



Australian Energy Market Commission

ISSUES PAPER 2

CONSUMER PROTECTIONS IN AN EVOLVING MARKET: TRADITIONAL SALE OF ENERGY - 2020 RETAIL ENERGY COMPETITION REVIEW

12 DECEMBER 2019

REVIEW

INQUIRIES

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ABOUT THE AEMC

The AEMC reports to the Council of Australian Governments (COAG) through the COAG Energy Council. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the COAG Energy Council.

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SUMMARY

- 1 Changes in technology, enabled by digitalisation, are changing electricity markets. Digitalisation is facilitating greater and different forms of consumer engagement and participation in the energy market. It is important that consumer protections do not inhibit this engagement and participation. This raises questions about the appropriateness and form of existing energy specific consumer protections and whether these are creating barriers to innovation.
- 2 On 28 June 2019, the Australian Energy Market Commission (AEMC or Commission) published the *2019 Retail energy competition review* final report. In the report, we mapped the consumer protections that energy consumers in the NEM receive under the National Energy Consumer Framework (NECF) and the Australian Consumer Law (ACL). This was the first step in assessing whether energy consumers are receiving appropriate protections and barriers to innovation are minimised. The Commission concluded that the NECF generally complemented the ACL well to provide energy consumer protections. However, the Commission noted weaknesses in two areas:
 1. The combination of the development of a range of new, non-traditional energy related products and services with the specific application of the NECF to the sale of energy, means there is a need to assess if (and what) consumer protections should apply to these new services and products.
 2. The information related provisions in the NECF are prescriptive and may prevent innovation, particularly in relation to digital technologies. Furthermore, in recent years there have been progressive one off additions to the information provisions.
- 3 The Commission is progressing both of these areas as part of the 2020 Retail energy competition review. This second stage will have two issues papers, the first issues paper (Issues Paper-1) is focused on non-traditional energy products and services and the second (Issues Paper-2), which is this paper, is focused on the traditional sale of energy.
- 4 This issues paper discusses how the digitalisation of the energy market is challenging some regulatory provisions under the NECF for the traditional sale of energy. Specifically, it covers information provision, cooling-off periods and explicit informed consent requirements.
- 5 The Commission welcomes submissions on this issues paper by 13 February 2020.

BOX 1: SUMMARY OF QUESTIONS FOR CONSULTATION

- 1. Information provision in the contents of bills:** 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?
- 2. Forms of regulation (bills):** 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?
- 3. Notifications:** 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?
- 4. Forms of regulation (innovation):** 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?
- 5. Explicit informed consent in a digitalised market:** 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?
- 6. Temporary explicit informed consent waiver:** Should energy consumers be able to waive EIC for certain services for a given time period?
- 7. Explicit informed consent, innovation and digitalisation:** 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?
- 8. Explicit informed consent delegation on a third party:** 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?
- 9. Cooling-off period under the NECF:** Are cooling-off period protections for solicited retail market contracts still beneficial? If so, why? If not, what improvements could be made?

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1 INTRODUCTION

1.1 Digitalisation of energy supply

Changes in technology, enabled by digitalisation, are changing electricity markets. These changes provide for increased engagement in, and responsiveness to, the market for electricity production or consumption. These factors are challenging the assumptions underpinning the original market design.

As the national electricity market (NEM) goes through this significant change the Commission is prioritising five key areas of policy reform so that customers can access safe, secure and reliable energy at the lowest possible costs. One of our 5 priorities is the *digitalisation of energy supply* (further information on our areas of priority can be found [here](#)).

The digitalisation of energy supply is:

a power system and market that efficiently utilises digital technologies to make it easier to choose and control how, when and where power is generated, delivered and used, including to empower customers to optimise their energy use within their homes and businesses.

Consumers are part of this evolution and technology is a tool that should empower their energy management (consumption and generation). With digitalisation, energy services in the future will be able to be bought and sold in a dynamic way and new technology, such as digitally controlled energy consuming devices (e.g. smart air conditioning or pool pumps) will respond to consumer preferences and price signals. Battery storage and electric vehicles will add another dimension to electricity system usage.

