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Mr John Pierce
Chairman
Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

By online submission

Dear Mr Pierce

AER Submission – Consumer Protections in an evolving market

The Australian Energy Regulator (AER) welcomes the opportunity to make a submission in response to the Australian Energy Market Commission's (AEMC) consultation on Consumer Protections in an evolving market.

About the AER

The AER works to put consumers at the centre of the transitioning energy market, as we play our part in delivering a secure, reliable and affordable energy future for Australia.¹ Our work is guided by five key strategic objectives. The objectives relevant to this consultation include driving effective competition, equipping consumers to engage effectively with the market, and protecting those who are unable to safeguard their own interests.

Overview

The AER supports the examination of consumer protections to enhance outcomes for energy customers. It is important to ensure that consumer protections and other regulatory arrangements are fit for purpose. They should be flexible in anticipating and responding to new challenges and opportunities in the transitioning energy market. In addition, the regulatory frameworks for this should be as streamlined as possible, while protecting consumers who cannot safeguard their own interests, and supporting fair consumer outcomes.

We consider the most efficient and effective way to ensure fair outcomes for consumers is to ensure regulatory approaches are balanced, proportionate, targeted and evidence-based. To avoid the potential for unnecessary costs to be passed on to consumers, regulatory approaches should be harm-based, consider overall consumer outcomes and combine a principles-based approach with enforceability. Businesses' ability to readily understand and comply with obligations should also be taken into account, as this can impact the cost of services, and ultimately the cost to serve consumers.

¹ AER, *Statement of Intent 2017-18, 2017* <https://www.aer.gov.au/system/files/AER%20Statement%20of%20Intent%202017-18.pdf>

It will be important to ensure that the framework supports regulators and others to address emerging issues (particularly those that may point to consumers experiencing vulnerability and hardship arising from market changes and new technologies) and for this to occur in proactive, coordinated and effective way.

New research recently commissioned by the AER illustrates the need to address the ways in which of markets can cause or worsen consumer vulnerabilities as a result of complexity, business practices, power imbalances and egregious harm to vulnerable customers.²

It is vital that the future consumer protection framework is driven by fair outcomes for consumers. Protections should improve outcomes for consumers experiencing vulnerability. Vulnerabilities can be both individualised and market-based. For example, individual vulnerabilities can manifest as temporal or non-static, for example, living with a mental illness, surviving family violence, having low literacy or a cognitive impairment. Market-based vulnerabilities can be addressed by a range of regulatory interventions and designs, and consumers can be empowered through reliable information and comparison tools to engage efficiently and effectively in the market. We encourage AEMC to consider the leading work of the UK Competition and Markets Authority in examining consumer vulnerability in sectors including energy,³ and in Ofgem's recently updated Consumer Vulnerability Strategy.⁴

Primary considerations

In looking forward to how the National Energy Customer Framework (NECF) should support consumer protections, we believe there are three primary considerations:

1. Evidence of the harm to consumers and testing of approaches

We want to see barriers that may prevent efficient and effective participation in the energy system removed. This includes barriers for consumers experiencing vulnerability, and also consumers seeking to overcome market-based problems (such as unclear or confusing retail information, the inability to easily compare offers or barriers to switching) – so they can access new opportunities and participate.

The AER encourages the AEMC to approach this review from a consumer-centric perspective and to analyse what the most effective mechanisms are to empower and protect consumers mechanisms most effectively empower and protect consumers. Energy products and services are essential for consumers' social, economic, health, wellbeing and participation. Any potential changes should be shaped by an understanding of current and future consumer behaviour and preferences, how consumers use available information and make choices (through research and other evidence), and how a lack of access to services supported by energy may harm consumers. Guided by principles of risk-based regulation, this evidence should inform the development of regulatory approaches at the front end, to ensure new measures and approaches will effectively and efficiently target the problem consumers are experiencing and improve consumer outcomes in the market.

² CPRC, *Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator*, February 2020 <https://www.aer.gov.au/system/files/CPRC%20-%20Exploring%20regulatory%20approaches%20to%20consumer%20vulnerability%20-%20A%20report%20for%20the%20AER%20-%20November%202019.pdf>

³ Competition and Markets Authority (CMA) (UK), *Consumer Vulnerability: Challenges and Potential Solutions*, February 2019 <https://www.gov.uk/government/publications/consumer-vulnerability-challenges-and-potential-solutions/consumer-vulnerability-challenges-and-potential-solutions>

⁴ Ofgem, *Consumer Vulnerability Strategy*, October 2019 https://www.ofgem.gov.uk/system/files/docs/2020/01/consumer_vulnerability_strategy_2025.pdf

We would like to see the AEMC examine the harms that potential changes may have for consumers. This could include an inclusive design approach to ensure that consumers are protected at the stages that they are likely to experience the greatest detriment. Consumers are likely to require greater protections when they are exposed to information asymmetry, an imbalance of power and a significant likelihood of being in a vulnerable situation. In addition, research and testing of approaches should inform any changes to ensure the rules are fit for purpose.

