provided with key information so they understand the value and appropriateness of the service for their needs
- the service performs in the intended way and meets consumers' expectations
- consumers continue to receive energy services where they are experiencing hardship.³⁰

We recognise further work and consultation will be required to further develop and refine these outcomes and welcome further engagement on this.

A tiered structure

The Paterson report notes that, 'a consumer duty works most effectively within a tiered structure encompassing clearly identified outcomes, principles for guiding conduct, focus outcome areas and rules or guidance on the key features of these outcomes.'³¹

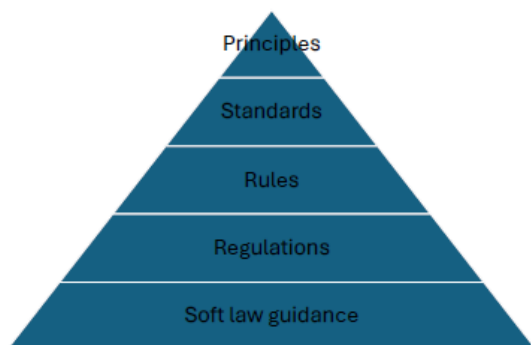


Figure 1 - The tiered approach to outcomes-based regulation³²

As an example, the UK Financial Conduct Authority's (FCA's) consumer duty consists of a consumer principle, three cross-cutting rules, and four outcomes. Critically, it is also underpinned by extensive guidance along with effective reporting and monitoring. Other resources include a rolling list of answers to queries from regulated businesses about the FCA's expectations, and examples of the duty in action.³³

²⁹ AER (n 1), 30.

³⁰ Ibid.

³¹ Paterson and Bourova (n 2), 23.

³² Paterson and Bourova (n 2), 7).

³³ <https://www.fca.org.uk/firms/consumer-duty>



In establishing a consumer duty, we recommend consideration is given to the appropriate tiered structure for the duty, in particular the role of supporting guidance material from the regulator or other instruments that will support achievement of good consumer outcomes to meet the duty.

A commitment to principles-based regulation

Introduction of a consumer duty should be underpinned by a broader commitment to principles-based regulation. As Paterson notes, ‘a consumer duty should not be reduced to prescriptive rules which would take away some of the strengths of the principles-based approach. The duty should articulate the desired outcomes and then leave scope to firms to determine how to meet those outcomes in the context of their business’.³⁴

Some prescriptive rules will still be required (particularly on matters where failure by a retailer could have a significant impact on individual customers, such as disconnections, concessions and life support) – a consumer duty should complement, not replace, prescriptive rules where these are necessary to ensure that consumers are protected from harm. However, even where prescriptive rules are retained or added, there is scope to reframe these to be more outcomes-focused in the context of a more principles-based regulatory regime.

Rule-making powers to support the duty

To give effect to a tiered regulatory structure with a consumer duty as a central component, additional guidance on the duty through a combination of hard and soft law mechanisms will be required. This should include powers for the regulator to issue guidance to assist energy providers in complying with the duty and ensure the consumer protection objectives of the duty are met. ECA notes the appropriate forms for this guidance to take through hard and soft law instruments, including rule-making powers, is a matter for further consideration.

Requirements for governance and monitoring by firms

For a consumer duty to be implemented successfully, duty-holders should be required to develop processes and procedures for complying with the duty and to monitor their own performance through realisable and meaningful metrics.³⁵

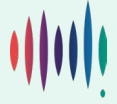
ECA notes the form of this requirement will require further development and consultation but supports the initial proposal in the AER Options Paper that the proposed duty, ‘would require energy service providers to prepare a regulatory compliance plan that demonstrates how they will achieve compliance. This plan would need to provide details on how the service provider would meet the objective, the primary principles, and the obligations that apply depending on the type of customer (small/large; residential/business) and the stage of the customer journey (for example, marketing, sales). This compliance plan would need to be approved by the AER’.³⁶

For a consumer duty to be effective, we need to articulate the expected outcomes for consumers around affordability, access and levels of service. Not doing that well will see existing problems continue, where we see vastly different and inconsistent approaches by retailers managing their critical consumer obligations. An important part of the policy process will also be to ensure that the regulator has the metrics and authority to monitor those outcomes and quickly respond to emerging problems and

³⁴ Paterson and Bourova (n 2), 23.

³⁵ Paterson and Bourova (n 2), 23.

³⁶ AER, *Review of consumer protections for future energy services: Options for reform of the National Energy Customer Framework*, October 2022, 22.



misbehaviour. The UK FCA has spent considerable time and effort on developing 'soft law' guidance to support the consumer duty, and we need to also undertake that analysis.