1.1.1 Impact on consumers

Digitalisation is changing what it means for a consumer to engage in the market and the market is already seeing increased consumer participation. This is being driven by a range of factors:

- **There is a focus on the increasing cost of electricity.** Increased awareness of electricity costs have driven consumers to seek to reduce these costs, leading to uptake of distributed energy resources (DER), demand side flexibility and energy efficiency.
- **Digitalisation will enable consumer participation to maximise return and minimise impact.** Most consumer participation previously involved manual changes but advances in technology are providing consumers the opportunity to participate with little to no tangible impact on their well-being. These trends will be accelerated by the entrance of non-traditional energy players or even non-energy players who offer home energy management services.¹
- **New products and services are becoming available to consumers.** As more devices become available to end-consumers, a range of new products and services are

¹ Samsung is marketing a home energy management service. For more information, see: <https://www.samsungsds.com/global/en/solutions/off/hms/SamsungSmartHome.html>

emerging that are redefining the way in which electricity is supplied to consumers, how consumers engage with the market and how and when electricity is used.

1.2 Consumer protections in a digitalised world

As consumers change the way in which they can engage in the market, it is important that the regulatory frameworks to protect consumers keep pace with these developments.

The introduction of digital technologies allows consumers, retailers and potentially other third parties to interact with each other and the market in ways that were not previously available. This raises questions about the appropriateness of the prescriptive nature of some elements of the National Energy Customer Framework (NECF) and whether it is creating barriers to innovation. In the Commission's recent work, the areas that warrant analysis are:

- prescriptive information and notice provisions in the NECF that may be restricting retailers providing information to customers in innovative ways
- the explicit informed consent (EIC) requirements that may prevent third parties from engaging with the market on a customer's behalf (which will be increasingly important with the development of the Consumer Data Right)
- cooling-off periods that mean customers cannot reap the benefits of switching despite technologies being in place that allow almost instantaneous switching.

1.3 Scope of this issues paper

On 28 June 2019, the Australian Energy Market Commission (the AEMC or Commission) published its *2019 Retail energy competition review* final report. In the report, we mapped the consumer protections that energy consumers in the NEM receive under the NECF and the Australian Consumer Law (ACL). This was the first step in assessing whether energy consumers are receiving appropriate protections and barriers to innovation are minimised. This mapping exercise highlighted that the two frameworks largely complement each other to maintain consumer protections in the provision of energy. However, the Commission concluded that the market has evolved significantly in recent years and there is a need to assess whether changes are needed for the nature and application of the NECF to adapt to these changes.

The Commission is progressing both of these areas as part of the 2020 Retail energy competition review. This second stage will have two issues papers, the first issues paper (Issues Paper-1) is focused on non-traditional energy products and services and the second (Issues Paper-2), which is this paper, is focused on the traditional sale of energy.

This issues paper discusses how the digitalisation of the energy market is challenging some regulatory provisions under the NECF, specifically those related to information provisions, EIC and cooling-off periods. The Commission is conscious there might be other areas for improvement. However, we have focussed on these three areas for this second stage.

1.4 Consultation process and next steps

This issues paper is prepared to facilitate public consultation on how the Commission should address the need for a regulatory response given the changes in the energy market. This includes inviting stakeholders to make written submissions to the Commission in response to this issues paper.

The Commission welcomes submissions on this issues paper by 28 February 2020 via the AEMC's website, www.aemc.gov.au, using the 'lodge a submission' function and selecting the project reference code RPR0013.

The Commission also welcomes interested stakeholders to contact us if they would like to meet with us to discuss this issues paper or related issues. All enquiries on this project should be addressed to Stephanie Flechas on (02) 8296 0640 or stephanie.flechas@aemc.gov.au.

1.4.1 Project time frame and next steps

Table 1.1: Project timetable

DATE	PROJECT MILESTONE
28/06/2019	Mapping consumer protections, 2019 Retail energy competition review, Final report
12/12/2019	Issues papers — Consumer protections in an evolving energy market: <ul style="list-style-type: none"> • New energy products and services • Traditional sale of energy
6-7/02/2020	Workshops in Sydney
13/02/2020	Submissions due date
06/2020	Consumer protection in an evolving energy market, 2020 Retail energy competition review, Final Report

2 INFORMATION PROVISION

Information provision is an integral part of the NECF to allow customers to have the necessary information to engage and participate in the market. Rules that enforce information provision are designed to allow customers to better be able to decide if and when they want to change retailer or plan, before they are impacted by price changes or the end of their benefit period, and understand their contracts and energy usage. The rules currently set out requirements of when retailers need to engage with consumers to convey or highlight information.

