



**ENERGY
CONSUMERS
AUSTRALIA**

A Suite 2, Level 20, 570 George Street
Sydney NSW 2000
PO Box A989
Sydney South NSW 1235
T 02 9220 5500
W energyconsumersaustralia.com.au
T @energyvoiceau
in /energyconsumersaustralia
I /energyconsumersaustralia
ABN 96 603 931 326

28 June 2022

Mr Mark Feather
General Manager, Strategic Policy and Energy Systems Innovation Branch
Australian Energy Regulator

Submitted by email: consumerpolicy@aer.gov.au

SUBMISSION: AER'S ISSUES PAPER ON THE RETAILER AUTHORISATION AND EXEMPTIONS REVIEW

Dear Mark,

Thank you for providing the opportunity for Energy Consumers Australia to comment on the Australian Energy Regulator's (AER) Retailer Authorisation and Exemption Review Issues Paper (the Issues Paper).

As you know, Energy Consumers Australia is the national voice of residential and small business energy consumers. We advocate for a modern, flexible, and resilient energy system that meets consumer values, expectations, and needs.

There is an important context for this review, which is the Energy Security Board's (ESB) Post 2025 Market Design program and specifically the key reform pathway of "*Integrating Distributed Energy resources (DER) and flexible demand*".

As noted in the Issues Paper, in its final advice to Energy Ministers¹ in November 2021, the ESB anticipated the emergence of new business models offering technologies and services to households and small businesses. In the ESB's view, this calls into question whether the current regulatory framework set out in the National Energy Retail Law, the National Energy Retail Rules and the National Energy Customer Framework (NECF) could remain fit for purpose. The ESB stated:

"A review of the retailer authorisation process is an important next step because the level of consumer protections that apply to these business models depend on whether the AER provides a full retail authorisation or an exemption (from all or parts of the NECF); and if it provides an exemption, what (if any) conditions are attached to it. The review may also identify where business models are out of scope of the NECF (for example, because they do not involve the sale of energy to customers for premises) and are covered by Australian Consumer Law (ACL) only, and what risks this may pose for consumers and effective retail competition."

We have responded in this submission to what we see as the two distinct parts of the AER's review, rather than responding directly to the 36 detailed questions in the Issues Paper.

¹ Energy Security Board. 2021. *Post-2025 Market Design: Final advice to Energy Ministers Part B*, <https://esb-post2025-market-design.aemc.gov.au/32572/1629945809-post-2025-market-design-final-advice-to-energy-ministers-part-b.pdf>, p. 82.

The first part of the review considers the pre-existing issues and challenges with the current authorisation and exemption framework for regulating the sale of energy, which essentially covers the traditional retail business model (as identified in Section 5.1). Our understanding is that the AER is seeking changes that will improve the operation of the NECF and we support these changes (Part 1 of our submission).

The second part of the AER's review considers how the NECF could be potentially adapted to comprehensively regulate existing models (such as designated embedded networks and other exempt arrangements) and new business models that are evolving in the way electricity is bought and sold, including in response to the challenges of a system that is 100% renewable.

In our view, the NECF should not and cannot be adapted in this way as it is inherently framed around a single supplier relationship, delivering electricity or gas to a customers' premise, with the supplier being responsible for billing. This framing is confirmed in the Issues Paper in its discussion of the history, purpose and provisions of the NECF. It is also reinforced in the consumer protection principles that have been enunciated as part of the Consumer Risk Assessment Tool.²

In our response to the Issues Paper (Part 2 of our submission) we argue that consumer agency, protection and access to dispute resolution should be the foundations of a new fit-for-purpose regulatory framework. In the context of this submission, we refer to consumer agency as the ability for consumers to make decisions that will determine the outcomes they desire.

The development of a new fit-for-purpose framework needs to be undertaken independently of the review of NECF. Just as the Australian Consumer Law often has to consider what is a market, we take the same approach to regulation in all the ways that energy is both bought and sold. For there to be an adequate consumer agency and protection framework, the intersection and interdependencies between what we think of collectively as the "market for energy" and the range of intermediaries (or suppliers) all needs to be considered. This includes:

- the sale of technology products (such as solar panels, home batteries, home energy management systems, smart appliances and electric vehicles with smart charging), which are often marketed on the basis of financial returns, payback periods and bill savings;
- contracts for pricing of electricity bought and sold, and contracts for control over consumer-owned "smart technologies";
- bundled services (for example a subscription rate for charging and lease or purchase of an electric vehicle, or packaged essential services bundles, or concierge models);
- shared services that include energy use (for example bulk hot water);
- green loan schemes, incentives for adoption of technologies or energy efficiency improvements and financial arrangements for purchasing of solar and battery systems (including leasing, credit and buy now pay later arrangements);
- government incentive schemes for technology, appliance adoption, and energy efficiency improvements;

² The consumer protection principles are listed in Section 2.3 of the Issues Paper.

