

MODELS FOR A CONSUMER DUTY IN THE RETAIL ENERGY MARKET

ENERGY CONSUMER DUTY REPORT #2

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A report for Energy Consumers Australia

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ENERGY CONSUMER DUTY REPORT #2

A. INTRODUCTION

There is considerable interest in introducing a Consumer Duty into the Australian Energy Market.

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

For example, in financial services, the regulatory regime has moved beyond merely relying on requirements for the disclosure of information to enable consumers to make better purchasing decisions towards positive obligations on firms to operate fairly and provide suitable products for consumers.¹

The AER has recommended similar outcomes-based duties in energy services.² The reasons for this proposal and the way in which an Energy Consumer Duty would operate as a form of outcomes-based regulation are considered in Research Report #1. This report, Research Report #2, considers the possible models for the duty.

a. What are outcomes-based duties?

Outcomes-based (or sometimes termed performance-based) duties specify the outcome or performance that the person or firm responsible for the regulated activity must meet, but not the process for achieving that output. Firms are responsible for implementing measures to achieve these outcomes, and for verifying to the regulator how they intend to do this and by what measures they will assess compliance.

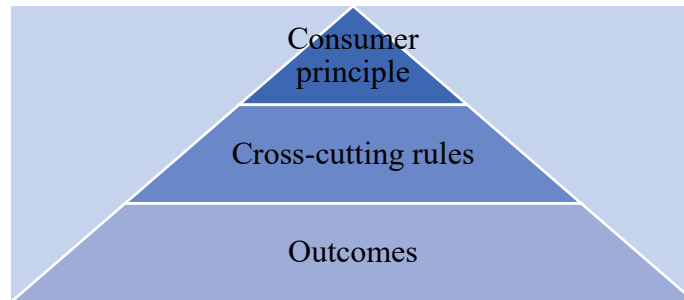
In energy, an outcomes-based duty would require regulated energy firms to affirmatively develop sales, billing, and service processes calculated to deliver good consumer outcomes, to perform regular consumer testing and data analysis to see if those processes are working, and to revise those processes where the desired outcomes are not being achieved.

b. Recommendations

A Consumer Duty in Energy should be modelled on the UK Consumer Duty in financial services, to encompass three elements.

¹ See eg, Jeannie Marie Paterson, 'From Disclosure to Design: The Australian Regulatory Response to Mis-selling to Consumer Investors by Financial Services Providers' in Sandra Booysen (ed), *Financial Advice and Investor Protection* (Elgar, 2021).

² AER, *Final Advice Report*, 3.



The energy consumer principle ‘act to deliver good outcomes for customers’.

Supported by *three cross-cutting rules*:

1. Energy firms must act in good faith towards their retail customers;
2. Energy firms must avoid foreseeable harm to their retail customers; and
3. Energy firms must enable and support retail customers to pursue those customers’ household energy objectives.

Deliver four outcomes:

1. *Suitable products and services*: consumers are sold products and services that are designed to meet their needs, characteristics and objectives;
2. *Fair price and value*: consumers receive products and services which offer fair value;
3. *Understanding*: consumers understand the information they are given and are confident in making timely and informed decisions;
4. *Accessible consumer support*: consumers are provided with access to support and dispute resolution that meets their needs.³

A vulnerability framework should be adopted as part of the Energy Consumer Duty, with a (more coherent) hardship regime sitting as a baseline of expectations.

The Energy Consumer Duty should be located in the National Energy Retail Law as a licensing or ‘gateway’ conduct obligation for energy retailers. Designated consumer energy resources and new energy service providers should also be subject to the consumer duty.

The Energy Consumer Duty should be overseen and enforced by the Australian Energy Regulator, with licensing sanctions and civil pecuniary penalties available as responses to default.

Consumers should be able to bring complaints about conduct contrary to the consumer duty to the relevant Ombudsman services, who should have dispute resolution *and* compensation powers in relation to the consumer duty.

³ See further <https://www.fca.org.uk/publications/good-and-poor-practice/consumer-duty-implementation-good-practice-and-areas-improvement#lf-chapter-id-consumer-support>.

