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26 February 2020

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

Submitted electronically

Dear Mr Pierce,

**Re: RPR0012 - Consumer protections in an evolving market**

Red Energy and Lumo Energy (Red and Lumo) welcome the opportunity to respond to the Australian Energy Market Commission's (Commission) Issues Paper One on consumer protections in an evolving market - new energy products and services and Issues Paper Two on consumer protections in the sale of traditional energy. This is a timely review and we agree with the Commission that it is necessary to review the regulatory framework to ensure it facilitates good customer outcomes as the energy market evolves. Inappropriate regulation can distort consumption and investment decisions, inhibit the development of new products, and also impose additional costs on consumers for little benefit.

**Introduction**

As the Commission notes, technological change and other developments are delivering new products and services. Similarly, consumers will receive information on which to base their consumption and investment decisions from an expanding and diverse range of sources. Despite this, electricity remains an essential service. In our view, there is a clear distinction between the need and form of regulation of the supply of an essential service and the regulation of goods and services that are ancillary to that essential service. The need for industry-specific regulation can differ depending on the good or service in question.

The Commission should also consider how technological change and other developments will enhance competition and how regulation will evolve as a result. For example, much of the current energy specific regulations that are intended to promote competition - such as information provision obligations - could fall away over time as competitive markets deliver better information to consumers in a more efficient and effective way. In other words, regulatory frameworks should retain a presumption in favour of competition, but also be flexible and able to adapt to market developments.

## **Electricity is an essential service**

We see the issue of market definition, rather than looking at a specific business model, as a framing device for determining the form of regulation that should apply. Electricity is recognised by all to be an essential service so there is a legitimate case for regulating its supply through specific regulation (e.g. the National Energy Retail Rules or NERR). On the other hand, the broader market is delivering other goods and services, such as advice, energy management, equipment and infrastructure. Aside from some specific cases (discussed in more detail below), these are generally complements to the supply of electricity, rather than a genuine alternative. The case for industry-specific regulation, rather than more general market conduct and competition law, is less clear in this case.

Energy specific regulation should apply when there is a commercial arrangement for the ongoing and continuous supply of an energy source and when a consumer has no viable alternatives. This is clearly the case when an entity is primarily responsible for supplying electricity to a grid connected premises, within an embedded network or a stand-alone power system. A competitively neutral framework should provide protections to all of these consumers, regardless of the mechanism through which they receive their energy. Therefore, we support the Commission's recent and ongoing analysis to apply equivalent NERR provisions to embedded networks and stand alone systems.

The core protections in this case that should apply through specific regulation are guaranteed levels of service, life support, notification of supply interruptions, limitations on disconnection, obligation to supply (including supporting Retailer of Last Resort arrangements), and access to dispute resolution. Issues Paper One discusses recent regulatory measures to assist consumers facing payment difficulties. These should apply to any entity who has primary responsibility to supply an essential service to a consumer.

These protections should be enshrined in standard retail contracts. However, energy regulation should continue to reflect the assumption that consumers can make an informed decision and remain able to enter into mutually beneficial contracts with service providers that could involve different terms and conditions, i.e. market retail contracts. These contracts are underpinned by market conduct and competition regulation.

Other protections for energy consumers such as access to information prior to entering into and then throughout a contract, could be applied through more general market conduct regulation, while regulations to facilitate competition could become redundant over time and in line with technological change.

This then leads to one of the key areas of focus of Issues Paper One, namely, how new products and services should be captured within this framework. One-off purchases of equipment or infrastructure such as a solar unit, battery or electric vehicle do not involve the continuous supply of an essential service. Australian consumer law and its subordinate instruments covers commercial advice about their use. Therefore, the need for energy-specific regulation over and above general market conduct and competition law is less compelling.

On the other hand, some energy management services involve an ongoing commercial arrangement and/or repeated transactions that could result in the interruption of an essential service. Examples of this are demand response arrangements for wholesale, network or retailer related benefits. In these situations, there is a stronger case for energy specific regulation but this involves a trade-off between competitive neutrality and proportionality.