It is clear that consumer interests are many and varied. Consumers have different levels of capacity to engage in the energy market and that the concept of what it means to be an 'energy consumer' is changing. Growing a better shared understanding of these issues will help us play our part in delivering a secure, reliable and affordable energy future for Australia, and keeping our approaches to improve consumer outcomes relevant and meaningful.

2. Promoting confidence in the market

For the market to function effectively, households and businesses need to be confident that energy markets are working effectively and in their long term interests. Consumer trust in the energy market is low, with only 29 per cent of consumers having overall confidence that the market is working in their interest.⁵ In addition, less than 60 per cent of consumers are satisfied with the value for money of electricity.⁶ Many consumers find it difficult and onerous to engage with the energy market.⁷

It is well-established that barriers to consumers engaging in a market result in inefficiency and poor consumer and market outcomes. Examples of these barriers include the inability to easily shop around for the best offer and information asymmetries such as complex or one-sided information preventing informed decision making. We consider there is more to be done in limiting the time and financial costs currently borne by consumers as a result of these barriers, and welcome further pro-active, evidence-based approaches to policy and regulation to address these costs.

The promotion of confidence is a critical part of ensuring residential and small business customers can effectively participate in a transforming energy market, and derive the benefits of investment and innovation. Consumer confidence in the market will increase if consumers can more easily and efficiently shop around, readily access information and assert their rights. It is also important that consumers continue to trust that they are protected by the regulatory framework in circumstances where they may be unable to safeguard their own interests. Building confidence and trust, and protecting those customers less able to engage, is particularly important in a market for essential services. Consumer protections that ensure and support a fair market are important to promote confidence in that market. Proactive steps by industry participants to reduce asymmetry of information (for example, about quality of service indicators) may limit the need for further regulatory approaches. However, this will need to be timely and evidence-based.

Initiatives to enhance greater trust and confidence in the market should be broad-based, focused on utilising channels that consumers will trust or recognise, and actively reduce financial and non-financial costs to consumers when engaging in decision-making and with innovation. Industry-led initiatives should be focused on the consumer need, while ensuring that the market remains competitive and relevant legal obligations are met.

⁵ Energy Consumers Australia, *Energy Consumer Sentiment Survey*, June 2018, p. 108 <https://energyconsumersaustralia.com.au/wp-content/uploads/Energy-Consumer-Sentiment-Survey-Report-June-2019.pdf>

⁶ *Ibid*, p. 13.

⁷ AEMC, *2018 Retail Energy Competition Review*, June 2018 <https://www.datocms-assets.com/5684/1528864055-2018-retail-energy-competition-reviewfinal15junepublished.pdf>

3. *Ease-of-use and enforceability of the framework*

It is also important that the framework provides the correct incentives to achieve positive consumer outcomes, has effective dispute resolution processes and is clear and enforceable. This review provides an opportunity to streamline the current protections to ensure a consistent approach that delivers for consumers. Robust enforcement mechanisms that empower regulators to ensure compliance with the law are vital in building consumer trust that businesses are doing the right thing. While the framework should support consumers (particularly those in vulnerable circumstances) to achieve positive outcomes, it must also ensure regulators can take enforcement action where needed.

We outline our views in response to the consultation questions at Attachments A (Issues paper one) and B (Issues paper two), with a focus on addressing the current areas of consumer detriment.

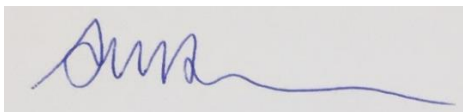
We also have a number of research papers and reports into consumer behaviour which can share with AEMC to aid the development and consideration of the frameworks, and would be happy to discuss these further. Some recent examples include:

- Engaging behavioural economists to undertake behavioural insights research to inform our work on presentation of price information to customers, the basic plan information documents and Energy Made Easy; and
- Research on regulatory approaches to consumer vulnerability with the Consumer Policy Research Centre, as mentioned above.