The Energy Consumer Duty should be introduced through a staged and consultative process led by the AER, with a strong commitment to moving away from prescriptive, rigid rules towards adaptive and innovative approaches to ensuring good consumer outcomes.

c. Scope of report

This report is part of a series:

Research Report #1 – considers the reasons for introducing an Energy Consumer Duty (Rationale Report)

Research Report #2 – discusses the form of the Energy Consumer Duty (Models for an Energy Consumer Duty Report)

Research Report #3 – considers the limits of existing consumer protection regimes and how these limits might be addressed by an Energy Consumer Duty in two key areas (Gap Analysis Report)

Research Report #4 – considers the ‘on the ground operation’ of an Energy Consumer Duty (Outcome Measures for an Energy Consumer Duty Report).

Research Report #5 – protections for people in a situation of vulnerability (Vulnerability Report).

These reports focus on reforms to the National Energy Retail Law, overseen by the Australian Energy Regulator. They make reference where relevant, to reforms proposed by the Essential Services Commission in Victoria.

B. MODELS FOR A CONSUMER DUTY IN THE AUSTRALIAN ENERGY MARKET

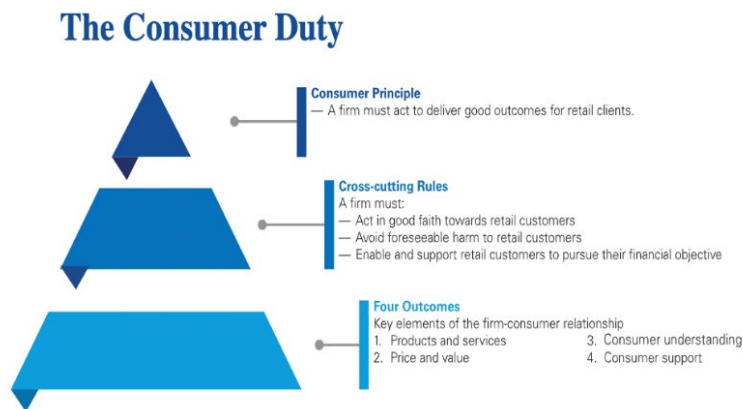
In thinking about an appropriate model for a consumer duty in the Australian energy market, there are four main possibilities:

- i. A duty to ensure good consumer outcomes based on the Consumer Duty in the UK under the Financial Conduct Authority (‘FCA’).
- ii. A licensing obligation to conduct the business efficiently, honestly and fairly, as found in the Corporations Act.
- iii. A design and distribution obligation to ensure products are suitable for consumers, as found in the Corporations Act.
- iv. A best interests duty

a. Option 1: A duty based on the UK Consumer Duty in banking

The UK Consumer Duty uses a tiered structure consisting of the overriding principle that firms must act to deliver good outcomes for consumers, several high-level rules to effectuate that principle, and more specific consumer outcomes that the FCA expects firms complying with the principle and rules to produce. This approach could be replicated in an Energy Consumer Duty in Australia.

*Framework for the UK Consumer Duty.*⁴



The UK Consumer Duty requires financial firms to deliver good outcomes for consumers. It has been introduced under the extensive rule-making powers of the FCA. The Consumer Duty is:

- expressed as a principle, and focuses on performance outcomes, as opposed to being contained in discrete and specific rules;
- is given content through a number of levels of obligation, including cross-cutting rules and the identified outcomes.

Firms have flexibility in how they implement the Duty, but they must be able to demonstrate that they are meeting its requirements. Firms are required to monitor their compliance with the Duty and report on their progress. The FCA also provides guidance on the measurable outcomes it expects from firms in complying with the Duty.⁵

i. The structure of the Consumer Duty:

The Consumer Duty is made up of the following:

- i. The key principle, which reflects the overall standard of behaviour required from financial services providers to deliver good outcomes to consumers.
- ii. The ‘cross-cutting rules’, which express the FCA’s expectations for behaviour, requiring financial services providers to act in good faith, avoid foreseeable harm to customers, and enable and support customers in pursuing their financial objectives.

⁴ KPMG, ‘What are the New Consumer Duty Requirements?’ <<https://kpmg.com/xx/en/our-insights/regulatoryinsights/what-are-the-new-consumer-duty-requirement.html>>.

⁵ FCA Handbook:

The Consumer Duty is incorporated into the FCA’s Handbook, which contains the rules and guidance that firms must follow.

Policy Statement (PS22/9) and Final Guidance (FG22/5):

The rules and expectations informing the consumer duty have been set out by the FCA in a Policy Statement (PS22/9) and Final Guidance (FG22/5).

