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Australian Energy Market Commission
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CONSUMER PROTECTIONS IN AN EVOLVING MARKET: ISSUES PAPERS 1 & 2

Energy Consumers Australia is the national voice for residential and small business energy consumers. Established by the Council of Australian Governments (COAG) Energy Council in 2015, our objective is to promote the long-term interests of energy consumers with respect to price, quality, reliability, safety and security of supply.

We appreciate the opportunity to make a submission on the Australian Energy Market Commission's (AEMC) Consumer Protections in an Evolving Market Issues Review. In the words of the Organisation for Economic Co-operation and Development (OECD):

“When they are empowered, consumers can improve economic performance by helping to drive competition and business innovation. This, however, requires an effective consumer policy regime in which consumers are protected from unfair marketplace practices, are in a position to make well-informed decisions and both business and consumers are aware of their rights and responsibilities.”¹

In this submission we make four key points:

1. Energy sector disruption is creating gaps in the consumer protection framework that need to be addressed because energy remains a critical enabler for Australian households and businesses.
2. The likelihood that change will continue and indeed accelerate, as well as the fact that new types of risks for consumers are emerging, mean that adapting consumer protection frameworks is more than simply a task of 'extending coverage'.
3. The AEMC Review is an opportunity to explore more flexible, 'principles-based' models, which can be more easily adapted to mitigate changing risks for consumers and place the onus on service providers to meet higher standards.
4. The New Energy Tech Consumer Code (NETCC), which Energy Consumers Australia is helping establish, is an early and important example of a flexible, industry-led approach to consumer protection that should be supported by the sector and studied for lessons about future frameworks.

Disruption changing the face of the energy market

As the AEMC notes, the traditional way consumers interact with energy is changing. More than two million households and businesses are now generating their own power. New energy service models are also emerging that seek to help people manage their energy use, integrate new 'smart' technologies, and trade or share energy. This is a paradigm shift built on innovation that holds great promise for consumers that want greater control of the way they use energy; how much it costs and where it comes from.

¹ OECD, Consumer Policy Toolkit, 9 July 2010, p.9.



However, as we have seen in other sectors, disruption creates value but it also new risks for consumers that need to be managed. New services don't necessarily fit neatly into the traditional categories of 'generator', 'network' or 'retailer' and, as a result, may not be covered by regulatory and consumer protection frameworks that were built on old assumptions about roles and responsibilities in a centralised, one-way system.

While the energy system is changing, consumers are telling us that energy remains a critical 'enabling' service for households and businesses. This combination of a system that is outgrowing the framework and consumer needs means we cannot be passive in the face of change. It is critical that we adapt consumer protection frameworks to head-off the risk of significant detriment for households and damage to the competitiveness of businesses.

It is important to recognise that the challenges for energy consumers in terms of consumer protection are not simply what might be termed as a 'coverage' issue i.e. issues that could be addressed by extending the existing framework to cover the new technology and services. It is also an issue which goes to the objectives and form of the consumer protection framework itself.

PART 1 - Organising principles for consumer protection

In its important 2016 Report, *Power Transformed*, The Consumer Action Law Centre outlined 12 forms of potential detriment in the new energy world:

1. Lack of access to basic consumer protections
2. Buck-passing and blame shifting
3. Mis-selling
4. Poor decision-making
5. Long lock-in contracts
6. Complex financing tools
7. Inability to access to new market
8. Difficulty comparing products and services
9. Market failure due to segmentation
10. Exclusion through complexity
11. Hardship in off-grid scenarios
12. Reduced choice in off-grid communities

However, amending the current, prescriptive regulatory framework to address these identified risks will not ensure a long term, resilient protections regime. As technology and uptake progresses, new consumer risks are likely to emerge. The design of a contemporary consumer protection framework must mitigate these kinds of risks, giving consumers confidence to navigate the market. One of the challenges of updating the consumer protection framework is ensuring that it is robust to change, and new risks that we might not anticipate.

In the energy sector, consumer protections are currently prescriptive, reflecting the multitude of individual, state-based requirements which were transitioned to the nationally harmonised framework (noting that Victoria, Northern Territory and Western Australia are not covered by the National Energy Customer Framework (NECF)). However, the dynamic nature of the risks that energy consumers face now means there is a need to consider the underlying reasoning for a framework.



Our paper *Contemporary Consumer Protections in Energy* sets out in greater detail the ‘why’ behind consumer protection frameworks, and an underlying logic to inform thinking about design. In particular, it sets out four categories of protections:

- Transactional – consumer protections that address the consumer / provider interface.
- Affordability – consumer protection for affordability.
- Reliability – the regulation of the electricity system to guarantee availability of supply (including quality and reliability).
- Market power – the regulation of firms with market power.