Please contact Bronwen Jennings on (03) 9658 6417 or myself on (03) 9290 6965 if you would like to discuss our submission in more detail.

We look forward to providing further views, including when the AEMC publishes its 2020 Retail Energy Competition Review and further work in relation to consumer protections in an evolving market.

Yours sincerely,



Sarah Proudfoot
General Manager, Consumers & Markets Branch

Attachment A - Issues paper 1

New market developments and revenue streams

Question 1: *Are there any other key market developments the Commission should consider when assessing consumer protections for new energy products and services?*

Question 2: *Are there other business models the Commission should consider in its analysis of new energy products and services?*

Question 3: *Are there other energy products and services the Commission should consider in its analysis of new energy products and services?*

Question 4: *Which regulatory provisions may be preventing value creation through the adoption of new technology?*

The AEMC has captured many of the new energy products and services we are seeing in the market. It is difficult to predict the range of business models and services that will eventuate, so the framework should be able to adapt to any new product or service to achieve desired consumer outcomes.

In examining the framework, the AEMC should consider how to provide necessary, adequate and enforceable protections to consumers.

We note the important role consumer protections will continue to play in enabling fairer and equitable consumer outcomes, particularly in the context of developments such as time of use tariffs.

A strong, principle-based framework has good potential to remain relevant and enforceable as business models change and evolve. This model can encourage industry participants to focus on outcomes and cultural changes needed and avoids a focus on compliance with 'black letter' provisions that may no longer reflect consumer needs and preferences.

By way of example, the distinction between authorisation and exemption under the current regulatory framework is in our view no longer fit for purpose, as it is unable to deal with the diversity and complexity of exempt selling arrangements, including selling in large, purpose-built embedded networks. The regulatory framework needs to be amended to provide a sufficiently flexible mechanism to deal with the increasingly diverse embedded network market which is occurring as part of a broader market transformation.⁸

Rationale for energy-specific consumer protections

Question 5: *What are the elements that define the supply of energy as an essential service?*

Question 6: *Has the essential nature of the sale of energy changed with the market's evolution?*

Question 7: *If the answer to Question 6 is yes, what are the implications for the NECF as the energy specific consumer framework?*

Energy is an essential service for Australian households and businesses. We consider that while the market is becoming increasingly complex, there are many opportunities to improve

⁸ AER, *Submission on Regulatory Arrangements for Embedded Networks*, May 2017
<https://www.aemc.gov.au/sites/default/files/content/a70483e9-1a6e-4929-be1d-444143d3a160/MarketReview-Submission-RPR0006-Australian-Energy-Regulator-170517.PDF>

the clarity, quality and comparability of consumer information and support. In addition, specific protections such as disconnection protections remain important as they provide protections not provided elsewhere.

Notwithstanding convergence and the growing prevalence new services and products supplying energy, we consider there remains a place for energy specific customer protections like many of those in the NECF. In some cases ‘stewardship’ across the supply chain or voluntary industry-led initiatives may support positive change and consumer outcomes, however in other cases firmer, enduring protections will always be needed (e.g. for consumers who have needs in life support, disconnection protections, hardship and vulnerability), alongside the more general protections provided by the Australian Consumer Law (ACL). Additionally, the Productivity Commission’s identification of the circumstances under which regulation is desirable, including consumer risk and unknown suitability and quality of service,⁹ remain relevant in an evolving market. There is a clear rationale for energy specific consumer protections alongside the general provisions of the ACL.

The transitioning sector and necessary market reform have the potential to result in increased information asymmetries.¹⁰ In the absence of clear, accessible, reliable indicators of quality of service, consumers often look to inefficient and unreliable proxies for ‘value’ such as brand, commission-based comparator sites and word-of-mouth reviews.

There is an ongoing need to consider the extent to which current regulatory arrangements are relevant to different market developments, such as embedded networks, and self-supply customers with rooftop solar PV and batteries. It can be difficult to predict the range of business models and services that will eventuate (e.g. consumer/suppliers, embedded networks), making it important to take into account reliable data, insights and analysis of other markets (in Australia and internationally), and to closely monitor trends and patterns in Australia as data collection may not keep pace with market developments. As a starting point, regulators should consider future market systems where there is less grid-supplied energy and more distributed generation, as well as different types of demand and consumer expectations (e.g. electric vehicles).

