



Submission to Community Consultation for ACT 3 – 8 of 2016

10 November 2016

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1. Introduction

Energy Consumers Australia thanks the Australian Competition Tribunal (**the Tribunal**) for granting consumer groups and service users leave to make written submissions of up to ten pages.¹ This submission addresses in three broad topics, namely:

- aspects of the legal framework that shapes the Tribunal's task, such as the consideration of a materially preferable National Electricity Objective (**NEO**) decision (**a materially preferable decision**), with reference to the submissions made to the Victorian Minister for Energy, Environment and Climate Change (**the Minister**) to the Tribunal on this issue;
- the Tribunal's recent decision in South Australian Power Networks' (**SAPN**) application for review of its AER determination, which covers very similar issues to those being considered in the applications from the five Victorian electricity and one gas distribution service providers (**DNSPs**) to which this submission is made (**these matters**); and
Energy Consumers Australia's research findings on consumers' satisfaction with energy markets outcomes in Victoria.

2. The importance of community consultation

Under section 71R(1)(b) of the National Electricity Law (**NEL**), the Tribunal 'must, before making a determination, take reasonable steps to consult with (in such manner as the Tribunal things appropriate)', users and prospective users of a relevant network applicant, as well as consumer groups. The Tribunal refers to these processes as **community consultations**.

The community consultation for these matters is the third time the Tribunal has undertaken the process since the requirement to do so was created as part of wide-ranging amendments the rules governing limited merits review (**LMR**) of Australian Energy Regulator (**AER**) decisions, made in 2013. Energy Consumers Australia has participated in each of the previous two process (ACT 1-8 of 2015, held in Sydney 6-7 August 2015 (**the Ausgrid matters**); and ACT 11 of 2015, held in Adelaide on 1 June 2016 (the **SAPN matter**)).

¹ Tribunal, Directions in ACT 3-8 of 2016, made 18 October 2016 (Justice Robertson, Deputy President).

Energy Consumers Australia also participated in community consultation for these matters.² Until that point, the community consultation for these matters had closely mirrored the process followed on two previous occasions. That is, participants were offered the opportunity to make oral submissions of around 15 minutes and to also provide further written submissions of up to three pages.

Because community consultation is such a new part of the Tribunal's process for LMR reviews of AER decisions, there has been some concern amongst consumer advocates about how the process will contribute to the Tribunal's conduct of its overall task. There has also been some concern about the how the first two iterations of community consultation were conducted and the part that the extent to which the material provided by consumers was heeded by the Tribunal and others. For example, the Minister asserts that the fact a ground of review is established, or the consequences of correcting the error for DNSP revenue, do not, in themselves, constitute a materially preferable NEO decision was not raised in the Ausgrid matters.³ In fact, these issues were raised by Energy Consumers Australia in the community consultation for the Ausgrid matters.⁴ Concerns related to the community consultation process (and the need for improvements thereof) were best expressed by the Public Interest Advocacy Centre (**PIAC**) at the consultation forum for these matters.

In light of these concerns, Energy Consumers Australia is pleased that the Tribunal has seen fit to enhance the consumer consultation process for these matters, by granting leave for service users and consumer groups to make additional written submissions. Energy Consumers Australia particularly appreciates the direction that this additional consumer input is invited to be made 'in relation to the written submissions lodged by the parties and the intervener'.⁵ This aspect of the direction gives ECA confidence that the Tribunal is genuinely seeking to engage with service users in a way that enlivens consideration in these matters of consumers views.

When jurisdictional energy ministers (then known as the Standing Council on Energy and Resources or **SCER**) reformed the LMR framework in 2013, they were clear that the intent of the new regime was that AER's decisions would only be varied where the Tribunal concluded that this was a 'a materially preferable decision in the long term interests of consumers'.⁶ This was a major departure from the previous regime that was focused on finding and remedying discrete errors. As noted by the Tribunal, SCER further considered that the new consultation process would be most useful to the Tribunal in its consideration of which of the available options was more in the long term interests of consumers.⁷ While

² Further information about how Energy Consumers Australia has sought to ensure consumers' interests are represented in the Tribunal's reviews of AER decisions was provided in oral submissions to the community consultation on 6 October 2016.