We also pose 18 questions under these four headings which we set out below for assistance which refer to the use cases described in our paper. We suggest the AEMC further consider these questions as part of its review.

Transactional protections

1. Is there something more to the relationship between the generic and industry specific protections than has been captured here?
2. Are the existing consumer protections provided by the NECF (or the Victorian Code) beyond the protections in the Australia Competition Law (ACL) still appropriate?
3. Should providers of energy services (both grid connected and distributed energy resources (DER)) be required to identify the consumer’s purpose in acquiring the service? If so, how should this requirement be framed?
4. Are there any protections that might be better provided by means of a voluntary or enforceable industry code rather than through legislation, rules and guidelines? Are there other forms of codes that can be effective in increasing consumer confidence?
5. How could a code be enforceable for the provision of DER that are not already part of the NECF? If the choice is to amend the Competition & Consumer Act (Cth) 2010 to extend the enforceability of codes, or to amend the scope of the national energy market to include DER, which should be preferred?
6. The energy regulatory framework provides for external dispute resolution (Ombudsman) and this is already being extended to customers in embedded networks. Most submissions to the Review of Behind the Meter protections called for the extension of Energy Ombudsman services to DER. If it is desired to provide external dispute resolution for their sales and service, should this be achieved by an extension of external dispute resolution under the ACL or should it occur through extension of existing Energy Ombudsman schemes?
7. In the design of consumer protections how much extra attention should be placed on the conclusions of behavioural insights, and what additional resources should be allocated to investigating the most effective behavioural interventions?

Affordability protections

8. Does the extension of affordability protections to different use cases require changes to regulation?
9. Would the extension of concession frameworks to other use cases be facilitated by greater national harmonisation of these schemes, or their replacement by a national scheme?
10. Should there be a review of schemes to provide access to new energy efficiency or distributed energy technologies for disadvantaged households? Should these be national schemes?



Reliability protections

11. Is it sufficient to rely on consumers' ability to make an informed choice in deciding to move off-grid or should there be an ongoing regulated connection subject to an appropriately risk-profiled usage tariff?
12. If customers choose to disconnect in use case C (individualised power systems), should the Distribution Network Service Provider (DNSP) continue to have an obligation to reconnect the customer? If not who should be responsible for ensuring the consumer is informed before they disconnect?
13. What consent is required before a community can be transitioned to use case F (islanded microgrids)?
14. In use case E (microgrid), the embedded network operator will determine how much network connectivity is required in addition to the on-site DER. What regulatory requirements are necessary to ensure enough connectivity is provided?

Market power protections

15. Should a network that is islanded by a DNSP still be subject to the uniform pricing policy of the DNSP?
16. Should there be a continuation of retail competition in this scenario since the consumption of these customers is no longer derived from the regional wholesale market, or should there be only one retailer? If the latter who should that retailer be, given the structural separation between retail and network operation?
17. If there is no retail competition, how should retail prices be set?
18. In use cases D and E (embedded networks and microgrids) is the standing offer of the local retailer a sufficient price control? If not, what should replace it?

PART 2 - A deeper dive on principles-based approaches

The challenge of designing contemporary energy consumer protections is not unique to Australia. Other sectors, and other jurisdictions, have already considered alternative approaches to a prescriptive, rules-based regime which would safeguard consumers in such a dynamic market.

In the United Kingdom (UK), the Financial Services Authority (now the Financial Conduct Authority (FCA)) leads the way in the development of a principles-based approach to regulation in the finance industry. Their outcomes-focused, principles-based approach is based on the premise that businesses are better placed than regulators to determine what processes and actions are required within their businesses to achieve a given regulatory objective, in the most efficient manner.

More recently in the UK, there have been some relevant reviews undertaken by Ofgem to ensure that the future regulatory system is fit for purpose, including how consumers are protected when they make decisions that relate to their energy supply.

In June 2017, Ofgem announced that they had removed 50 pages of rules on energy company conduct and replaced the detailed rules on sales and marketing activities with five new principles requiring suppliers to help their customers make informed choices. These enforceable principles can be summarised as:

- the structure, terms and conditions of retail offers must be clear and easily comprehensible;
- retail offers must be easily distinguishable from each other;



- information, services and/or tools must be provided to enable a consumer to easily compare and select appropriate retail offers, taking into account their characteristics and/or preferences;
- misleading or otherwise use inappropriate tactics must not be used, including high pressure sales techniques, when selling or marketing to consumers; and
- a recommendation to a consumer can only be made for a retail offer which is appropriate to their characteristics and/or preferences.