Consumer reliability, access, affordability, information provisions and access to dispute resolutions are necessary for transitioning services. The Retail Rules and any other arrangements should support inclusive design and rollout of innovative services. This will ensure that consumer needs and preferences are factored into regulatory design, rather than necessitating incremental ‘catch up’ changes after consumer detriment has already occurred.¹¹

Application of consumer protections

Question 9: *Which elements of the energy market are useful to define the scope of the energy specific consumer framework?*

As above, we consider it is important to ensure consumer protections and other regulatory arrangements continue to be fit for purpose and responsive to new challenges and opportunities in an evolving energy market. Accordingly, we encourage the AEMC and proponents of new regulatory arrangements to avoid the application of a definition (such as business models) that may restrict or limit flexibility in responding to emerging products and services that may improve consumer outcomes.

⁹ Productivity Commission, *Review of Australia’s consumer policy framework, Inquiry report, Vol. 1*, April 2008 <https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer1.pdf>

¹⁰ Consumer Policy Research Centre, *But are they any good? The value of service quality information in complex markets*, 2018 <https://cprc.org.au/wp-content/uploads/CPRC-2018-But-are-they-any-good-1.pdf>

¹¹ CMA.

We consider that an outcome driven principles-based approach may be more appropriate than defining the market for the application of consumer protections, noting this requires clarity around regulatory expectations and firm responses where practices are not delivering positive consumer/market outcomes.

Objectives of an overarching consumer regulatory framework

Question 10: *Do you agree with the objectives identified by the Productivity Commission? Are there other objectives the AEMC should consider?*

We consider the Productivity Commission's objectives for Australia's consumer policy framework have ongoing relevance. These align with our own Strategic Objectives which recognise that energy is an essential service for Australian households and businesses, and a critical contributor to the long-term success of the Australian economy.¹²

In considering the future design of consumer protections, the AEMC and others should be guided by proven and internationally recognised consumer policy principles including those developed by the OECD (affordability, efficiency, quality of service, comparability and accessibility of consumer information, choice and fairness, and appropriate safeguards and safety nets).¹³

As noted above, we recently commissioned the Consumer Policy Research Centre (CPRC) to undertake research into regulatory responses to consumer vulnerabilities. We consider this research is highly-relevant to this consultation. The report outlines the importance of addressing the role of markets in creating or exacerbating consumer vulnerabilities and which should be a priority objective of this review.¹⁴

NECF / ACL / Voluntary Codes

Current and future customer frameworks

Question 8: *For the supply of new energy products and services, is there any risk of consumer detriment that needs to be considered to have additional consumer protections (industry – specific regulation) beyond the voluntary framework? Please explain.*

Question 11: *How can the three consumer frameworks be better integrated to make it easier for energy customers and businesses in terms of information requirements? Please give specific examples.*

Question 12: *Are there risks to consumers that should be considered and are not already addressed by the NECF, ACL and the voluntary codes?*

We consider regulators need access to a suite of regulatory tools and approaches to influence or bring about positive market change or improved practices. This includes through regulatory decision-making, guidance for industry participants, consumer education and information, and making guidelines and influencing policy outcomes.

We support industry efforts to proactively address market issues, particularly before consumer detriment arises, and to employ approaches informed by behavioural insights and inclusive design principles to address consumer detriment more holistically and 'at the front end'. Similarly, many positive consumer outcomes can be improved and achieved through

¹² AER, *AER Strategic Statement*, 2017 <https://www.aer.gov.au/publications/corporate-documents/aer-strategic-statement>

¹³ Organisation for Economic Cooperation and Development (OECD), *OECD Recommendation on Consumer Policy Decision Making*, 2014 <http://www.oecd.org/sti/consumer/Toolkit-recommendation-booklet.pdf>

¹⁴ CPRC 2020.

retailers' proactive compliance with current legal obligations (e.g. through the early, proactive identification for assistance of consumers experiencing financial difficulty due to hardship, in line with the AER's enforceable *Customer Hardship Policy Guideline*, March 2019).

We note also that there may also be situations where industry is able to develop innovative and constructive approaches to addressing market problems, for example through voluntary codes, industry self-regulation or co-regulatory approaches, as suggested in the issues papers. While it is always our preference that businesses proactively ensure positive outcomes for energy consumers, there is currently an important role for regulators where consumers are unable to safeguard their own interests.¹⁵ Due to the essential nature of energy and the potential for certain market practices to create consumer detriment, there will be circumstances where it is appropriate for regulators to take strong, targeted action.