³ The Minister, *Outline of submissions of the Minister for Energy, Environment and Climate Change for the State of Victoria*, ACT 3-8 of 2016, files 10 October 2016, [16].

⁴ ECA submitted that: '*Materiality is to be determined with reference to the national electricity or gas objective and nothing else. It's not a reference to the quantum involved or the impact on the regulated revenue*', see Transcript, Community Consultation for ACT1-8 of 2015, day 1, 6 August 2015, 79. Tribunal, as above n 1.

⁵ Tribunal, as above n 1.
⁶ The Minister, as above n 3, [20(c)].

⁷ Tribunal, *Explanatory information for participants in the Tribunal's community consultation process*, 2016, page 4. Available at: http://www.competitiontribunal.gov.au/data/assets/pdf_file/0017/33713/Mel-explanatory-memorandum.pdf.

noting that the entire LMR framework is currently being reviewed by energy ministers (now known as the Council of Australian Governments Energy Council of **COAG Energy Council**), ECA urges the Tribunal to continue to refine the process by which it gathers that information.

3. Framework issues – the Minister’s submissions

As outlined below, Energy Consumers Australia endorses the Minister’s submissions to in relation to the two framework issues with which Energy Consumers Australia has been most concerned in its all its oral submissions to earlier Tribunals previous community consultations These issues are:

- that in interpreting the NEO, the long term interests of consumers is *the* paramount objective and economic efficiency is the method for pursuing (but not guarantee of achieving) that aim; and
- the Tribunal’s task in deciding whether varying, or setting aside and remitting, the AER’s decision will lead to materially preferable NEO decision.

3.1 The NEO, the long term interest of consumers and economic efficiency

Energy Consumers Australia endorses the submission from the Minister that:

The NEO clearly identifies both the purpose of the regulatory regime (promoting the long term interests of consumers) and the methodology for achieving that purpose (promoting efficient investment in, operation and use of electricity services). The NEO is to promote investment, operation and use of electricity services for the long term interests of consumers but only insofar as that investment, operation and use is efficient.⁸

This submission from the Minister is consistent with the Tribunal’s reasons for determination in *Applications by the Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 (**Ausgrid Decision**). In that determination, the Tribunal noted that the promotion of efficient investment in, and efficient operation and use of, electricity and gas services:

is to be done “for” the long term interests of consumers. It does not involve a balance as between efficient investment, operation and use on the one hand and the long term interest of consumers on the other. Rather, the necessary legislative premise is that the long term interests of consumers will be served by regulation that advances economic efficiency.⁹

However, as noted by the Minister in her submissions, while this is the premise of the legislation:

this does not mean that all forms of economic efficiency and the long term interest of consumers are always equivalent or that the promotion of economic efficiency (by any means) necessarily promotes those long term interests of consumers.¹⁰

⁸ The Minister, as above n 3, [36].

⁹ The Ausgrid decision [77].

¹⁰ The Minister, as above n 3, [40].

Energy Consumers Australia agrees with this interpretation, for the reasons given in the Minister's submissions from [41] to [46]. It is not necessary to restate all of those arguments here but briefly, as outlined in the second reading speech for the passage of the reforms to the LMR regime:

*the nature of decisions in the energy sector are such that there may be several possible economically efficient decisions, with different implications for the long term interests of consumers.*¹¹

As noted by the Expert Panel that conducted the 2012 review of LMR of AER decisions, a monopolist who is able to practice perfect price discrimination will maximise the economic efficiency of their market but will not do so in a way that most promotes the interests of consumers in either the short or long term. Accordingly, the Expert Panel took the view that:

*Just as effective competition is defined as 'competition that works well for the long-term interests of consumers', so effective regulation can be defined as 'regulation that works well for the long-term interests of consumers'. In both cases, there is an intentional, distributional tilt in public policy. This distributional tilt is common to competition and regulatory policies around the world.*¹²

Energy Consumers Australia therefore submits, in accordance with the Minister, that the simple promotion of economic efficiency is not the intended purpose of the regime governing the regulation of electricity networks. The goal of such regulation – and the task of the Tribunal – is to ensure that network revenue determinations reflect economic efficiency in the way that most promotes the long term interests of consumers. The former serves the latter.