- tenancy arrangements that bundle energy supply;
- services that provide access to shared solar and storage assets, not at the consumers' premises; and
- "stand-alone" sales of electricity and gas.

What these examples make clear is that the potential evolution and innovation in business models could cut across a range of sectors. Energy remains an essential service and therefore these new business models will continue to require energy specific regulation. However there exists an opportunity, and a need, to consider the issues of consumer agency and protection in how energy is bought and sold from a broader legal and regulatory perspective.

Notwithstanding our view that this review, as part of the ESB's current work program, should be limited to the existing challenges and opportunities, we look forward to continuing our engagement with you and the ESB on the need for an ambitious agenda for developing a fit-for-purpose consumer agency and protection framework that is comprehensive and robust in its application to evolving and future business models.

Should you have any questions on this submission, please contact Melissa McAuliffe, Senior Policy Associate by email at [REDACTED]

Yours sincerely,

[REDACTED]

Lynne Gallagher
Chief Executive Officer

SUBMISSION

PART 1 - EXISTING CHALLENGES AND OPPORTUNITIES WITH THE AUTHORISATION AND EXEMPTION FRAMEWORK

In this section we address the matters raised in the Issues Paper that address existing challenges and opportunities and are raised in Questions 7-10 and 20-25.

Point-in-time assessments

Is this an effective way to assess a business application and mitigate potential harms? Does it translate in a future market?

We believe this is a good opportunity to re-evaluate the point-in-time assessment process given the potential detriment to consumers if a retailer significantly changes their business model which the application was based upon.

Trust in the energy industry is still very much a live issue with our Energy Consumer Sentiment Survey (ECSS) revealing only 46% of respondents feel positive that the energy market is working in their long-term interests³. Consumers should feel confident that their energy retailer has, and will be, appropriately vetted. The fact that a retailer can change their business model or pass their licence on to another retailer without oversight from the regulator is not in consumers' best interest and should be transparent.

The ability for the AER to impose conditions

The Issues Paper canvasses the ability for the AER to impose conditions.

One approach could be to have specific overarching conditions, or obligations, which approved entities must comply with to avoid risk of revocation or a penalty, for example if the business model changes in terms of who they service or other matters that may have an impact on consumers. We also consider it a potentially positive change that the AER would have the ability to vary an authorisation at a given point in time. Whether the onus sits with the AER or the approved entity to disclose we are not concerned with as long as consumers are no worse off based on the outcome. We feel overarching or tailored obligations along with the ability to vary them may give the AER additional comfort when reviewing applications and enhance innovation in the industry. However, as these questions are at a very high level, much more work needs to be done on what this might look like and whether the changes are worthwhile to consumers.

The use of limitations

The AER might like to consider whether, like the Essential Services Commission (ESC), conditions or limitations on the granting of an application could be imposed. As noted in the issues paper, through the powers which exist in Victoria, the ESC placed conditions on the approval of Telstra Energy's application for a retailer licence due to their history in the telecommunications industry⁴.

³ Energy Consumers Australia, *Energy Consumer Sentiment Survey*, <https://ecss.energyconsumersaustralia.com.au/behaviour-survey-oct-2021/>.

⁴ Essential Services Commission <https://www.esc.vic.gov.au/media-centre/telstra-energy-must-provide-special-protections-consumers-part-victorian-energy-licences> accessed 13.05.2022

These conditions included limiting customer numbers for the first six months and holding senior executives accountable for any energy disconnections for non-payments. Having this capability would go some way to mitigate potential harms or provide an avenue for the AER to approve applications but with the ability to monitor the activities if they have some concern, instead of potentially declining an application from a disruptor in the market.