- iii. The ‘four outcomes’, which set more detailed expectations for the customer outcomes that firm conduct should produce in four key aspects of the firm-consumer relationship.⁶

ii. *The four outcomes for the UK Consumer Duty:*

The UK Consumer Duty identifies four specific outcomes that firms must strive to achieve.

The ‘four outcomes’ are a suite of rules and guidance setting more detailed expectations for firm conduct in the following areas:

1. Price and value;
2. Products and services;
3. Consumer understanding; and
4. Consumer support.⁷

The four outcomes are focused on consumers’ experience. As described by the FCA:

- *Fair price and value* means consumers ‘pay a price for products and services that represents fair value, and poor value products and services are removed from markets, leading to fewer upheld complaints about poor value and unexpected fees or charges’.
- *Suitable products and services* mean consumers ‘are sold and receive products and services that have been designed to meet their needs, characteristics and objectives, leading to a reduction in the number of upheld complaints about products and services not working as expected’.
- *Consider understanding* ensures consumers ‘increase their confidence in financial services markets and are equipped with the right information to make effective, timely and properly informed decisions about their products and services’.
- *Customer support* means consumers ‘receive good customer service, leading to a reduction in upheld complaints about switching, cancellation and service levels and customers having higher levels of satisfaction with the service they receive’.⁸

iii. *Enforcement of the Consumer Duty*

To enforce the Consumer Duty, the FCA can use its powers to withdraw a firm’s authorisation to engage in regulated financial conduct, suspend or ban specific firms or individuals from engaging in regulated activities, ban promotions it finds to be misleading, issue fines, and apply

⁶ FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty.

⁷ FCA, Finalised Guidance FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty [1.3].

⁸ FCA, A new Consumer Duty Feedback to CP21/36 and final rules (PS22/9) [1.23].

for injunctions or restitution orders.⁹ The FCA has licensing (called “authorisation”) authority, supervisory authority over licensees, investigatory power over the sector, and standards-setting authority.¹⁰

To date, the FCA has engaged in investigations, supervision, and the threat of enforcement actions to drive compliance with the Consumer Duty. As a result of these activities, firms have made a variety of changes, including withdrawing products from the market, changing their fees, increasing the speed with which they comply with customer requests, and improving their methods of identifying vulnerable consumers.¹¹

Although consumers cannot sue firms for breach of the Consumer Duty, they can lodge ombuds complaints.¹² In addition, consumer advocacy groups can lodge super-complaints with the FCA about potential firm noncompliance with the Consumer Duty.¹³

b. Option 2: an EHF licencing obligation

A second potential model for an Energy Consumer Duty is the Australian Corporations Act obligation on financial service providers to conduct their businesses ‘efficiently, honestly and fairly’.¹⁴ The efficient, honest, and fair conduct obligation in financial services is a licensing condition, enforced by ASIC.

The Victorian Department of Energy, Environment and Climate Action (DEECA) has expressed support for an Energy Consumer Duty for CER providers based on the efficient honest and fair formulation. DEECA has suggested:

⁹ FCA, Enforcement Information Guide [Aug. 2025].

¹⁰ FCA, Our approach to supervision [2025]; <https://www.fca.org.uk/firms/authorisation>; <https://www.fca.org.uk/about/what-we-do/the-fca>.

¹¹ FCA, *Gap insurers agree to suspend sales following FCA concerns over fair value* (Press Release, 09 February 2024) <<https://www.fca.org.uk/news/press-releases/gap-insurers-agree-suspend-sales-following-fca-concerns-over-fair-value>>; FCA, *FCA writes firms about treatment of ‘retained interest’ and customers’ cash balances* (Press Release, 12 December 2023) <<https://www.fca.org.uk/news/press-releases/fca-writes-firms-about-treatment-retained-interest-customers-cash-balances>>; Dentons, *Consumer Duty – onwards and upwards* (3 October 2025) <<https://www.dentons.com/en/insights/articles/2025/october/3/consumer-duty-onwards-and-upwards>>; FCA, *FCA update: Cash savings – September 2024* (Multi-firm review, September 2024) <<https://www.fca.org.uk/publications/multi-firm-reviews/fca-update-cash-savings-september-2024/printable/print>>.