3.2 Materially preferable national electricity objective decision as a whole

As discussed above, following the 2013 amendments to the LMR framework, the Tribunal has a two-stage decision making process to follow. Once a ground of review has been established, the Tribunal must only make a determination to vary or set aside the AER's revenue determination if it 'is satisfied that to do so will, or is likely to, result in a decision that is materially preferable to the reviewable regulatory decision in making a contribution to the achievement of the national electricity objective'.¹³ If not satisfied, the NEL states that 'the Tribunal must affirm the decision'.¹⁴

According to the Minister's submissions, this second stage of the Tribunals task can be broken down into four parts, as follows:

- (a) *consider and identify the putative alternative decision it or the AER would be likely to make as a result of the establishment of once or more grounds of review;*
- (b) *compare that putative alternative decision with the existing regulatory decision;*

¹¹ Ibid [41].

¹² Ibid [43].

¹³ NEL, cl 71P (2a)(c).

¹⁴ Ibid.

- (c) *determine whether that putative alternative decision will or is likely [to] be preferable to the existing regulatory decision in making a contribution to the achievement of the NEO – that is, to the promotion of efficiency in electricity services for the long term interests of consumers; and*
- (d) *if the putative alternative decision is preferable in that sense, determine whether it is materially preferable.*¹⁵

The Minister elaborates at length regarding these steps in her submission, which Energy Consumers Australia will not repeat here.¹⁶ However, Energy Consumers Australia wishes to note its particular agreement with the submission of the Minister and the AER, as cited in the Ausgrid decision, that as part of the consideration of whether a decision will be materially preferable that ‘there is necessarily a comparison of the implications of each decision for... prices with the impact of each decision on the long term interests of consumers’ with respect to the various elements of the NEO’.¹⁷

As outlined below, Energy Consumers Australia believes that consumers themselves are best placed to aid the Tribunal in that consideration and the issue of what is in the long term interests of consumers. This view appears, to Energy Consumers Australia, to be consistent with the view the Tribunal expressed in its determination in the SAPN matter (**the SAPN decision**).

4. The Tribunal’s determination in Application SAPN

The Tribunal handed down the SAPN decision on 28 October. Energy Consumers Australia understands that because the Tribunal is not a court, the doctrine of precedent does not apply from the SAPN Decision to these matters (and, similarly, from the Ausgrid Decision to either the SAPN Decision or these matters). Nonetheless, the SAPN decision contains a number of elements that Energy Consumers Australia submits are relevant to these matters and important for consistency.

4.1 The use of material from the community consultation

In the SAPN decision, the Tribunal found that no ground of review had been established and, therefore, affirmed the AER’s determination. As a result, it was not necessary for the Tribunal to turn its mind to the second stage of the decision making process, being whether varying or setting aside the AER’s determination would lead to a materially preferable NEO decision. Despite this, the SAPN decision recounts the submissions made to the Tribunal in the community consultation process at length. Significantly, the Tribunal notes at [59] that:

*It is useful to note the starting point from which the majority of the submissions were made. It was generally submitted that, when considered according to the elements of the NEO – price quality, safety, reliability and security of supply of electricity – the only element with which consumers were dissatisfied was price.*¹⁸

¹⁵ Ibid [54].

¹⁶ Ibid, sections 3.6 to 3.11 [66 -109].

¹⁷ Ibid [70].

¹⁸ SAPN decision [59].

As discussed further below, Energy Consumers Australia's quantitative research of energy consumers confirms that energy price increases have put pressure on consumers and left them with the view that energy services represent inferior value for money than other services, such as banking, insurance and communications.

Most significantly, the Tribunal stated in the SAPN decision that:

*the consultation process and the submissions of consumers (and the Minister) **may have become particularly significant** (if error had been found in the Final Decision) **in the consideration of the materially preferable NEO decision**. This has been unnecessary in this review as no error has been found to occur (emphasis added).¹⁹*

Energy Consumers Australia strongly endorses the Tribunal's reasoning. It is consistent with the fact that, according to the Tribunal SCER considered that consulting with participants would assist the Tribunal, in particular, in establishing what constitutes the long term interests of consumers, as discussed above. Energy Consumers Australia submits that the Tribunal should adopt the same approach in these matters.