In order to protect customers and provide access to their usage information, the National Energy Retail Rules (NERR) have been amended over the years to include additional requirements on retailers. This includes (but is not limited to) requiring retailers to:

- inform customers on contract entry of key aspects of their contract and how they may vary over the duration of the contract
- allow customers to obtain their electricity consumption data from their distributor as well as their retailer
- allow customers to authorise other parties to request access to electricity consumption data from retailers and distributors.

Under the NERR all notices and bills must be received in writing unless stated otherwise by the National Energy Retail Law (NERL). With new technologies and greater access to information, greater flexibility of regulation could allow communication between retailers and customers to evolve in a way that better meets consumers needs. This flexibility may include the methods of delivery and the method of regulation.

This section explores the:

- information provisions included in the contents of bills
- information provisions that give rise to mandatory notifications
- options of how the requirements of information provisions could be changed to enable better customer outcomes.

2.1 Bill contents

Under the NERR, there are 24 requirements for the content of a retail bill². The requirements include identifying information, the parameters of the bill and basis for charging, as well as details on the customer's energy habits. This issues paper is seeking to understand what consumers need and what innovations retailers could implement to meet them.

Currently, bills are required to be in written form that includes all 24 requirements set out in the rules. The information is accessible and storable and shows a snapshot of energy usage set against established benchmarks. Some retailers also offer detailed or real-time feeds of

2 NERR, Rule 25.

customer's energy usage that customers can access on their online accounts or mobile applications.

The Commission considers that the information currently provided in the contents of the bills should continue to be easily available to all customers. However, it should be adaptable to consumer needs and it is likely to bring benefits from allowing retailers to innovate in the form that information is received to meet consumer preferences.

QUESTION 1: INFORMATION PROVISION IN THE CONTENTS OF BILLS

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: FORMS OF REGULATION (BILLS)

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?

2.2

Notifications

The NECF has been amended to include a number of notification triggers to alert customers to significant changes that could impact the cost of their energy. The number of notification triggers in the rules has been increased following the *Independent Review into the Future Security of the NEM* (the Finkel Review) and ACCC's *Review of Electricity Pricing Inquiry* (REPI) that noted some customers were unaware of changes made to the conditions of their contract.

Currently, retailers are required to notify customers in writing to alert them to significant changes. This includes price changes³ and changes to contracts based on the end of a benefit period.⁴

The Commission considers that the information required under the rules are important in making customers aware of changes to their services. However, as noted in section 1.1, as digitalisation changes the way in which customers are able to engage in the market, the consumer protection framework should be flexible enough to allow customers the ability to receive notifications about their services in a way they want.

³ NERR, Rule 46.

⁴ NERR, Rule 48A.

QUESTION 3: NOTIFICATIONS

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: FORMS OF REGULATION (INNOVATION)

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?

3 EXPLICIT INFORMED CONSENT

Explicit informed consent (EIC) is the way that customers give retailers permission to do something on their behalf. The main instance of a customer providing EIC is when they change retailer. This section explores the:

- current arrangements of how and when retail businesses have to get EIC
- current market dynamics that may mean that the arrangements for EIC should be changed
- options of how EIC could be changed to empower and enable consumers to get better bill outcomes.

3.1 Current arrangements

The purpose of EIC is to provide protections for customers to make sure when a customer enters into a contract or when there are changes to a customer's contract, these only occur when the customer has specifically agreed to it. EIC is a key consumer protection for customers when they are entering into arrangements for the supply of energy in a competitive market.

The requirement, nature and way to record EIC is defined in sections 38 to 42 of the NERL. It also establishes how 'no' or 'defective' EIC is established and handled if EIC has not been obtained.

EIC must be obtained:

- When a small customer enters into a market retail contract, including into a prepayment meter market retail contract.⁵
- For customers entering into arrangements regarding:
 - bill smoothing for retail market contracts⁶
 - modified frequency of billing⁷
 - direct debit, including the agreed amount, initial date and frequency⁸
 - variation of tariffs, charges or benefits to the customer⁹
 - record of withdrawal from a contract during a cooling off period¹⁰
 - retailer transferring the customer to an alternate contract, which has been determined as more appropriate after a review¹¹

5 However, EIC of a small customer is not required in relation to the transfer of a retailer's authorisation (NERL, section 103(7)), to the surrender of a retailer authorisation (NERL, section 105(8)), and for the transfer from one retailer to another under the Retailer of Last Resort scheme (NERL, part 6).