¹² Financial Ombudsman Service, *The complaints-deal and the Consumer Duty* (n.d.) <<https://www.financial-ombudsman.org.uk/businesses/complaints-deal/consumer-duty>>.

¹³ <https://media.product.which.co.uk/prod/files/file/gm-5016d1bf-11e5-43ac-8b4b-0c8e5849c3e0-which-super-complaint-addressing-poor-consumer-outcomes-in-home-and-travel-insurance-1.pdf>.

¹⁴ *Corporations Act* s 912A.

In line with a principles-based general customer duty, providers could be required to act efficiently, honestly and fairly to deliver positive outcomes for customers and ensure any CER they provide are aligned with customer needs and circumstances.¹⁵

The Energy and Water Ombudsman Victoria (EWOV) have also expressed support for an efficient, honest and fair duty in energy.¹⁶

We agree that the ‘efficient, honest and fair’ formulation could be applied in a manner that would focus on the outcomes produced by licensees, in effect performing the role of an outcomes-based duty.¹⁷ Adopting this formulation in energy would create a synergy with financial services regulation.

However, on balance, we think the ‘efficient, honest and fair’ formulation is not as well-suited as the UK Consumer Duty approach, which focuses directly on ensuring good outcomes. Our reasons for this relate to uncertainty and fit.

i. Uncertainty

Despite a now reasonable body of case law considering the obligation to conduct business in a manner that is ‘efficient, honest and fair’, the core content of the obligation remains elusive. Many of the cases involve consent judgments, which means there is little robust analysis of the scope of the obligation. Some courts have described the obligation in similar terms to unconscionable conduct,¹⁸ or, in other words, as a negative prohibition on egregious conduct.¹⁹ Other courts have insisted that the obligation does not require ‘commercial perfection’,²⁰ without implying any expectation that when firms fail to act in a manner that produces fair outcomes, they must revise and improve the approaches they use to deliver compliance.

We do acknowledge, however, as raised by the EWOV, emerging case law that includes a proactive element for the duty that would be useful in the energy context, especially as applied to new energy services.

ii. Fit

On their face, the words ‘efficient, honest and fair’ do connote the essence of a positive obligation. However, a degree of work would be required to make them cover the core needs of a consumer duty in energy.

¹⁵ Victoria Department of Energy, Environment and Climate Action, *Consumer Energy Resources (CER) Consumer Protections Review Directions Paper* (Dec 2024) pp. 31 to 36.

¹⁶ EWOV, *The Duty to Ensure Services are Provided Efficiently, Honestly and Fairly (EHF duty)* (2025).

¹⁷ See Paterson, Willis, Bourova, Howell, ‘Can EHF act as an outcome-based obligation?’ (2025) forthcoming.

¹⁸ *ASIC v Westpac* [2019] FCAFC 187, [174].

¹⁹ Arguably the finding in this case suggests some elements of positive or proactive obligation in that the outcome was criticised as making customers worse not better off.

²⁰ *ASIC v NAB* [2022] FCA 1324, [357].

‘Efficient’ may focus too much weight on the operational needs of the retailer. This is a relevant consideration in the sense that disproportionately heavy burdens should not be imposed on retailers. However, outcome-based duties are underpinned by the premise that if a retailer offers a service, it must commit to doing so in a way that produces good outcomes for the customer.

‘Honest’ precludes bad faith or fraudulent behaviour. It does not necessarily require measures that ensure good consumer outcomes. For example, the obligation to act honestly requires that information provided to consumers by the firm is not misleading. It is uncertain whether the obligation goes further to ensure that such information is provided in a manner that actually promotes customer understanding.

‘Fair’ is a useful positive obligation, although in this context we have some concern about it being ungrounded from specific outcomes. Delivering fair value for consumers is tethered to the products or terms consumers receive; a requirement to ‘conduct business fairly’ is more nebulous, potentially subject to wide variation in interpretation.

c. Option 3: A distribution and design obligation

In Australia, issuers and distributors of financial products are required to comply with the design and distribution obligations in Part 7.8A of the *Corporations Act*. These “DDO” obligations address the objective of product suitability.²¹ They encompass the following requirements:

- For issuers to design financial products that are likely to be consistent with the objectives, financial situation and needs of a defined target market – that is, the intended consumers of those products;
- For issuers and distributors to take ‘reasonable steps’, meaning steps that are reasonably likely to result in financial products reaching consumers in the target market defined by the issuer; and
- For issuers to monitor consumer outcomes and regularly review the performance of financial products sold to consumers to ensure that the products are likely to be consistent with those consumers’ objectives, financial situation and needs.²²

We consider a distribution and design obligation to be useful for regulating products at the points when they are designed and sold to consumers. However, the obligation is less amenable to addressing the key problems consumers encounter in energy contracts and services, which are typically ongoing. A primary difference between Australia’s DDO regime and the UK’s Consumer Duty regime in financial services is that the latter imposes affirmative duties on firms in their relations with customers over time.