Misconduct

We welcome an increase in visibility and oversight, particularly with exempt sellers as it appears this is extremely limited, with the AER noting they rely on customer complaints and ombudsman schemes to identify existing issues. Such an approach could see potential breaches in conduct remaining hidden. Not all customers are aware of their rights or the reporting avenues available to them with our ECSS data finding only 34% of respondents were either familiar or very familiar with the Energy Ombudsman⁵. Reporting may be particularly difficult for customers in embedded networks where the possibility of reporting a complaint to the ombudsman may not be an option if their network is not an ombudsman scheme member.

We recognise the complexity involved in ensuring adequate oversight and regulation is reached as efficiently as possible for all parties involved. However, we cannot lose sight that central to this needs to be that service providers are delivering the outcomes most valued by consumers. We believe more flexibility and undertaking from the AER would be a good thing and can be achieved in an efficient way provided it is centred on delivering the outcomes most valued by consumers.

PART 2 – A FIT-FOR PURPOSE CONSUMER AGENCY AND PROTECTION FRAMEWORK

In the context of the consumer journey on the pathway to a net zero electricity system, Energy Consumers Australia has an ambition for developing a fit-for-purpose consumer agency and protection framework that is comprehensive and robust in its application to evolving and future business models.

Much of the focus in recent policy reform processes has been on the “supply side” i.e. issues concerning competition, innovation, future market design and regulatory frameworks for a post 2025 energy system that will be 100% renewable.

We want to go beyond the current framing to start with the consumer perspective, rather than starting from the system (engineering), market and regulation (economic) or existing business model (commercial) requirements. We want to encompass the legal and regulatory arrangements for consumer protection and fair trading and access to free and independent dispute resolution across all jurisdictions including Commonwealth and all States and Territories, and the sector specific regulation of energy, finance and tenancy.

In this section we address the issues raised in relation to Questions 1-6; 11-19; and 26-36 and in particular we question:

- the usefulness of “use cases/business models”, consumer archetypes and consumer protection principles as a framing for testing whether the regulatory framework is fit for purpose (Questions 1-3);

⁵ Energy Consumers Australia, *Energy Consumer Sentiment Survey*, <https://ecss.energyconsumersaustralia.com.au/behaviour-survey-oct-2021/>.

- the concept of “essentiality” as a necessary condition that can sensibly be applied beyond energy specific regulation of the traditional energy supply arrangements (Questions 3-4); and
- whether it is appropriate for the regulatory framework to incorporate the need to encourage uptake of distributed energy resources products and services (Question 5).

A broader perspective on consumer energy choices and decisions

Households and small businesses are diverse in their needs and preferences. Each have their own opportunities and challenges when it comes to making decisions that will have consequences for the costs and supply of their energy. These decisions go beyond the traditional ways in which policy makers, regulators and industry have thought about energy markets and consumer choice, which mainly involved persuading consumers to actively select an energy retailer to supply electricity and gas to their home or business premise.

Consumer segmentation and diversity

In relation to the diversity of consumers, the Issues Paper references the consumer archetypes developed for the Australian Energy Market Commission (and not Energy Consumers Australia) specifically to consider the design of two-sided markets. Rather than considering these archetypes as in some way universal, and as sufficient for testing the design of a consumer protection framework, we support both:

- consumer segmentation utilising the Capability, Opportunity, Motivation, Behaviour (COM-B) model, which is what is embedded in our [Supporting Households Framework](#) and for which we developed a [Policy Makers Guide](#). For example, the COM-B model underpins the Sunrise Project’s Climate Compass Survey, which segments Australians in relation to their attitudes to climate change action; and
- using living labs to user test proposed designs, so that any final framework has been informed by and responded to social practice in the home and business practices and constraints. For example, Energy Systems Catapult in the United Kingdom utilises their [Living Lab](#) to design, market-test and refine innovative products and services. We need to take a similar approach to the design of regulatory frameworks, to be assured they are fit for purpose.

There is a further challenge, in closing rather than widening the energy divide. Our attention is often focused on the 3 million households that have installed solar generation, which is expected to rise to 6 million in the next decade. Yet not all households (or small businesses) will have the means or the opportunity to access their own on-site generation and storage and the price-points for electric vehicles will take some time to be accessible for those consumers with the least resources. A significant proportion of our households are renters (1/3) and do not live in detached housing (1/3) while estimates are that close to 2 million Australians are living in poverty (after housing costs). The current high price of electricity, and the transition away from fossil fuel gas heating in our homes will only serve to exacerbate the number of Australian households and small businesses that struggle to pay energy bills.