6 NERR, Rule 23(2).

7 NERR, Rule 24(2).

8 NERR, Rule 32(3).

9 NERR, Rule 46A.

10 NERR, Rule 47(6).

11 NERR, Rule 74(5).

The nature of EIC to a transaction is consent given by a small customer to a retailer where:¹²

- the retailer, or person on behalf of the retailer, has clearly, fully and adequately disclosed all matters relevant to the consent of the customer, including each specific purpose or use of the consent
- the customer gives the consent to the transaction in writing signed by the customer, or verbally (evidenced such that it can be verified), or by electronic communication generated by the customer
- any requirements prescribed by the Rules for the purposes of this obtaining EIC have been complied with.

A retailer must do the following to record EIC:¹³

- create a record of EIC for all instances when it is required and it is provided by a small customer
- retain that record for at least two years
- the record must be in a format and include information that will enable:
 - the Australian Energy Regulator (AER) to verify the retailer's compliance with the relevant requirements set out above and the Rules relating to EIC
 - the retailer to answer enquiries from a small customer relating to the customer's own EIC.
- a retailer must provide the customer with access to a copy on the record of any EIC given by the customer and then retained by the retailer on request by a small customer and at no charge.

The Commission notes the EIC is used in other industries, such as telecommunications, for similar purposes. For example, if a consumer requests a transfer, even if it is through a third party¹⁴, a gaining supplier must "use reasonable endeavours" to determine if the person requesting the transfer is authorised to do so (in the case of third parties) and that the consumer consents to the transfer.¹⁵

3.2 Current market conditions

The EIC provisions in the NECF have not been reviewed since the inception of the NECF. The market was significantly different at the time that the framework was designed given that the majority of customers were:

- still understanding how retail energy competition worked and how it affected them
- using accumulation meters (type 6 meters), which are manually read every 90-95 days and do not provide any control or granular data to the market or consumers.

12 NERL, Section 39.

13 NERL, Section 40.

14 Authorised Representative: means the person who has authority from a Consumer to deal with a Supplier, including to discuss or make changes to a Customer's account without that Customer being present, on behalf of that Consumer. Communications Alliance LTD, *Industry Code C628:2019 Telecommunications Consumer Protection Code*, July 2019, p. 6.

15 Communications Alliance LTD, *Industry Code C628:2019 Telecommunications Consumer Protection Code*, July 2019, c.9.1.1 p. 61.

The Commission considers it timely to look at whether the current arrangements for EIC, are still appropriate given that:

- consumers have greater understanding of energy retail competition and the ability to be well-informed prior to entering market retail contracts with energy businesses
- the installation of advanced meters are providing consumers with greater control and access to more granular data
- new, emerging technologies and business models may mean that customers would provide a third party with the ability to give EIC on their behalf such that they can change retailers without having to directly engage and receive support to make more informed choices when switching retailers.

3.3 Scope and options for potential change

The Commission considers that EIC is a core part of the interaction between retailers and consumers and that a retailer should continue to receive and record when consumer consent is given. However, under the current (and likely future) market conditions the Commission considers it is timely to review whether changes should be made to the ways that EIC is provided and the circumstances when must be required. This includes the potential for consumers to be able to provide EIC to a third party, who may then act on their behalf in the retail market — such as switching services seen in the United Kingdom market.

Additionally, the Consumer Data Right for the energy sector (led by the ACCC) is a project designed to give consumers greater access to and control over their data to improve their ability to compare and switch between products and services¹⁶. The Consumer Data Right also has a focus on EIC and the Commission will consider its development and future implementation throughout this review.

QUESTION 5: EXPLICIT INFORMED CONSENT IN A DIGITALISED MARKET

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: TEMPORARY EXPLICIT INFORMED CONSENT WAIVER

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

¹⁶ See: <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr/energy-cdr>

QUESTION 7: EXPLICIT INFORMED CONSENT, INNOVATION AND DIGITALISATION

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?

QUESTION 8: EXPLICIT INFORMED CONSENT DELEGATION ON A THIRD PARTY

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?