²¹ See *Corporations Act* s 760A(aa).

²² See Australian Securities and Investments Commission, *Product Design and Distribution Obligations* (Regulatory Guide 274, September 2024) 4.

d. Option 4: 'Best interests'

We do not favour a 'best interests duty', such as applying to financial advisors. A best interests duty is primarily a rule about the conflicts of interest that may undermine the service provided by an intermediary between consumer and supplier of (financial) products. The concern of a best interests duty is to realign the focus of the intermediary in circumstances where they otherwise be swayed by commissions or fees to prefer their own interests over those of the consumer. This purpose does not provide a good fit with the issues of retail energy, which largely involve direct not intermediated services.

C. CONTENT OF AN ENERGY CONSUMER DUTY

We suggest that an Energy Consumer Duty should largely follow the same form as the UK Consumer Duty, modified for the energy context.

a. A model for an Energy Consumer Duty

i. Consumer principle

A duty to deliver good outcomes for Energy Consumers.

ii. Cross-cutting rules

The UK Consumer Duty refers to cross-cutting rules requiring firms to act in good faith, avoid foreseeable harm and enable and support retail customers.

Cross-cutting rules adapted for the energy context could be stated as:

1. Energy firms must act in good faith towards their retail customers;
2. Energy firms must avoid foreseeable harm to their retail customers; and
3. Energy firms must enable and support retail customers to pursue those customers' household energy objectives.

We note that cross-cutting rule 1 may have less salience in Australia, given that Australia does not recognise a general duty of good faith. Cross-cutting rule 2, a duty of care-style obligation, is to some extent also provided by the guarantee of due care and skill in providing services to consumers under the Australian Consumer Law.²³ But repeating the obligation does no harm and does not cause inconsistency. The third cross-cutting rule has more potential in the Australian context. It expresses the performance-oriented aspiration of an Energy Consumer Duty and will be useful in avoiding underperforming products and pricing that involves a loyalty penalty.

²³ We note that the has proposed specific demands of functionality that should apply to CER: p 30.

iii. Outcomes

The very basis of an outcomes-based duty is to avoid detailed prescriptive compliance rules and to allow firms to pursue the outcomes in a manner that best fits the circumstances and evolves as circumstances change over time. Nonetheless, some guidance on the prioritised outcomes is probably necessary to ensure retailers' (and courts') efforts are focused on the desired direction.

The FCA identifies four outcomes that are the aims of the UK Consumer Duty.²⁴ We suggest these outcomes are salient and appropriate in the Australian energy context, with a focus on:

1. Suitable products and services;
2. Fair price and value;
3. Promoting understanding;
4. Accessible consumer support.

iv. Metrics

The FCA identifies some measures of regulatory compliance with the UK Consumer Duty. This is a useful way of emphasising the performance or outcome basis of the Duty (for example, through metrics such as whether consumers understand their energy plan) as opposed to compliance based on specific and potentially formulaic actions (for example, through requirements to make available a disclosure statement). Measuring, testing and validating outcomes that meet the expectations of the consumer duty is discussed in Report #4.

v. Vulnerability, hardship and other minimum performance standards

These issues are discussed in a separate report. However, we suggest that a vulnerability framework should be developed as part of the consumer duty, with a (more coherent) hardship regime sitting as a baseline of expectations.

Existing minimum performance standards, such as life support and family violence will remain in place.

vi. Comparing the AER proposal

By contrast, the AER has suggested the following more specific outcomes:

- consumers should be provided with key information, so they understand the value and appropriateness of the service for their needs;
- providers should clearly explain the implications of controlling their assets;
- contracts should meet consumer needs;
- consumers should get access to their energy supply when needed;

²⁴ FCA, A New Consumer Duty Feedback to CP21/36 and final rules (PS22/9) [1.23].

