

14 February 2023

Mark Feather
General Manager, Strategic Policy and Energy Systems Innovation
Australian Energy Regulator
[REDACTED]

Dear Mr. Feather,

RE: AER Review of Consumer Protections for Future Energy Services

SACOSS welcomes the opportunity to respond to the Australian Energy Regulator's (AER) review of consumer protections for future energy services: options for reform of the National Energy Customer Framework (options paper).

The South Australian Council of Social Service (SACOSS) is the peak non-government representative body for health and community services in South Australia, and has a vision of *Justice, Opportunity and Shared Wealth for all South Australians*. SACOSS does not accept poverty, inequity or injustice. Our mission is to be a powerful and representative voice that leads and supports our community to take actions that achieve our vision, and to hold to account governments, businesses, and communities for actions that disadvantage vulnerable South Australians.

SACOSS' purpose is to influence public policy in a way that promotes fair and just access to the goods and services required to live a decent life. We undertake policy and advocacy work in areas that specifically affect disadvantaged and low-income consumers in South Australia.

SACOSS also has a long-standing interest in the delivery of essential services. Our research shows the basic cost of necessities like electricity impacts greatly and disproportionately on people on low incomes and living with disadvantage.

We support the PIAC submission, and in particular their call for reform of the energy consumer framework more broadly than is being considered in this consultation paper. We share their concerns that without such reform, a framework that is already unsuitable for a majority of consumers will not be fit for purpose for future energy services. Like PIAC, we support a framework for consumer protections that is outcomes based. The AER itself acknowledges that the status quo will not be fit for purpose for the future energy market, but SACOSS remains unconvinced that the three models put forward by the AER as part of this consultation adequately address current and future problems within the NECF. As such

our submission will focus on the protections that consumers need in a future energy market, though we will outline other regulation needs and discuss our preferred model as well.

1. What protections do consumers need to effectively engage with the future energy market?

The way Australian residential consumers are buying energy services is changing. As the energy market changes, it must deliver fair outcomes for all. Distributed technologies are already delivering energy in ways that were not contemplated when regulations governing consumer rights and protections were developed. It is essential that future consumer protection frameworks balance innovation and consumer choice with universal access to electricity supply¹. The options paper correctly identifies that the uptake of new energy products and services is a vital component to realising the benefits of energy system transformation. Robust consumer protections are needed from the outset when considering future energy services, particularly to ensure that there is equitable access to new technologies. Further, we understand the inherent challenges in designing fit-for-purpose regulation for future energy services given the level of uncertainty around the products and services that will become available over time. We therefore suggest that a future approach is principles and outcomes based, to allow for adaptability in the face of new technologies and services while also reducing the administrative load of needing more frequent reviews/updates. This adds an additional safeguard for the most vulnerable consumers, as while innovation can deliver significant benefits to consumers, it doesn't always deliver those benefits for all consumers. This is particularly important given that consumers don't have the option to choose not to have energy or to not purchase certain energy services if they can't afford them.

It is vital that consumer protections are communicated clearly and effectively to consumers as well as to industry stakeholders. Research by ARENA has indicated, for example, that there is confusion among stakeholders regarding the relevant protections available to consumers when energy services fail to meet consumers' expectations². It should be easy for people to engage and make well informed decisions about the energy services they use. Consumer protections need to be consistent with considerations of vulnerability embedded across the energy system, particularly when it comes to consumers living with disabilities, on low incomes, or from culturally and linguistically diverse backgrounds. The framework must remain flexible to accommodate the emergence of new issues alongside new technologies, and to account for emerging consumer risks as identified by industry participants, consumer advocates, and ombudsman schemes. In particular, those who experience digital exclusion – who are often consumers in vulnerable situations – should still have access to the same quality of service and access to offers as all other consumers.

¹ Orton, Nelson, Pierce and Chappel 2017: *Access Rights and Consumer Protections in a Distributed Energy System* <https://www.sciencedirect.com/science/article/pii/B9780128117583000140>

² ARENA 2022: *The benefits, challenges, and opportunities for the acceleration of EaaS in Australia* <https://arena.gov.au/assets/2022/12/accenture-energy-as-a-service.pdf>

Consumers need to be protected from unsolicited sales, as well as the use of misleading and high-pressure sales tactics. This is needed now more than ever when we are seeing a significant increase in scams.