4 COOLING-OFF PERIODS

A cooling-off period is a consumer protection that provides the right, for a period of time, for a consumer to withdraw from a contract after they initially enter into the contract. The cooling-off period acts as a safeguard for consumers, enabling them to change their mind about a purchase they have made or contract they have entered into should they later learn that the contract they have entered is not in their best interests.

This section explores:

- current arrangements of how the consumer protection framework provides cooling-off periods for market contracts
- current market dynamics that may mean that the current arrangement could be adjusted to work more efficiently and effectively for consumers
- options for how the framework regarding cooling-off periods could be changed to empower and enable consumers to get better bill outcomes.

4.1 Current arrangements

Under the ACL (sections 76 and 82), all consumers who agree to *unsolicited* agreements¹⁷ have 10 business days (the 'cooling-off' period) to reconsider their purchase, during which they can cancel the agreement without penalty. This exists for all purchases economy-wide in Australia.

Under the NECF, the right to withdraw during the cooling-off period is extended to all electricity and/or gas market retail contracts, regardless of whether the agreement is unsolicited or solicited. This protection goes beyond the ACL by giving energy consumers the right to withdraw from solicited market agreements within 10 business days. The right for a cooling-off period in electricity and gas contracts exists in rule 47 of the NERR. The details of the right are:

- it is for a length of 10 business days commencing from the date the small customer receives the required information about the customer's market retail contract (under NERR rule 64)
- the small customer can inform the retailer of their intent to withdraw orally or in writing
- the retailer must include express provisions setting out the rights and obligations regarding the cooling-off period in the customer's market retail contract
- the retailer must create a record of each withdrawal, similar to the prescribed record for explicit informed consent.

The 10 business days commences when the customer receives the required information that the retailer must provide under rule 64 of the NERR. However, it should be noted that this right only applies to market retail contracts and does not apply to standard retail contracts.

¹⁷ Unsolicited agreements are defined by the *Competition Consumer Act 2010* section 69. Broadly an agreement is considered to be unsolicited where the customer did not invite the provider to enter into negotiations and where the total price payable by the customer under the agreement is not clear at the time the agreement was made or is higher than prescribed legislations by \$100 or more.

Customers who enter into standard retail contracts would only have the general consumer protection under the ACL to withdraw from the contract during the cooling-off period if they entered into an unsolicited agreement.

It is also worth noting that early market retail contract termination charges are limited under the NECF. The nature of a term or condition that provides an early termination charge is regulated to be a reasonable estimate of the costs to the retailer resulting from the early termination.¹⁸

4.2 Current market conditions

Similar to that of the EIC provision, the cooling-off period provisions in the NECF have not been reviewed since the inception of the NECF. The market was significantly different at the time that the framework was designed given that the majority of customers were:

- still coming to understand how retail energy competition worked and how it affected them
- using accumulation meters (type 6 meters), which are manually read every 90-95 days and do not provide any control or granular data to the market or consumers.

Retail market innovation and the movement toward market digitalisation is a priority for the Commission. Given this, we find it timely to consider whether the current arrangements, namely the NERR provisions, are still appropriate in the context of:

- consumers having a greater understanding of energy retail competition and their ability to be well-informed prior to entering market retail contracts with energy businesses
- the installation of advanced meters (and the ability to switch without estimates) are providing consumers with greater control and access to more granular data to make more informed choices when switching retailers
- currently, the reduction of time frames for customers' switching retailers is being progressed through an AEMC rule change and an Australian Energy Market Operator (AEMO) procedure change. These changes will lead to a two-day switching process, which now means that the majority of the time a customer is waiting to switching retailers will be due to the cooling-off period.
- new, emerging technologies and business models may mean that a customer wants to, and can, change retailers more often.

4.3 Scope and options for potential change

The Commission considers it is still an important consumer protection that all unsolicited agreements for both market and standard contracts retain the existing ACL cooling-off period protection.

However, in the context of the market and technology changes highlighted above, it may be timely to alter or remove the additional energy specific cooling-off period protection.

¹⁸ NERR, Rule 49A.

QUESTION 9: COOLING-OFF PERIOD UNDER THE NECF

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

ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER Commission	Australian Energy Regulator See AEMC
DER	Distributed energy resources
EIC	Explicit informed consent
NECF	National Energy Customer Framework
NEM	National electricity market
NERL	National Energy Retail Law
NERR	National Energy Retail Rules
REPI	<i>Retail Electricity Pricing Inquiry</i>