4.2 Cost of corporate income tax (gamma)

The calculation of gamma is the only issue that is common across the applications of all five Victorian DNSPs. It was also considered by the Tribunal in both the Ausgrid and SAPN decisions. In the former decision, the Tribunal agreed with the submissions of the networks and made a determination (currently under review by the Full Federal Court) that the AER's value for gamma should be varied. In the latter decision, the Tribunal affirmed the AER's decision on gamma, which the Tribunal 'recognises... is the converse of that made by a differently constituted Tribunal in the Ausgrid case.'²⁰

The Tribunal's task is to make the correct decision on the facts before it. Particularly when dealing with a technical or factual enquiry, it should consider any new evidence or arguments available, and not simply follow what has been decided in earlier proceedings. Where there is a genuine diversity of views, it is not necessary for the Tribunal assess whether the AER adopted the 'best' approach. Provided the result has been arrived at through a rigorous and transparent process, the AER is entitled to use an element of judgement when landing on a final number in relation to a forward-looking parameter. Indeed, consumers rely on the AER to undertake such a task, as a regulator that is required to promote the NEO.

In the SAPN decision, the Tribunal concludes in relation to gamma that:

In the face of significant uncertainty, the approach by the AER of considering a range of approaches to estimating gamma and applying different weights to those approaches is, the Tribunal believes, appropriate. It is clear that some experts would apply different weights to the alternative types of evidence, and that some support the AER's relative ranking while others disagree. In particular, some would accord much higher weight to results of dividend drop-off studies. The Tribunal has noted the arguments about the problems of deriving reliable tax-related parameters such as investor valuation of

¹⁹ SAPN decision [103].

²⁰ SAPN decision [159].

imputation credits from drop-off parameters, and is of the view that the AER did not err in forming the judgement it did regarding weight to give different forms of evidence.²¹

Energy Consumers Australia supports this conclusion as recognising the AER’s proper exercise of discretion, and submits that the Tribunal should make an equivalent finding in these matters.

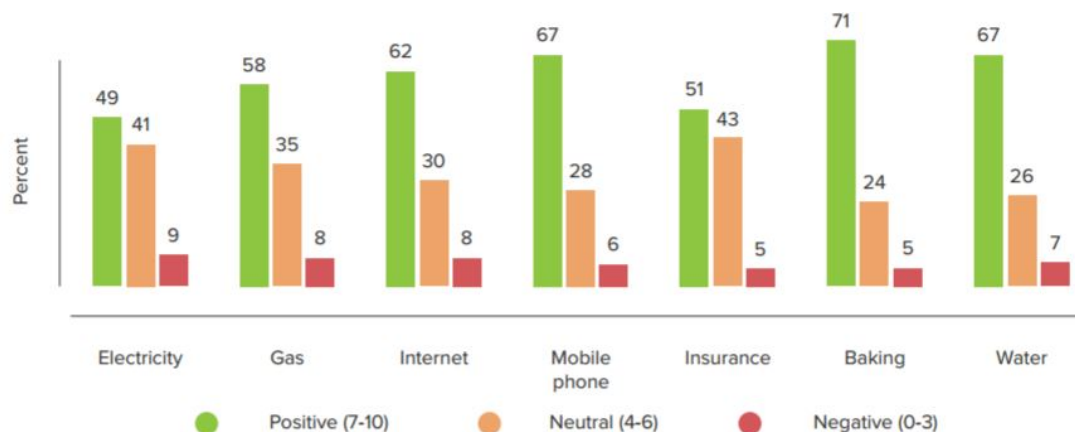
5. What consumers are telling Energy Consumers Australia

Energy Consumers Australia collects extensive evidence about the outcomes that energy markets are delivering for consumers. Energy Consumers Australia conducts a six-monthly Energy Consumer Sentiment Survey (ECSS) of 2,500 residential and 600 small business consumers. We undertake regular consultations in regional areas of the National Energy Market and commissions bespoke research into particular aspects of the market. The findings of this research is relevant to the Tribunal in its consideration of the network’s claims for additional revenue, that would increase prices for consumers who are already struggling with affordability.