- the service should perform in the intended way and meet consumers’ expectations;
- consumers should continue to receive energy services where they are experiencing hardship;
- consumers should have access to free, timely and fair dispute resolution.²⁵

These outcomes are more granular and focused on specific actions by energy retailers than the UK model. For example, they require consumers to be provided with key information (a conduct-like rule) to promote understanding, as opposed to requiring that consumers be confident and ‘equipped’ to make informed decisions (an outcome-based objective). They are also designed for the issues seen in the market today, as opposed to a more future-proofed framing.

We suggest that AER’s specifics would be effectuated in an Energy Consumer Duty in the model we suggest, but our suggested construction would be broader, covering unanticipated situations. For example, our third outcome, promoting understanding, would cover AER’s outcomes a and b, but would also require providers to promote consumer understanding in ways that go beyond the simple provision of information – anything providers do that explicitly or implicitly conveys messages to consumers, from marketing to website choice architecture, would need to promote consumer understanding.

b. Regulatory status

i. Legislation

The Energy Consumer Duty might be located in either the National Energy Retail Law, the Australian Consumer Law or the Competition and Consumer Act as a specific industry code. We suggest the Energy Consumer Duty should be located in the National Energy Retail Law, given its specific energy focus. States outside the National Energy Customer Framework might choose to amend their cognate legislation to introduce a similar scheme.

ii. Form

It is our view that the Consumer Duty in Energy should be expressed as a licensing obligation under the National Energy Retail Law.

The reasons for a licensing duty are:

- This expresses an upfront or ‘gatekeeping’ expectation about the performance obligations of retailers and designated entities.
- It can be overseen and enforced by the AER, with a range of supervisory, investigatory, sanctions and enforcement powers set out below.
- The very formation of a *licensing* as opposed to a general obligation expresses the significance of providing good outcomes for consumers.

²⁵ AER, Options Paper, 30.

Imposing a licensing requirement will require reform to the existing regime, but that would be the case with any model for properly embedding an Energy Consumer Duty.

The alternative models discussed above – an efficient, honest and fair (EHF) duty or a design and distribution obligation – are also amenable to implementation through a licensing regime.²⁶

Alternatively, the Energy Consumer Duty could be expressed as a consumer protection conduct obligation, similar in status to other energy specific consumer protections.

iii. Scope – retailers, consumer energy resources and new energy services

A Consumer Duty in Energy should apply, at a minimum, to all energy retailers. Given the essential nature of the service and the resources (including customer energy use data) to which energy retailers have access, it is reasonable to require energy retailers to comply with this type of regulation.

In order to respond adequately to the challenges for consumers of the transition to new forms of energy, there is a question about how an Energy Consumer Duty should also apply to consumer energy resource (CER) providers and providers of new energy services (NES). These providers are increasingly integral and important players in retail energy. Consumers have experienced some frustration with and confusion about their services. These factors provide a strong case for specific regulation.

Equally, however, our view is that care must be taken in deciding who the Energy Consumer Duty applies to. It is important not to undermine the impact of the Duty by coverage that is too broad or overburden firms for whom it is not suitable given their short term or tenuous connection with energy consumers.

Additionally, compliance with a consumer duty of the type we suggest here (using the UK FCA model) requires data collection and analysis that in some cases might not be proportionate to the resources possessed and risks presented by all consumer energy resource providers that are not energy retailers, particularly small CER providers. Placing a disproportionate regulatory burden on a small business could create a danger that in practice, the Energy Consumer Duty itself is weakened, so as to be no more effective than current law with respect to not only small businesses but also energy retailers.

There are at least three options for managing this concern.

1. One possibility is to place the Energy Consumer Duty on energy retailers, but maintain the status quo for CER and NES providers. These entities are currently covered by the Australian Consumer Law obligations overseen and enforced by the ACCC. This path would at minimum require greater oversight and enforcement from the ACCC, as it appears that there are performance issues in these domains. Dispute resolution for consumers seems limited.

²⁶ We note that the obligation to conduct a financial service business in a manner that is ‘efficient, honest and fair’ under s 912A of the Corporations Act is a licensing conduct obligation.