Requirements for reporting by firms

Duty-holders should also be required to report on their performance against the consumer duty, including any non-compliance, to the regulator. This will support compliance, continuous improvement, and establishing a regulatory culture of accountability and responsibility by providers for meeting the outcomes of a consumer duty. ECA acknowledges the form of any reporting requirements is a matter for further development and consultation.

ECA also notes that a key consideration in design of a consumer duty will be how the broader compliance and enforcement regime will apply to the consumer duty. Financial services obligations in Australia are typically subject to civil penalties. ECA acknowledges this is a matter for further development and consultation but considers that the civil penalty regime currently available to the AER, as well as other remedial and enforcement tools, should be available in relation to a consumer duty.

Consumer advocates and civil society groups should be involved in the design process

We would strongly encourage officials to develop a process that enables substantive engagement with consumer voices and organisations (in relation to the design of a consumer duty as well as other matters within the scope of the BECE reforms). Given the scope of this work, we would recommend that this be chunked into discrete issues, to ensure that it can engage with a wide range of consumer voices who will be affected by the BECE reforms, including those not currently covered well within the National Energy Customer Framework (NECF).

A single framework

A consumer duty should be a key element of a consistent and effective national consumer protection framework for all Australians.

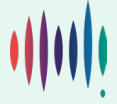
This protection provided to consumers should not depend on where they live or how their energy is supplied. All jurisdictions must participate and ensure the same high standard of consumer protection is available to all Australians. Derogations that have the effect of reducing the level of protection for consumers impact the most exposed communities most profoundly.

Nor should the level of protection depend on how consumers access energy. The fundamental protections offered to a household in an embedded network, or that is off-grid, or on a pre-payment meter, or who receives hot water through bulk supply, must be the same as those for people living in a standalone house in a capital city.

We note this aligns with the 'Equity' principle guiding the BECE process, that 'Consumers should enjoy an equivalent level of regulatory protection, regardless of location, income or other circumstances.'³⁷ We strongly support this as a key principle for the reform process.

The framework must also reflect how consumers themselves think about energy. Many are increasingly likely to assume that regulation and consumer protection do not end with their retailer, but instead extend to how they might interact more broadly with the energy system, through Virtual Power Plants (VPPs), energy management services, etc.

³⁷ Consultation Paper – Better Energy Customer Experiences, 3.



At present one of the main ways that many consumers engage with the energy system and the transition is through products such as on-site generation (solar), storage (batteries) and flexible demand (EV charging equipment, smart appliances, and home energy management systems). These too should be brought into the overarching framework, including through the use of one or more codes. Such a framework can build on the New Energy Tech Consumer Code (NETCC),³⁸ which was developed with the close involvement of consumer advocates, but it must be mandatory, not voluntary, approved and overseen by the AER, and include effective monitoring, enforcement and redress.

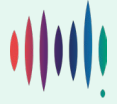
The AER should be the key regulatory and enforcement authority for all energy consumer protections under the full framework. Critically, this includes the AER being able to take action for breaches of the Australian Consumer Law (ACL) as well as the NECF. The ACL is already established as a 'one law, multiple regulators' system, with a memorandum of understanding setting out a framework for cooperation between the ACCC, ASIC and state consumer protection agencies. It does not make sense to rely on the energy retail market being subject to the ACL, but then to deprive energy retail market regulators of the ability to enforce the ACL.

This wide role for the AER will require that it has the capability and resources to use all the tools at its disposal to ensure that the evolving retail market is working for consumers. Designing an effective consumer duty will require defining consumer outcomes and developing of key metrics to allow the regulator to monitor and enforce those outcomes in a transparent and consistent way.

Immediate impact through the BECE process

Although we think the BECE process should primarily aim to transform the overall regulatory framework including through the introduction of a consumer duty, it should also make immediate progress on key opportunities to protect consumers. ECA will write separately in relation to other priority issues for immediate action including redress and external dispute resolution schemes, automating concessions and payment difficulties.

³⁸ <https://www.newenergytech.org.au/>



ECA responses to questions in the Consultation Paper

1. In your view, which issues should be priority? Which further issues should be included?

The priority is getting the regulatory framework right so that it drives culture change and increased compliance by energy providers in order to deliver better consumer outcomes. This should cover both the current retail market, new energy services and CER products.

We want to see the creation of a consumer duty, supported by guidance and codes, as a priority. The consumer duty should be a central component of a revised regulatory framework that is more principles-based and outcomes-focused, and that places primary responsibility for ensuring good consumer outcomes on energy providers, rather than energy consumers.

The AER's role as primary regulator will be critical in the success of a new approach to regulation, so it must have the capabilities and resources to take on this larger and more diverse set of functions.