5.1 ECSS results for Victoria

Energy Consumers Australia released the results of its first ECSS in July this year.²² The results showed that Victorian consumers are generally satisfied with the energy services that they receive, especially in relation to levels of reliability. However, as shown in Figure 1, below, consumers believe the value for money they receive from electricity services is less than all other surveyed services.

Figure 1 – Victorian consumers’ view on value for money of different services²³



*How would you rate the overall value for money of the products and services provided by your service provider in the following areas, in the past 6 months?
0-10 scale, 0 = 'very poor', 10 = 'excellent'*

²¹ SAPN decision [196].

²² The results for Victoria are attached to this submission. The results for Australia and each state and territory are available at: <http://www.energyconsumersaustralia.com.au/research/energy-consumer-sentiment-survey-findings>.

²³ Energy Consumers Australia, *Energy Consumer Sentiment Survey findings (Victoria)*, July 2016, 4. Attached and available at: <http://www.energyconsumersaustralia.com.au/research/energy-consumer-sentiment-survey-findings>.

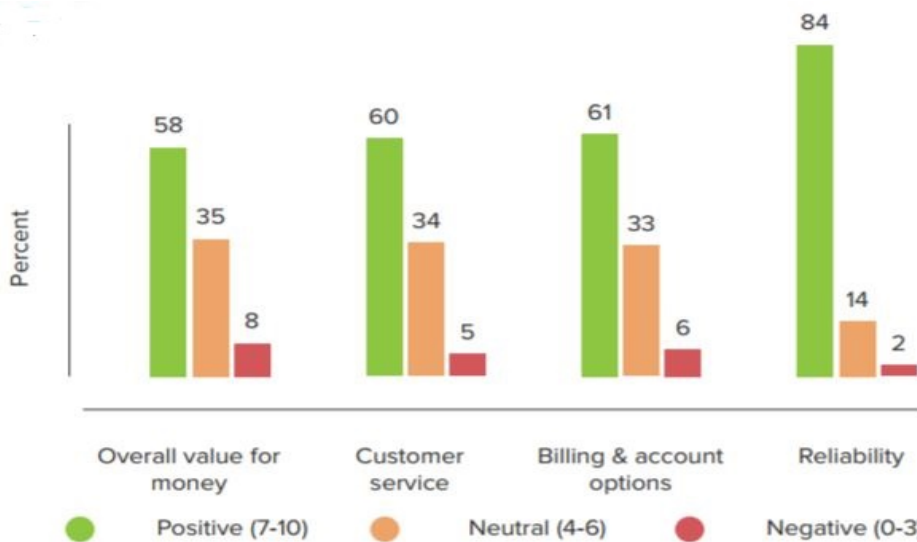
In addition, as shown in Figures 2 and 3, below, Victorian consumers are less positive about the value for money, customer service and reliability of electricity services compared to gas services.

Figure 2 – Victorian consumers’ satisfaction with aspects of electricity services²⁴



How would you rate the [attribute]? 0-10 scale, 0 = 'very poor', 10 = 'excellent'

Figure 3 – Victorian consumers’ satisfaction with aspects of gas services²⁵



How would you rate the [attribute]? 0-10 scale, 0 = 'very poor', 10 = 'excellent'

It is also significant that only 39 per cent of survey participants responded positively to the proposition that the overall market (businesses and regulators) was working in their long term interests, compared to 37 per cent being neutral and 24 per cent negative.²⁶

²⁴ Ibid 3.

²⁵ Ibid.

²⁶ Ibid 4.

As previously stated, the Victorian results of the ECSS support the Tribunal’s view in its SAPN decision that of all the elements of the NEO, the one with which consumers are least satisfied is price. Energy Consumers Australia submits that, in line with these findings, it would not be in the long-term interests of consumers to incrementally increase the prices charged for energy services in Victoria, even if this increase results in a marginal increase in reliability (which Energy Consumers Australia is not convinced they will). As shown in Figure 4, below, the average minutes of unplanned outages experienced by electricity consumers has remained largely flat over the last decade, at a time when electricity prices have spiked dramatically (Figure 5).