Voluntary codes are generally unenforceable and there is limited role for a regulator with them. We note that the Australian Competition and Consumer Commission (ACCC) has found that voluntary industry codes are more likely to be effective when self-regulatory bodies:

- have widespread support of industry
- comprise representatives of the key stakeholders, including consumers, consumer associations, the government and other community groups, and
- operate effective systems of complaints handling.¹⁶

The ACCC also identifies factors to consider when deciding if a voluntary code is an appropriate mechanism; including the level of confidence and trust among consumers.¹⁷ These factors should be mandatory considerations in assessing the suitability of industry frameworks.

The Organisation for Economic Cooperation and Development (OECD) also identifies business codes of conduct and standards as important necessary factors in the effectiveness of industry frameworks.¹⁸ That said, we consider the successful development and implementation of voluntary/proactive industry initiatives is generally reliant on a strong levels of both consumer trust and confidence in the delivery partners, and motivation and commitment by industry participants to see the benefits of these approaches in order to sustain and deliver results.

The experience in retail telecommunications, for example, is that industry progress towards enacting voluntary mechanisms has generally been slow or resulted in gaps in consumer outcomes which have later required urgent regulatory interventions. Improving consumer experience and outcomes from the telecommunications framework has been largely driven by concerted and time consuming commitments by stakeholders, including regulators. For example, we note steps to improve outcomes in NBN migration experiences and broadband performance were brought about by targeted efforts including by the Australian Competition and Consumer Commission (ACCC) and Australian Communications and Media Authority (ACMA).

¹⁵ AER 2019-20 enforcement priorities <https://www.aer.gov.au/about-us/compliance-enforcement-policy-priorities>

¹⁶ ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, July 2011 <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>

¹⁷ Ibid.

¹⁸ OECD, *Industry Self-Regulation: Role and Use in Supporting Consumer Interests*, OECD Digital Economy Papers, No. 247, March 2015 <http://dx.doi.org/10.1787/5js4k1fjqkwh-en>

Consumers experiencing vulnerability

Question 13: *For new energy services and products, what characteristics of a vulnerable consumer should be considered under the energy-specific regulatory framework to any other industry? Why?*

Question 14: *For new energy services and products, are there additional risks to vulnerable consumers that should and are not already addressed by the ACL and the voluntary codes?*

Question 15: *What are the risks of extending the obligation of have policies that identify and protect consumers under vulnerable circumstances to new energy services and products suppliers?*

Question 16: *Do new energy products and services have specific characteristics that require additional protections to prevent unfair practices or conduct against good faith that should go beyond the ACL? Please explain*

It is important to ensure that consumer information about new energy products and services is accurate, reliable, accessible and comparable (whether provided by industry participants, regulators, consumer advocates and others). For more complex products or services, the more care needs to be taken to ensure info meets these requirements. Also need to ensure consumers living with individualised vulnerabilities e.g. low literacy, an acquired brain injury etc. are not disadvantaged in the transitioning energy market, and are able to actively participate in the market.

CPRC highlight the importance of understanding and addressing the role of markets in causing or exacerbating consumer vulnerability. Vulnerability arises not just from individual-based factors, but also market features, 'including complex and poor product and service design, deliberate exploitation of people's behavioural biases, information asymmetry and targeted exploitation of particular communities'.¹⁹

The ACCC's 2018 Retail Electricity Pricing Inquiry (REPI) identified some of the impacts of these features in the Australian energy market. Specifically, the inquiry found that 'energy retailers have ... played a major role in poor outcomes for consumers', by making pricing structures confusing and using discounting strategies that are opaque and not comparable.²⁰ Standing offers have been priced excessively to facilitate this, which has left inactive customers with higher bills. Pay-on-time discounts are 'excessive and punitive for those customers who fail to pay bills on time'.

Ofgem recently released its new *Consumer Vulnerability Strategy* which will help guide and manage expectations, particularly through energy market transitions. Ofgem recognise that the energy market is changing rapidly, particularly by the impacts of digitalisation, decarbonisation and decentralisation.

¹⁹ CPRC 2020, p. 7.

²⁰ Australian Competition and Consumer Commission, *Restoring Electricity Affordability and Australia's Competitive Advantage: Retail Electricity Pricing Inquiry – Final Report* (REPI final report), June 2018, p. 293-294.