There is also the risk that as products get more complex, some companies may turn to sales tactics relying on product complexity to mask inappropriate or undesirable/unsuitable qualities in their products and services. In a similar vein, consumers also risk exclusion through complexity where people who could benefit from emerging energy products and services might not engage with them if the information and price signals are too complex³. Consumers must have clear access to information for their own benefit and decision-making. Research has shown that around only half of Australians feel like they have enough clear information to make energy related decisions, and even fewer feel they have the tools and assistance they need to manage energy use and costs⁴.

Greenwashing is also an emerging issue for consumers. While not everyone can afford to do so, some consumers are willing to pay more for (or otherwise support/switch to) energy services that are – or they perceive to be – more sustainable.

In addition, consideration should be given to protections against inappropriate or unaffordable financing options being offered for new technologies and services. This is particularly important as the cost of energy and of energy services rises. The use of Buy Now, Pay Later (BNLP) services is of particular concern, as consumers end up paying more for the service due to associated fees and/or interest.

Consumer access to free and simple dispute resolution through state-based schemes (e.g. Ombudsman) needs to be improved and expanded. Consumers should not have to “shop around” or interact with multiple bodies to have disputes resolved, which is currently the case (e.g. disputes with solar installers).

There should also be space for emerging digital technologies to foster consumer policy objectives and protections⁵. Consumer data must also be protected throughout the future energy system. Data generated by consumers’ actions must remain the property of consumers. Its use should be to the benefit, not detriment, of consumers.

Further, any future consumer protection framework must consider the development of energy production and distribution arrangements outside of the supplier-consumer relationship. Emerging technologies such as virtual power plants and other forms of peer-to-peer energy sharing still require consumer protections. For examples, consumers who

³ CALC 2016: *Power transformed: unlocking effective competition and trust in the transforming energy market* <https://consumeraction.org.au/wp-content/uploads/2016/07/Power-Transformed-Consumer-Action-Law-Centre-July-2016.pdf>

⁴ ECA 2020: *Energy Consumer Sentiment Survey 2019* <https://energyconsumersaustralia.com.au/publications/energy-consumer-sentiment-survey-findings-december-2019>

⁵ Thorun and Diels 2020: *Consumer protection technologies: an investigation into the potentials of new digital technologies for consumer policy* <https://link.springer.com/article/10.1007/s10603-019-09411-6>

participate in community energy schemes might become captive to those systems as they may require substantial up-front investments, reducing the incentives for consumers to exercise choice if better energy service options become available to them. Households should be allowed to participate voluntarily in community energy initiatives as well as to leave them, without losing access to the network operated by the community energy initiative or losing their rights as consumers⁶. This consideration should extend to peer-to-peer sharing platforms and other community energy systems such as apartment blocks.

2. Who should be regulated in the future energy market?

Under existing frameworks, decisions about which entities are subject to consumer protection obligations is often binary and does not always consider or accommodate new energy products, business models, or supply arrangements. To address these challenges, SACOSS suggests moving to a framework based on fundamental rights/principles for all consumers that are irrespective of how they source, manage, or consume energy. As new business and consumption models emerge, it is essential that these models benefit all household consumers, not just a few.

Internationally it has been recognised that by interpreting and enforcing consumer protections uniformly irrespective of the market position of a firm, consumers reliant on larger and more powerful market players suffer from less effective protection. This should be addressed by imposing a greater level of responsibility on firms possessing greater market power not only under competition law, but under consumer protection law as well. Analysis indicates that the effectiveness of regulation can be improved by tailoring enforcement approaches depending on the extent of market power held by firms⁷. For example, the European Union's 2019 "Clean Energy Package" does not prescribe consumer protections as being attached to different new products and services; instead, it distinguishes between different types of consumers and the protections are tailored to each consumer type⁸. To be meaningful, penalties for breaches of consumer protection requirements must be appropriate and commensurate.