Proposed business models

The Issues Paper identifies four broad business models (Table 1, page 21) as:

- charging of electric vehicles;
- aggregation and/or energy management services;

- multiple energy providers; and
- embedded networks and microgrids.

These business models and how they are described are not sufficiently grounded in consumer choices and decision making. Using these business models means there is a risk of developing a regulatory framework that might be fit for purpose from a system perspective, or a regulated provider perspective but not from the perspective of consumers and the services they might want to access.

Clearly there are benefits to achieving a least cost electricity system and in fully utilising renewable electricity when it is abundant and cheaper. Achieving this comes with greater complexity, with pricing and controls over use and generation being deployed to dynamically balance demand and supply of electricity. Yet, consumers tell us in our research that they want choices to be simple and easier to navigate, at the same time as giving them access to cheaper energy.

We need to shift our focus from how energy – electricity and gas – is sold, to how it is bought. In this context a consumer perspective on potential future business models would start with consumers' needs and preferences, for services that are likely to include:

- convenience, such as subscription rates, bundled services or set and forget management of energy use and generation (both static and dynamic);
- a single supplier, with landlords, vehicle suppliers, technology companies or financial institutions providing electricity and energy management services combined;
- shared services such as local storage and bulk hot water;
- multiple rates (pricing) for appliances and technologies, across one or more multiple suppliers, so that consumers can mitigate their risk of higher bills from being exposed to time varying pricing.

In the United Kingdom, the Utility 2050 took the approach of co-creating potential future energy retail business models, which we propose should also be adopted in Australia, if we are to ensure that regulation is fit-for purpose from a consumer perspective.⁶

Taking this consumer centred business model approach to the services that consumers may need or prefer, also removes the necessity to define issues of essentiality within this review (beyond ensuring access to supply that is part of the NECF) and enshrining system requirements for the uptake and use of consumer energy resources (such as controllable energy use, generation and on-site storage).

Our research into consumer preferences for pricing and control services

A consumer centred business model approach not only takes into account the need for affordability and simplicity but also considers the diverse preferences consumers have in regards to their level of control over services. Broadening our perspective of consumer energy choices means better understanding the extent to which consumers feel they have control over everything from their devices to how they pay for energy.

⁶ Jeffrey Hardy and Laura Sandys, *Anticipating customer-centred zero-carbon energy business models*, Nature Energy, Volume 7, May 2022

Consumers tell us in our research that they want to feel in control of their bills. Control means different things to different people. To some, it's about understanding and being able to predict the size of their bill. These customers prefer flat tariffs, or models similar to internet plans where you just pay a fixed amount per month. For others, control is about being able to take actions that will reduce the size of their bills. These customers prefer time of use tariffs where they are able to shift energy use to off-peak times. For all customers, smaller, more regular billing is important to avoid bill shock.

When it comes to automating devices, the industry has some way to go to develop sufficient trust for consumers to be happy to hand over control. Our October 2021 [Energy Consumer Behaviour Survey](#) found that only 7% of consumers would be happy for smart appliances to be fully automated. Half of consumers are happy for smart appliances to be automated, but only if they are able to override the settings. A further 42% of consumers would prefer to set smart appliance timings themselves so they remain in complete control.

This finding accords with research conducted by Monash University, in partnership with ECA, Ausgrid and AusNet, for the Digital Energy Futures project. Extensive interviews with 81 participants found that many households *“reject the need for smart technologies for energy management, preferring to rely on their own routines and more hands-on control”*.⁷

Foundations for a fit for purpose regulatory framework for energy services

Whether a regulatory framework is fit for purpose will be reliant on the extent to which these diverse consumer needs and preferences are understood and incorporated.

In our view, a fit for purpose regulatory framework which seeks to maximise consumer benefits and mitigate risk should have three foundational elements:

- the enshrining of consumer agency;
- consumer protection and rights
- access to free and independent dispute resolution

Consumer agency

One of the consequences for consumers of rapidly emerging business models and innovation in energy services could be limitations on consumers' agency.

In our view, there is a need to enshrine the concept of **consumer agency** in accessing energy services rather than limiting the regulatory framework to mitigating potential risk and harms.