Ofgem's 2020-25 Strategy outlines five priority themes to support this transition:

- Improving identification of vulnerability and smart use of data
- Supporting those struggling with their bills
- Driving significant improvements in customer service (e.g. new entrants will be expected to demonstrate an understanding of vulnerability and explain how they will ensure vulnerable customers are not disadvantaged by their products and services).
- Encouraging positive and inclusive innovation (ensure vulnerable customers benefit from innovation; look to have products and services designed to meet the needs of a wide range of customers, including vulnerable customers; host innovation days)
- Working with partners to tackle issues that cut across multiple sectors.

Effective complaints management

Question 17: *Does the nature of the market (new energy services and products) require an industry specific system / scheme to handle consumer complaints? Please explain.*

Question 18: *What are the risks of having different redress mechanisms under different consumer frameworks? Please explain?*

Question 19: *Is there a better way to provide access to effective and strong redress mechanisms for consumers of new energy products and services?*

Easy to access and well known redress mechanisms are important for protecting consumers. We support mechanisms that allow for identification of systemic issues across different jurisdictions, frameworks and businesses models, and note the significant work done by energy ombudsman schemes across Australia to improve consumer outcomes. This is important to signal when intervention is required.²¹

The most efficient and effective redress mechanism is for industry participants to ensure that have consumer-focused and fit for purpose business systems. This will limit the need for consumers to complain in the first place. It is important that if an issue does arise, consumers can quickly and easily resolve the issue. Empowering consumers to achieve desirable outcomes will increase trust and reduce lengthy and costly dispute resolution.

Multiple frameworks with different redress bodies can work effectively, but customers must be able to easily access and understand them. In addition, there needs to be a mechanism that enables the identification of national and systemic problems across various jurisdictions and bodies.

State Courts and Tribunals can be complex, time consuming and expensive for consumers to navigate, resulting in a slower and less satisfactory outcomes for consumers. It is more efficient for industry participants to proactively design their business and systems so that consumers are at the heart of the service, and to proactively comply with the legal frameworks. Consumer trust in the sector may be damaged and undermined when consumers feel they are unable to assert their rights and resolve their complaints.²²

²¹ OECD, *Enhancing Consumer Policy Making: The Role of Consumer Complaints*, 31 August 2012
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2011\)22/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2011)22/FINAL&docLanguage=En)

²² ANZEWON, *What will energy consumers expect of an energy and water ombudsman scheme in 2020, 2025 and 2030?*, October 2019
<https://www.ewon.com.au/content/Document/Publications%20and%20submissions/EWON%20reports/ANZEWON-report-Dec-2019.pdf>

Attachment B - Issues Paper 2

The current NECF provisions are important ongoing protections for consumers and in the context of the essential nature of energy services, we recommend caution when considering any relaxation of the scope and application of these protections. In particular, we consider that enabling customers to waive explicitly informed consent (EIC) for certain transactions could lead to customer detriment.

At the same time, we note the ACL provides a range of economy-wide consumer protections, a number of which have particular relevance to energy consumers.

For example, although there is a move towards increased digitisation and distance energy sales, some industry participants continue to use telemarketing, door-to-door sales and other unsolicited contact sales methods to market their services and secure business from residential consumers. This can include consumers experiencing vulnerability for a range of reasons.

It is common for older consumers and other people who are home during the day to be exposed to these sales channels. Noting the potential for consumer harm, the ACL includes a range of general but extensive protections to prohibit sales and marketing practices. These recognise the potential for harm if consumers who are vulnerable to pressure sales are targeted, noting that factors like empowerment, time, assertiveness and knowledge of rights can impact consumer outcomes, as well as egregious business practices, levels of literacy, and experiences for culturally and linguistically diverse (CALD) communities.

We consider that these general consumer protections in Part 3-2 of Division 2 of the ACL provide important protections for energy consumers governing many key considerations including the different types of customer interactions and agreements, permitted hours of visiting and negotiating agreements, duties to inform, disclosure and prescribed information, cooling off and termination rights, and express consumer rights and obligations. We note that these provisions have been operating nationally across sectors since January 2011, and have been reviewed and measured through Australian Consumer Law surveys and other testing.

We note also that when considering the ways in which arrangements can encourage or support innovation and digitisation, it is important to look at the ways in which consumer engagement and participation in the market can be optimised, and to remove any barriers to that participation. We consider that this can best be brought about by looking to the principles of inclusive service design, behavioural insights, plain and easy English and other languages and communication methods; learning from other markets including internationally; and with a view to avoiding any duplication of responsibility or requirements in the law and rules.