Core energy market protections should apply to new energy products and services to the extent that they directly impact the supply of an essential service. At this stage, most of these providers are not offering a viable and continuous alternative to more conventional models of supply. They may take control of a consumer's consumption or generation, but this is generally for a short period of time. In our view, specific requirements for these arrangements should involve the confirmation of life support status and advance notification (and record of acknowledgement by a customer) of supply interruptions.

However, the nature of these core energy obligations on providers of new products and services should be reviewed regularly as different business models emerge and where they offer a more viable alternative to consumers in the form of continuous supply of an essential service. If that is the case, they should be subject to the broader suite of regulations.

Another core protection is access to external dispute resolution or at the very least, a requirement on service providers to establish internal complaint handling procedures. State-based energy ombudsman schemes are already incorporating exempt sellers into their frameworks. The Commission should consult with them to understand how this is developing and how they can further expand to account for new market participants who directly influence the supply of energy.

While it is beyond the scope of this review, another important issue for these alternative providers who take control of an end user's consumption or generation are the wholesale market regulations and prudential requirements that they face. Competitive neutrality requires that they should face the same obligations as more traditional market participants when they are capable of influencing wholesale market outcomes. Otherwise, regulation could undermine the signals for investment in generation and demand response capabilities.

## **Gas**

The Commission will need to consider the role of gas within this framework. It is arguable that access to gas is not essential as many consumers across the NEM satisfy their energy needs without connecting to the gas distribution network. We also note the ACT Government's recent initiative to remove the mandatory requirement for gas connections to new suburbs.

On the other hand, gas has some of the same characteristics as electricity for consumers who have previously invested in gas appliances and equipment. It would seem difficult and impractical to separate the regulation of the two fuels because of those legacy arrangements. However, this illustrates the temporal nature of the essential service in that gas consumers do have a viable alternative once their gas appliances need to be replaced. The classification of a service as essential has numerous impacts because of the commensurate regulatory obligations. These include additional compliance and administrative costs and the potential to undermine competition and innovation. We recommend that the Commission should continue to consider the question of whether gas remains an essential service.

## **Market conduct regulation**

The case for specific regulation is well established for the ongoing supply of an essential service. However, it is less clear cut in the case of regulation that covers the sale and marketing of energy products, including any new goods and services that might arise with the evolution of the market and with technological change.

Australian consumer law applies equally to these transactions and is sufficient to address many actual and perceived consumer harms. Another example is financial regulation that applies to the sale and lease of equipment and infrastructure. The appropriate response to new products and services is not necessarily new regulations for the energy sector - or an expansion of scope of existing regulations - but better administration and greater clarity around how existing regulations apply to new products and services.

Some stakeholders appear unsure of the application of Australian Consumer Law, particularly for new goods and services. However, this is not due to the absence of sufficient protections but rather because some products are relatively new and/or regulators have not used consumer law to take action against specific examples of misconduct. The application of Australian Consumer Law to unsolicited sales - via cold calling and doorknocking, for example - is well established and widely understood. It also applies to intermediaries, such as brokers and comparators and other advisory services, that could emerge in the future.

Our reservation about some elements of (prescriptive) energy specific regulation that relate to marketing and the provision of information to promote competition is that they have the potential to provide information to energy consumers at a time or in a form that is not useful. They may also inhibit the development of innovative products, or more generally, that they can impose costs for little benefit. Furthermore, there is always the risk of duplication, which creates additional regulatory risks when regulators have different interpretations, along with different models of regulatory administration and governance arrangements.

A further issue explored in Issues Paper One is the role of voluntary codes. In our view, these are a complement to Australian Consumer Law and the NERR, rather than a substitute for regulation of an essential service. In many instances, these codes perform a signalling or marketing function that helps to address issues such as adverse selection. They appear more relevant for the delivery of non essential products and services where a provider may seek to differentiate itself from competitors by offering a higher grade of service or holding themselves to a higher standard.