3. How and when are energy providers regulated?

The regulation of energy providers must be clear, robust, and well enforced.

Regulations should minimise the use of exemptions and exclusions, given the propensity for them to become loopholes for energy providers, and instead focus on outcomes-based regulatory tools.

Consideration needs to be given to household experiences of the system and of the services. Households, particularly vulnerable households who struggle with energy affordability,

⁶ Decker, 2022: *Protecting consumers in digitized and multi-source energy systems*
<https://www.tandfonline.com/doi/full/10.1080/15567249.2021.2012541>

⁷ Graef and Van Berlo 2020: *Towards smarter regulation in the areas of competition, data protection and consumer law: why greater power should come with greater responsibility*
<https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/towards-smarter-regulation-in-the-areas-of-competition-data-protection-and-consumer-law-why-greater-power-should-come-with-greater-responsibility/8B00EFC66EA7F599DB9B700B1720ABAD>

⁸ EU, 2019: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0944>

should not be obliged to constantly engage with the energy market just to avoid substantial financial losses. Consumer engagement is important, but if fair outcomes are contingent on significant market engagement there is the potential to increase consumer vulnerability.

There needs to be a much stronger focus on enforcement and compliance so that service providers who do the wrong thing are properly penalised. As noted in the Issues Paper, the application of the NECF (including the compliance and enforcement framework) should be extended to new energy service or products, where those services or products are 'essential' to the delivery of electricity. The penalty regime covering breaches of regulatory requirements relating to the services or products required for the delivery of electricity should properly align with the AER's existing compliance and enforcement powers. For example, Section 308 of the NERL gives the AER the power to serve an infringement notice on a retailer that the AER 'has reason to believe has breached a civil penalty provision.'⁹ Under schemes administered by ACMA, the ACCC and ASIC, the regulator must have *reasonable grounds* to believe that a person has contravened a provision subject to an infringement notice, before issuing the notice.¹⁰ The lower threshold of a 'reason to believe', should equally apply to breaches by providers of energy products and services that are essential to the delivery of electricity to households. Penalties need to be commensurate and reflective of the risks to consumers associated with an interruption to their essential energy supply.

4. Preferred model and discussion of strengths and weaknesses

As we have already indicated, our preference is for an outcomes-based regulatory framework coupled with prescriptive requirements for products and services that may directly impact the core rights of consumers to access a safe, reliable and secure supply of electricity on fair terms.

If regulation and policy are not adaptive, the shift towards decentralised, decarbonised future energy services risks destabilisation¹¹. Already 75% of network leaders say regulation is not moving fast enough. They have also indicated that greater regulatory direction is needed to ensure that customers are not disadvantaged financially¹².

An outcomes and principles based regulatory framework can accommodate new technologies and services but without discriminating between traditional and non-traditional energy service providers. In this way, increased consumer protections do not act as a barrier to innovation.

While we acknowledge and support the need for flexibility within such a framework, SACOSS are of the view that some elements of the framework must remain prescriptive, particularly when it comes to issues affecting vulnerable consumers e.g. disconnections, payment difficulty, family violence, life support etc. This level of prescription is essential

⁹ Section 277(1) of the National Gas Law

¹⁰ Allens and NERA, Review of enforcement regimes under the National Energy laws: A Report Prepared for the Standing Council on Energy Resources, November 2013, p.107

¹¹ EY: *How much faster would our energy system transform if underpinned by supportive regulation?* https://www.ey.com/en_au/power-utilities/six-ways-for-regulators-to-support-the-energy-transition

¹² "EY DSO Survey," 2018

both for consumer clarity and certainty, but also for effective enforcement. Where the failure of a service leaves consumers disconnected from or unable to access an energy supply, there needs to be strong and prescriptive consumer protections in place.

If you have any questions in relation to this submission, please contact our policy officer Malwina Wyra at [REDACTED] or on [REDACTED].

Yours sincerely,

A large black rectangular redaction box covering the signature area.

Dr Rebecca Tooher
Director of Policy and Advocacy
South Australian Council of Social Service