Bill contents

Question 1: *Are the current requirements for the information and delivery of information that is required to be included on restricting innovation and digitalisation? If so, what changes would allow innovation to occur?*

Question 2: *Does the current form of regulation of information provision restrict innovation and digitalisation? If so, what form of regulation – the mechanism employed – could be introduced? For example, could industry self-regulation or principle – based regulation better facilitate innovation and digitalisation?*

We agree it is important to promote innovation and digitalisation that supports consumer preferences and needs. In considering changing current requirements to achieve that, we note it is important to understand how the innovation supports consumer outcomes. We encourage the AEMC to consider current evidence and consumer testing on when and how to deliver information that they need. There is some merit in retaining all relevant requirements in one place as this reduces overall compliance costs and ensures these are not passed on to consumers.

We consider the current regulation of information provision is beneficial and necessary in protecting consumer interests at this point, given it applies to the broad range of consumer needs across the life of a service agreement (e.g. retail pricing information, explicit and informed consent).

Although internet and electronic communication is beneficial to many customers, 14 per cent do not have access to the internet at home or the confidence to use it.²³ Other groups of consumers who have particular communications needs (e.g. CALD, low literacy, or a lack of consistent internet access due to employment uncertainty) can also be disadvantaged by online-only communications. For this reason, billing requirements should ensure that information is communicated using plain language and provides for various groups of consumers, including those for whom English is a second language or have limited literacy capacity when they need it and in a way that they can use.

In our view, the ability for retailers to communicate billing information, in conjunction with consumption data, through web portals, mobile apps and email²⁴ is an example of positive innovation and capturing the benefits of digitalisation. The ability to communicate with customers in this way creates more flexibility for retailers to distribute information,²⁵ and results in a service which everyone can use.

We note the ACCC's concerns that if retailers are given total flexibility to choose what information to provide to customers in a way tailored to the customers, rather than in a traditional bill format, the risks to consumers will significantly outweigh the benefits.²⁶

Notifications

Question 3: *Do the current requirements on delivery of information of notifications to consumers restrict innovation and digitalisation? If so, what changes would allow these to occur?*

Question 4: *Does the current form of regulation of information provision restrict innovation and digitalisation? If so, what form of regulation – the mechanism employed – could be introduced? For example, are industry self-regulation or principle-based regulation appropriate methods of regulation?*

We consider the current notification provisions to be important protections for customers and caution that reducing their application may be disadvantageous to consumers. We are interested to ensure these arrangements remain fit for purpose in the transitioning energy market, and to understand options for streamlining these to ensure they meet consumer needs, where this is supported by authoritative evidence.

²³ Australian Bureau of Statistics, *Household use of information technology*, 2016-17
<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8146.0Main+Features12016-17?OpenDocument>

²⁴ REPI final report, p. 289.

²⁵ Ibid.

²⁶ Ibid.

We note that the recent Advance Notice of Price Changes Rule requires notification to be given to customers *by their preferred form of communication*, recognising consumers have different preferences in this regard and reflecting growing trends in the method of communication.²⁷ Under Rule 46, customers may receive notifications via SMS, which is an example of requirements being adjusted to allow innovation and digitalisation to occur.

We also note that the same requirements on delivery of information of notifications do not apply to benefit changes,²⁸ or deregistration of premises²⁹ and would support those requirements being expanded to allow these notifications to be communicated to customers by their preferred form of communication.

Principles-based regulation is the most appropriate delivery for this type of consumer protection. However, where industry participants do not adopt a proactive, consumer-centric approach, specific regulation could be needed. Ideally, a move to principles-based regulation focused on consumer needs and empowerments will allow the flexibility to accommodate varying consumer needs and innovation and digitalisation to occur.

Explicit Informed Consent

Question 5: *Is the current method prescribed in the NECF for retailers to record EIC restricting innovation and digitalisation? If so, how could it be changed to allow these to occur?*

Question 6: *Should energy consumers be able to waive EIC for certain services for a given time period?*

Question 7: *Are the current provisions that require retailers to have a record of EIC restricting innovation and digitalisation? If so, how could these be changed to allow these to occur?*

EIC is an important ongoing protection for consumers. We consider that caution should be taken in considering relaxing the scope and application of EIC. In particular, we are concerned that enabling customers to waive EIC for certain transactions could lead to customer detriment. Any move away from the current protections would need to be supported by strong, authoritative evidence.