ECA considers there are a number of other issues that should be priorities for immediate action including redress and external dispute resolution schemes, automating concessions and payment difficulties framework, and will write separately on these matters.

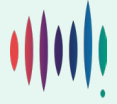
2. In light of changes occurring in the energy market, what gaps do you see in consumer protections that this process should focus on addressing?

The baseline level of protection that consumers receive should not be affected by where they live or how they access energy. There should be a consistently high standard of consumer protection across Australia, that should not be derogated from (unless this would result in a higher standard of consumer protection).

The BECE process should prioritise introducing a consumer duty as a central component of a principles-based and outcomes-focused regulatory framework (see the section of this submission on 'Why a consumer duty is needed'). The consumer duty should draw on successful examples of similar duties in other consumer-focused regulatory regimes in Australia and other jurisdictions. The duty should have broad coverage so that it provides a baseline level of protection for energy consumers regardless of where they live or how their energy is supplied.

We will write separately on other priority issues including:

- **Redress:** The remit of existing external dispute resolution (EDR) schemes should be expanded to cover new energy products and services. EDR is a critical part of an effective regulatory framework, not only addressing the problems of an individual consumer, but alerting governments and regulators to emerging consumer issues. Similar to clarifying obligations on retailers, we would like to see BECE articulate best practice in relation to EDR schemes and recommend / assist jurisdictions to get there (including where it may be efficient to combine schemes across jurisdictions to ensure a consistent level of assistance and support to consumers).
- **Automating concessions:** BECE should work with the AEMC to address market failings in relation to pricing and tariffs. We see the proposed AEMC rule change as an interim measure, and there is scope for BECE to drive more substantial change in the medium term. We view automation of concessions as the best option. The BECE process should also consider more broadly whether



the current concessions regime is providing effective support and protection for vulnerable consumers.

- Payment difficulties: BECE could potentially take action on the AER's call in particular for civil penalties for retailers who do not use disconnection as a last resort.

3. *Are there opportunities to consider holistic reforms that can address a number of issues simultaneously?*

The NECF is no longer fit for purpose and although it is a daunting task, it should be substantially reformed and simplified. We support a move towards a more principles-based and outcomes-focused regulatory framework, with a consumer duty as a central component of the revised framework.

The NECF should give consumers confidence that they are being protected in the market, ensure that AER is able to effectively use enforcement to achieve compliance, and drive culture change within businesses and make them accountable for their actions and consumer outcomes, rather than placing the onus on consumers to make the market work.

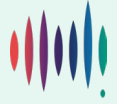
The NECF relies largely on detailed prescriptive regulation. This can be necessary and important to tackle serious consumer harm. It can be particularly important where the consequences of non-compliance are damaging for some or all consumers. But over-reliance on prescriptive regulation can also be:

- **Backward-looking:** often driven by what has gone wrong in the past
- **Inaccessible:** in an effort to cover every situation, it can become unduly long and complicated
- **Inflexible and cumbersome:** in trying to tackle particular problems, it can become too narrowly focused and be hard for both regulators and regulated businesses to effectively address emerging issues
- **Easy to exploit:** regulated businesses may look for gaps in the rules which they can take advantage of
- **Of benefit to incumbents:** large established businesses may find it easier to comply than smaller rivals and new entrants, which can then reduce competition
- **An obstacle to innovation:** it may reflect a particular view of the market and make it harder for innovative products and services to emerge
- **Unsustainable:** it can patch up problems but may not drive real culture change.

The key to getting the NECF fit for the future will be to have the balance right between principles, a focus on outcomes, and detailed, prescriptive rules.

A consumer duty should complement, not replace, prescriptive rules where these are necessary to ensure that consumers are protected from harm. We anticipate many prescriptive rules will still be required, particularly on matters where failure by a retailer could have a significant impact on individual customers, such as disconnections, concessions and life support, or where it is important that all retailers operate in the same way, for example tariff comparisons.

However, even where prescriptive rules are retained or added, there is scope to reframe these to be more outcomes-focused in the context of a more principles-based regulatory framework. This review should look for opportunities to reframe many rules so that they are more focused on consumer outcomes.



The NECF sits alongside the ACL, which is enforced by different agencies, most notably the ACCC. We recommend that the AER becomes able to take action using both the NECF and the ACL. This is consistent with practice in other sectors and is an efficient way to ensure energy consumers are protected.

4. Are there particular views on the recommendations made by these reviews that we should consider in its assessment?

ECA strongly supports the proposals in the AER review for a consumer duty.

The scope of the AER review meant that it focused on the NECF in relation to future energy services, but it is important to recognise that there are major issues to be tackled in relation to the NECF more generally, which the review did not consider in depth.