Figure 4 – Unplanned electricity system average interruption duration index (SAIDI)²⁷

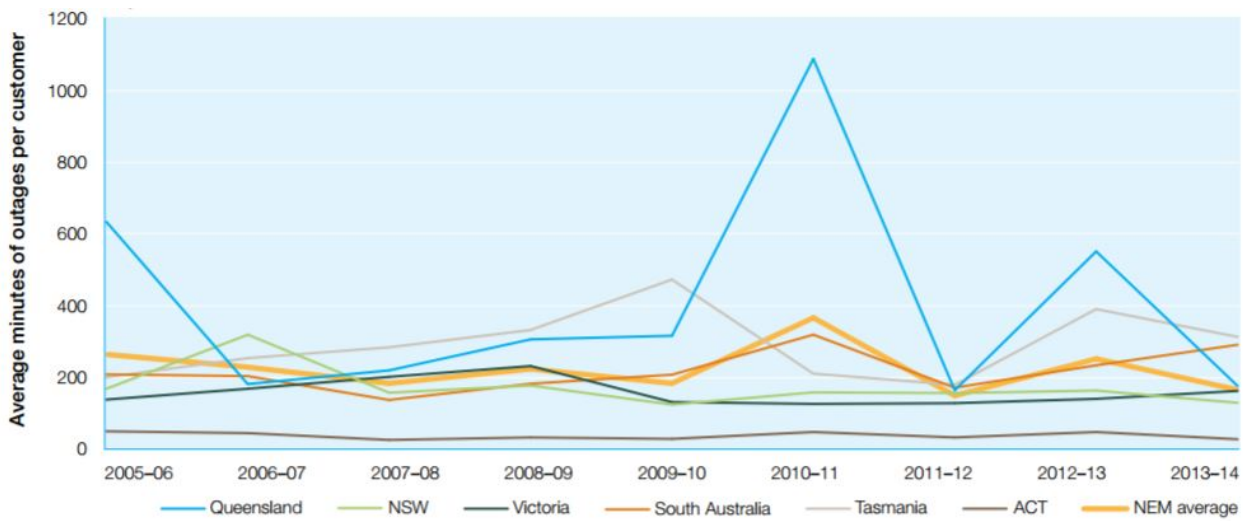
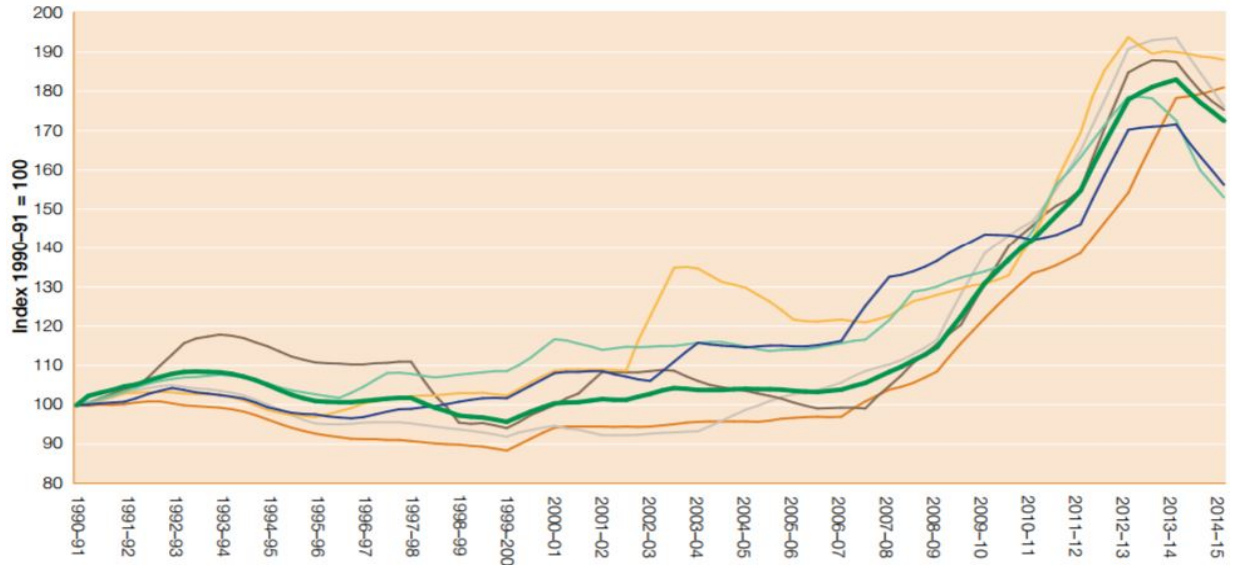