In the sense that we mean it, consumers should be able to determine their desired outcomes and circumstances, in the choices that they make. If consumers feel they have agency over their energy choices, this will also go some way to building confidence and trust in a market that is increasingly characterised by uncertainty and where innovation may also be accompanied by business model failure. We have some experience of this in recent weeks, with energy retailers withdrawing offers other than the default offer, actively promoting that their customers urgently move to another retailer and some retailers are ceasing to trade.

⁷ [Strengers Y, Dahlgren K, Nicholls L, Pink S, Martin R. 2021. Digital Energy Futures: Future Home Life. Emerging Technologies Research Lab \(Monash University\). Melbourne, Australia, p.6.](#)

In our view it is necessary to enshrine consumer agency as a counterbalance to the other goals of protecting competition (the market) and encouraging (business model) innovation.

As the number of choices over how their energy is used and managed grows, becoming increasingly complex, there is a real risk that many consumers will be unable to engage fully with the opportunities it presents. As we have discussed, consumers want simplicity as well as affordability. Overwhelming information, or presenting consumers with a degree of choice that is impossible to navigate, risks reducing their overall agency by cutting off their ability to adequately engage.

Competition authorities and regulators often focus their efforts on the ensuring that the “supply side” of a market is functioning competitively. As the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) recognised, “significant problems may also emerge on the demand side”, by which they mean consumers.⁸

The OECD goes on to describe the problem as limitations on the ability of consumers to access reliable and independent information on products and services, to assess the information, to act on the information in their best interests and to easily access affordable external dispute resolution. The sources of these limitations (according to the OECD) include “sellers” behaviour such as making information more complicated or increasing the difficulty involved in comparing products. Consumers also face limitations in consumer decision-making and transaction or search costs.

To address this problem, the OECD discusses consumer facing remedies, amongst which disclosure and transparency measures are the most common. They also stress that “consumer focused remedies should be tested carefully as the actual response of consumers may differ from what is expected”.

In his work, Monash University’s Dr Ben-David has emphasised the need for recognition of consumer sovereignty rather than what might be called “system sovereignty”, including in his submission to the AER’s review. In an earlier submission in 2020, on the design of the two-sided market he also pointed to the need to for “*The preferred model should be the one that delivers the greatest benefit across the widest range of potential behaviours by market participants.*” In that context he proposes that this requires deploying “*a range of economic disciplines to solve this problem, including (but not limited to): experimental and behavioural economics, industrial organisation, game theory and institutional design.*”⁹

⁸ OECD Working Party No.3 of the OECD Competition Committee roundtable on ‘demand side problems which limit the ability of a consumers access to information on a product, assess and/or act on the information’ *Executive Summary* 2018 <https://www.oecd.org/digital/consumer/consumer-economics.htm>. An earlier paper is also relevant. OECD (2006-04-20), “Report on a Roundtable on Demand side Economics for Consumer Policy”, *OECD Digital Economy Papers*, No. 116, OECD Publishing, Paris. <http://dx.doi.org/10.1787/231473533741>

⁹ Dr Ben-David ‘*Response to consultation on Two Sided Markets*’ Monash Business School 2020. https://web.archive.org/au/awa/20210603171211mp_/https://energyministers.gov.au/sites/prod.energycouncil/files/publications/documents/ESB%20-%20Two%20Sided%20Markets%20-%20Ron%20Ben-David%20Monash%20Business%20School%20Response%20to%20Consultation%20on%20Two%20Sided%20Markets.pdf

Consumer protections and rights

Traditionally our consumer laws provide protection against low quality or dangerous products and misleading and deceptive conduct. As we have discussed earlier in this submission, our regulatory frameworks need to keep pace with the way in which energy will be bought throughout the life of a relevant contract rather than sold. This means replacing the current narrow framework that focuses on a single supplier model with a robust and comprehensive framework for **consumer protections and rights**, no matter how energy is bought. This avoids the issue of having to draw artificial boundaries between energy supply that is essential or not essential, or whether the sale of energy is the primary business model activity or incidental (described as on-selling in the Issues Paper).

In our view, there is considerable merit in the proposal in Dr Ben-David's submission to the AER's review, that we consider imposing "a single, simple and universal duty of care requiring all energy service providers to act in a customer's best interests".

Access to dispute resolution

As we have discussed earlier in this submission, business models and energy services are likely to develop to meet the needs of consumers in an energy system that is based on renewable energy, with the challenges that poses for dynamically balancing supply and demand. Just as we support consideration of a universal duty of care, there should also be universal access to **free and independent dispute resolution** however energy is bought.