It will be important to ensure that BECE does not cut across processes already underway to improve consumer protection, or for issues to fall in the gap between BECE and other reviews, though BECE may be able to accelerate progress on some pressing issues that have been identified elsewhere.

5. Are there aspects of state-based consumer regimes that may offer benefits if applied at a national level?

ECA supports the introduction of a consumer duty for energy and we have noted in this submission examples of similar duties that have been implemented successfully in other consumer protection contexts (see section on 'Why a consumer duty is needed').

We note the Victorian Essential Services Commission has made a number of changes to its Energy Retail Code of Practice to make certain requirements under the Code more outcomes-focused. This could be considered by BECE in moving towards a more principles-based and outcomes-focused approach for the NECF.

Our biggest concern relates to the fact that Australian consumers experience different levels of protection and assistance depending on where they live or how they are supplied. The lack of a consistent national approach to consumer protection in energy has seen some consumers – such as Aboriginal and Torres Strait Islanders living in remote communities – excised from the NECF entirely. Small businesses in Victoria are unable to access similar levels of protection with respect to their energy contracts than their counterparts in other NEM states.

We expect to see a uniformly high standard of protection, whereas the current arrangements allow different states to provide a lower standard. We see no reason why geography alone should determine the level of protections available to consumers.

6. Do you agree with the AER's risk analysis regarding new energy products and services and their conclusions that certain types of services should be captured under the NECF? Why/why not?

We agree that there should be effective consumer protection and redress for new energy products and services, as part of a single consumer protection framework. We also agree with the AER's recommendation that new energy services should be brought within the NECF, with a new authorisation arrangement developed.



We agree that a principles-based approach may need to be taken for at least some of these services given the challenge of predicting how the market will evolve.

We consider that the sale and/or installation of energy products such as solar panels, batteries and EV charging equipment should be part of a single framework too, because they are a key part of how consumers experience the energy system nowadays and appear to be associated with much too high a level of consumer detriment. We support the use of the ACL and codes for the sale and installation of CER products. These arrangements could potentially build on the NETCC but need to be mandatory and include provision for redress through an ombudsman.

The introduction of a consumer duty, that could also apply in relation to new energy products and services, would assist to ensure a baseline level of consumer protection particularly where prescriptive rules in relation to these products and services may not yet exist.

7. *Do you have any further comments or feedback on the primary findings from the AER's review? Are there issues covered by the AER's review that you think require further exploration and research as part of this process?*

We strongly agree with much of the AER's analysis, including the AER's observation that 'An integral part of a shift towards a more principles-based regulatory model would be the introduction of an overarching consumer duty'.³⁹

Having effective consumer protection for new energy services will boost consumer trust and support for both service innovation and confidence in the energy transition. The AER's argument for a single consumer protection framework is well-made, though it then stopped short of considering how this might be established across the whole of the retail market, broadly defined.

Additionally, the NECF is not a single framework, because it sits alongside the ACL, which is enforced by different agencies, most notably the ACCC. We recommend that the AER be able to take compliance and enforcement action under both the NECF and the ACL.

The authorisation process for new energy products needs to be made clearer.

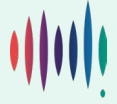
8. *What factors should inform preliminary consideration of the potential for an overarching consumer duty?*

As outlined in this submission ECA strongly supports the introduction of an overarching consumer duty.

ECA considers a consumer duty is needed:

- to respond to – and ensure the regulatory framework can keep pace with – the increasing complexity of energy markets, services and products
- to refocus the regulatory and compliance culture from only following prescriptive rules towards providers proactively thinking about how to achieve good consumer outcomes
- to recognise the information asymmetry and imbalance of bargaining power in energy markets and shift responsibility for ensuring good consumer outcomes from consumers themselves to energy providers.

³⁹ AER (n 1), 30.



Similar duties have been successfully implemented in several other consumer protection contexts both in Australia and other jurisdictions. For further information see the section of this submission on 'Why a consumer duty is needed'.

There are a number of model and design considerations that will also need to be considered in order to successfully implement a consumer duty. These include:

- (i) The scope and framing of a consumer duty
- (ii) Relationship with existing consumer protection obligations
- (iii) Specified key consumer outcomes
- (iv) A tiered structure
- (v) A commitment to principles-based regulation
- (vi) Rule-making powers to support the duty
- (vii) Requirements for governance and monitoring by firms
- (viii) Requirements for reporting by firms
- (ix) Consumer advocates and civil society groups should be involved in the design process.

We note significant further work and consultation will be required on these matters. We have included preliminary views on key design considerations as part of this submission to help guide this process (see the section of this submission on 'Model and design considerations for a consumer duty').

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small business energy consumers**



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