Figure 5 – Retail electricity price index (inflation adjusted) – Australian capital cities²⁸



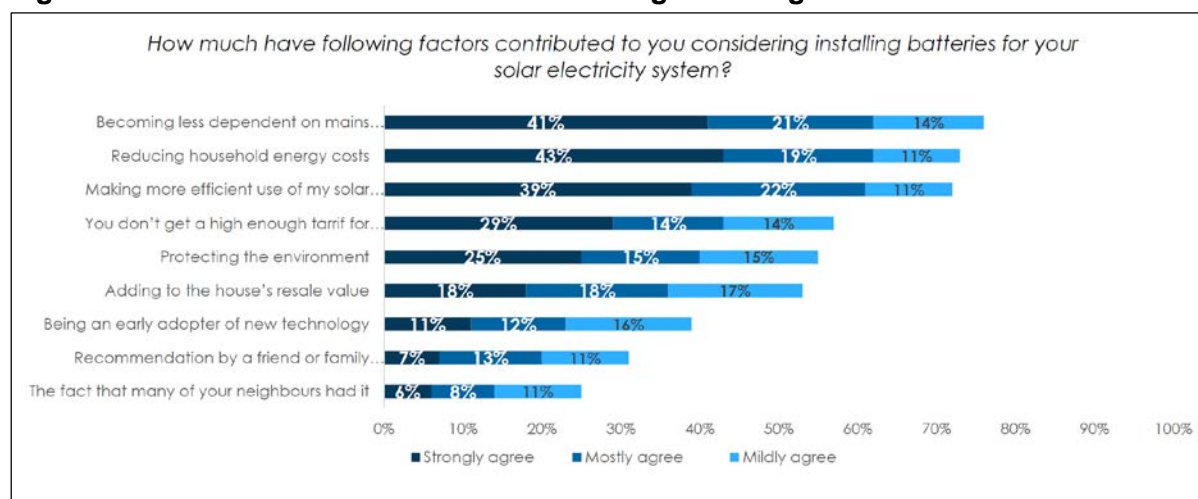
²⁷ AER, *State of Energy Market 2015, 2016*, 84.

²⁸ *Ibid*, 135.

5.2 Consumer dissatisfaction is driving new behaviours

Finally, forthcoming research that Energy Consumers Australia will publish in early 2017, indicates that ‘becoming less dependent on the grid’ is driving interest in battery technology among those consumers who have already installed solar PV. As shown in Figure 6, below, this is the most common motivation for consumers in pursuing installing batteries to complement their existing solar panels. This finding is symptomatic of the dissatisfaction with the results that the energy market has delivered for them, especially in regards to price. The question of whether any decision by the Tribunal not to affirm the AER’s decision will be a materially preferable NEO decision must be considered in that context.

Figure 6 – Consumers’ reasons for considering installing batteries²⁹



6. Conclusion

Once again, Energy Consumers Australia thanks the Tribunal for the opportunity to provide this submission. For the reasons outlined above, ECA submits that the Tribunal the AER’s decision should be affirmed in relation to the grounds for which the Victorian DNSPs are seeking review. In the event that the Tribunal finds that any of those grounds has been made out, ECA submits that any decision that leads to increased revenue for the DNSPs would not be a materially preferable NEO decision.

²⁹ Energy Consumers Australia, forthcoming research report on consumers’ experience and intentions with distributed energy supply.