2. A second possibility would be to place the Energy Consumer Duty directly only on retailers, but, as discussed in the Report #3, place more responsibility on retailers for overseeing and supervising the conduct of any CER providers with which they have a financial relationship or that they recommend or facilitate (for example, through feeding into the energy price payable by the consumer). Consumer experiences and outcomes in energy are shaped by both the retailer and the CER provider, and it may be impossible for a consumer to know whether the retailer or the CER provider is the source of any problems. Making the retailer responsible for the consumer’s relationship with the grid would encourage retailers to exercise sufficient oversight over CER providers so as to produce the consumer outcomes that are the aim of the Energy Consumer Duty.
3. A third possibility is for the AER to operate a licensing and designation regime with two tiers. Under this model, some CER and NES providers might be required to hold a license subject to an Energy Consumer Duty. However other CER/NES providers would be ‘designated’ under the legislation, which would require them to meet the expectations of the consumer duty and be a member of an external dispute resolution body, such as EWOV and other state and territory equivalents.²⁷

This adds complexity to the regulatory system and could produce some regulatory arbitrage as energy retailers might have an incentive to spin off CER operations so as to subject those operations to the less demanding EHF obligation rather than the full Energy Consumer Duty. On the other hand, it would reduce the regulatory burden on smaller or less essential providers while giving AER, with its expertise in energy, supervisory, investigatory, sanction and enforcement powers to ensure compliance with an EHF duty.²⁸

On balance we prefer option 3. Whatever option is chosen the goal should be to ensure good outcomes for consumers, by encouraging an adaptive and responsive mindset in CER and NES markets.

D. ENFORCEMENT

The kinds of enforcement and investigative powers given to the regulator will be central to the success of the Energy Consumer Duty. It will also require a commitment to a careful, consultative roll-out (for which a model might be found in the UK Consumer Duty in finance). The regulator must encourage a principles-based approach without reverting to undue reliance on rigid or inconsistent rules.

²⁷ Noting Victoria is considering a licensing obligation imposed on CER providers: <<https://engage.vic.gov.au/CER-consumer-protections-review?>>

²⁸ Note that the Victorian Department of Energy, Environment, and Climate Action (DEECA) is considering requiring Victorian CER providers to be licensed and to be members of the Victorian Energy and Water ombuds scheme. DEECA is also proposing that CER providers be covered by “[a] general consumer duty”. DEECA has suggested that some CER providers might be exempt from this licensing scheme, but the scope of the exemption is not yet defined. Victorian DEECA, Consumer energy resources (CER) consumer protections review (Dec 2024) pp 31-36 <<https://engage.vic.gov.au/CER-consumer-protections-review?>>

a. Powers

The AER is responsible for monitoring compliance with the National Energy Retail Law, investigating potential breaches and taking enforcement action where necessary.²⁹ As a licensing requirement, the Energy Consumer Duty would provide the AER with a suite of enforcement powers:

- investigatory and supervisory powers
- infringement notices
- court enforceable undertaking
- instituting civil proceedings in court to seek declarations in relation to the alleged breaches, as well as other court orders (for example, requiring the retailer to undertake remedial action or release a public notice).
- injunctions requiring the retailer to take or refrain from certain actions; and
- civil pecuniary penalties.

b. Actions

Under its existing powers, where there is a material failure by a retailer to meet its obligations, and a reasonable apprehension that the retailer will not be able to meet its obligations in the near future, the AER can suspend or revoke its retail authorisation.

Under a consumer duty, enforcement would be triggered by an energy retailer's failure to meet the outcomes prioritised as central to the consumer duty. Drawing on the UK Consumer Duty as a model, the powers of the regulator under an Energy Consumer Duty might be triggered by failing to:

- consistently consider and fairly address the needs of their customers, and how they behave, at every stage of the product/service lifecycle;
- offer consumers suitable products and services, that provide fair value at a fair price;
- promote consumer understanding of energy products, services and pricing;
- provide consumers with accessible support; and
- monitor and regularly review the outcomes that their customers are experiencing in practice and take action to address any poor consumer outcomes and any risks to good customer outcomes.³⁰

²⁹ See generally, Australian Energy Regulator, *AER Compliance and Enforcement Policy* (July 2021).

³⁰ FCA, Finalised Guidance FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty [1.9].

c. Internal dispute resolutions (IDR)/External dispute resolutions (EDR)

As in financial services, IDR and EDR remain an essential element of the consumer duty, ensuring that consumers have access to a dispute resolution and a complaints process.