The EIC requirements ensure consumers are given sufficient information before they are switched to a new energy retailer or enter into a new market contract. This is supported by recent jurisprudence. For example, we note the Federal Court of Australia has recently noted that obtaining EIC is important to consumer confidence, observing that all industry participants should understand the importance of EIC and carry out procedures to achieve it.³⁰

For new product types emerging as a result of the digitalisation of the energy market, EIC is particularly important in order to increase customer confidence and ensure successful transactions. We note the NSW Energy and Water Ombudsman has suggested that customers should be educated about tariffs and provide EIC when being placed on flexible pricing contracts, including 'time of use' plans, as she expected tariff-related complaints to

²⁷ Australian Energy Market Commission *National Energy Retail Amendment (Advance Notice of Price Changes) Rule*, 27 September 2018, p. 23. https://www.aemc.gov.au/sites/default/files/2018-09/Final%20Determination_2.pdf

²⁸ AEMC, *National Energy Retail Rules*, s 48A (at 24 February 2020).

²⁹ *Ibid*, section 125.

³⁰ *Australian Competition and Consumer Commission v Energy Australia Pty Ltd [2015] FCA 274*.

increase with the smart meter rollout.³¹ Similarly, the Consumer Action Law Centre proposed that consideration should be given to the appropriateness of strengthening consent requirements, rather than diminishing them, for those customers.³² It is important to ensure that the framework supports consumers in the transition.

In our view, the current EIC requirements do not place significant burden upon retailers, and amount to the minimum standards required to ensure consumers' decision making is informed.

EIC remains relevant in new frameworks also, such as the Consumer Data Rights. In that context, EIC protections apply to information consumers are required to be provided with prior to consent, the withdrawal of authorisation, and the duration of consent.³³ Consent must be voluntary, express, informed, specific as to purpose, time limited and easily withdrawn.³⁴

EIC assists dispute resolution

We consider EIC is beneficial for retailers as well as customers, as it provides a record which can be referred to if a dispute in relation to consent arises.³⁵ A record of consent is advantageous to both the retailer and their customer as both benefit from the dispute being resolved efficiently and effectively.

Question 8: *Should energy consumers be able to provide EIC to a third party to interact with the retail market on their behalf? If so, what arrangements should be in place?*

We recognise the potential benefits of the ACCC's recommendation that third party intermediaries (TPIs) should be able to act on a customer's behalf, having been given authority to do through a customer's EIC, while also noting this is not without risk. We support TPIs having the ability to provide EIC on the behalf of customers, only where the code of conduct proposed by the ACCC in REPI, or some similar regulatory mechanism, is adopted. We consider that the absence of appropriate controls could see sub-optimal consumer outcomes and risk undermining customers' confidence in the market.

³¹ The Sydney Morning Herald, *NSW families paying \$400 more under 'time of use' electricity plans, new research shows*, 31 May 2017 <https://www.smh.com.au/business/consumer-affairs/nsw-families-paying-400-more-under-time-of-use-electricity-plans-new-research-shows-20170530-gwg9qc.html>

³² Consumer Action Law Centre, *Power Transformed – Unlocking effective competition and trust in the transforming energy market*, July 2016, p. 39 <http://consumeraction.org.au/wp-content/uploads/2016/07/Power-Transformed-Consumer-Action-Law-Centre-July-2016.pdf>

³³ Ibid.

³⁴ Ibid.

³⁵ Energy Working Group *New products and services in the electricity market*, July 2015, p. 17 <https://prod-energycouncil.energy.slicedtech.com.au/sites/prod.energycouncil/files/publications/documents/New-Products-and-Services-Policy-Advice-FINALAugust-2015.pdf>

Cooling off periods

Question 9: *Are cooling-off period protections for solicited retail market contracts still beneficial? Is so, why? If not, what improvements could be made?*

Cooling-off periods have traditionally acted as a safeguard for consumers by giving them an opportunity to change their minds about an agreement.³⁶ They are particularly necessary when consumers are making purchasing decisions as a result of unsolicited contact, or where the decision is about a significant or essential product or service such as energy.

In a transitioning market with new products and services, the need for cooling-off periods will still be needed. Retail market contracts with new innovative offerings will perform differently to traditional ones, with potentially different requirements, service and quality factors. Consumers may not fully understand these differences, the cost structures and how these services will function together. A cooling-off period for these solicited retail market contracts might provide consumers with added confidence that if the service does not deliver as expected, then they can change to a more suitable contract. We consider that the current NECF and ACL protections will continue to work alongside each other to efficiently and effectively protect and empower consumers.

³⁶ ACCC, *Entering into a contract* <https://www.accc.gov.au/consumers/contracts-agreements/entering-into-a-contract>