These changes put the responsibility onto the energy company for consumer outcomes. As the regulator said in announcing these changes:

“We are convinced this principles-based approach – along with a significant step up in our own compliance monitoring and assurance work – is the most effective and sustainable way to achieve the treatment that energy bill payers expect and deserve.”²

Going further, in November 2017 Ofgem initiated a review to consider whether regulatory arrangements needed to change in light of the significant technological changes impacting the sector, including how to protect consumers regardless of how they access their energy supply. Informing the review, Dr Jeffrey Hardy, one of the authors of the Reshaping Regulation report, identified that:

“In the future, consumers may not need specific energy regulation to protect them as energy will be an almost invisible product bundled in with products such as the ‘smart home’ meters, smart speakers such as Alexa and Hive and electric car providers.

However, people will need much stronger consumer protection around their personal data and across these bundled services.”³

Among the views expressed by stakeholders consulted in the review were that a better regulatory framework “should focus more on outcomes and services provided (many references to principles-based regulation) and the need to ensure consumers can easily engage with a more complex market.”

Our view is that principles-based regulation has many benefits, beyond efficiency. Used in conjunction with subordinate instruments, such as mandatory guidelines or industry codes, this approach can remain flexible and responsive to change, yet provide guidance to businesses on compliance. It avoids stifling innovation within industry and within businesses, giving them the ability to determine how they meet their requirements and as a result is less likely to become outdated.

New expectations for business

It is also important to recognise our starting point, that consumers do not have confidence that the energy sector is working in their long-term interests. While the recent history of energy price rises is a major contributor to distrust, and to some extent sets it apart from the experience in other sectors, this distrust also reflects wider community dissatisfaction with a view of the role of the corporation that prioritises shareholder returns above all other things, including consumer and community outcomes.

Implicit in the shift from ‘shareholder’ to ‘stakeholder’ capitalism, is a change in expectations about where the responsibility for consumer outcomes lies: a move away from a strict view of ‘caveat emptor’ that left it to consumers to avoid the traps and pitfalls of complex and difficult markets like

² Improving Supplier Conduct Through Binding Principles, <https://www.ofgem.gov.uk/news-blog/our-blog/improving-supplier-conduct-through-binding-principles>

³ Reshaping Regulation, <https://www.imperial.ac.uk/media/imperial-college/grantham-institute/publications/collaborative-publications/Reshaping-Regulation-Powering-from-the-future.pdf>



energy, to a model where the onus is on the service provider to understand the needs of their customers and tailor their products and services accordingly.

In this world, the expectation is not just that companies are 'complying with the law' and a set of minimum standards for conduct, but that they are striving to deliver real value.

Industry-led solutions

Importantly, an outcomes-based approach focuses on the purpose behind the requirement, meaning compliance is more likely to meet consumer expectations. Ultimately, consumers don't care if a set of rules has been followed, what is important to them is the outcome they receive.

A local example of this approach is the recent development of the New Energy Tech Consumer Code (NETCC) by industry with consumer advocates. Once commenced, the NETCC will provide important insights into the potential for industry leadership and accountability.

The structure of the NETCC has been developed to be flexible, meaning that as issues arise in the market, they can be quickly and easily addressed for consumers by the service providers. Taking a high-level principles-based approach means the Code is also technologically neutral. New products, systems and services can be accommodated as they enter the market. Should a need arise for more detailed guidance for industry, then this can be accommodated through the development of standards, guidelines or training.

Transitioning to a principles-based approach will not be simple. It is essential that there is leadership from regulators and shared sector vision on the direction of travel which lifts expectations of what "good" service and outcomes look like. A transition will need to be supported by a change in business culture, a pivot to ensure that consumers are at the centre of the business model, ensuring they are not left behind. The sector will find it difficult to rebuild consumer trust if there is little confidence that the industry is willing to accept what went wrong and to work to improve outcomes.

Reforms to the regulatory framework should be an opportunity to boost trust and confidence. Compliance and enforcement approaches should be an opportunity to shift accountability from consumers and regulators to the energy businesses.

Thank you for the opportunity to make this submission. If you have any questions about our comments, or require further detail, please contact Jacqueline Crawshaw, Associate Director, on 02 9220 5520 or by email at jacqueline.crawshaw@energyconsumersaustralia.com.au.

Yours sincerely,

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