The key question is whether signatories to a code are involved in the delivery of an essential service. If so, they should be covered by energy market regulations. Otherwise, it becomes a commercial decision for the individual supplier as to whether they want to replicate core energy market protections, such as support for vulnerable consumers.

### **Ensuring energy regulations remain fit for purpose**

Development of the traditional sale of energy regulatory framework was completed in a different environment. There has been a significant amount of evolution in the market, increasing levels of competition and regulatory interventions since the establishment of the NERR. There must be a constant assessment of whether the benefits of regulatory interventions or increased consumer protections outweigh their costs, particularly for more onerous interventions. Further, to also ensure that regulations apply equally to all energy market participants, i.e. that the regulatory framework is competitively neutral. This form of regulation is often implemented with little scope for ex-post evaluation to determine whether obligations remain relevant in the context of an evolving market and whether they have achieved objectives.

As a result of the changing nature of the market, we recommend that the Commission undertake ongoing reviews regarding the relevance, efficiency and effectiveness of energy-specific regulation. We applaud the Commission in releasing these two issues papers as a first step in conducting a more fulsome evaluation. There are two important questions for the Commission to consider in light of this: where other regulatory instruments duplicate or make energy-specific regulation redundant, what should occur? How should the Commission best

preserve competitive neutrality and consumer protections in light of new innovative energy services?

One option for the Commission to consider is to rely more on principled or outcome based regulation, rather than prescribing specific obligations. This would allow space for innovation in how all energy market participants communicate and deliver information to consumers.

For the traditional energy retailers, we consider that principle or outcome based regulation would remove any regulatory barriers to communicating or providing notifications to consumers in forms that are not currently contemplated (e.g. post, email). However, we do note that standard industry practice is to utilise authenticated communication in order to preserve privacy and allow parties to communicate regarding a customer's account or service.

Further, the Commission could consider enshrining sunset provisions in the NERR to facilitate this type of regular assessment. As an example, the Explanatory Statement for the DMO Code states:

*The Department of the Environment and Energy, in consultation with other government agencies, including the ACCC, will undertake a post-implementation review of the Regulations after two years. Among other matters, the objective of the review is to consider the operation of the Regulations, including in light of any changes, innovations or developments in the retail electricity market.<sup>1</sup>*

Specifically, the Commission should review its existing regulation with a view to remove duplicate obligations, such as rule 46B of the NERR in light of the DMO Code. Other examples include the removal of cooling-off periods for solicited sales, given that energy consumers have easy access to competition. We additionally consider that where non-traditional energy participants are permitted to provide a service in a particular way, that the same should be reflected back into the energy-specific regulations for market retail contracts.

While we accept that standard retail contracts should maintain the highest level of consumer protections, retailers (traditional or otherwise) must maintain an ability to provide products and services with varying terms and conditions to those contained within the standard retail contract. For example, should the provision of a bill for energy services from a non-traditional energy provider be subject to relevant legislation (but not energy-specific regulation) then the existing provisions should only apply to standard retail contracts. Maintaining competitive neutrality and

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<sup>1</sup> Department of the Environment and Energy (2019), *Explanatory Statement, Competition and Consumer Act 2010, Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019*, (Issued by the authority of the Minister for Energy)



the ability for traditional retailers to tailor information, communications, products and services to their customer's needs is paramount to ensuring a viable market.

### **Scope of regulations under review**

The issues papers discuss general marketing and conduct provisions under Australian Consumer Law, in addition to the NERR and applicable codes of practice. However, we also note that energy market participants and other service providers are subject to various other additional requirements. Specific examples are the DMO Code, which regulates retail prices but also includes extensive obligations for the presentation of information to consumers; the Spam Act which governs electronic communication with customers, the GST Act that covers the requirements of a legally-sound tax invoice, safety and performance standards for equipment such as meters; and privacy obligations.

These energy-specific regulations should be part of any assessment of the prevailing regulatory framework, particularly if there is some uncertainty about their application to new service providers. This will ensure a competitively neutral assessment.

### **About Red and Lumo**

We are 100% Australian owned subsidiaries of Snowy Hydro Limited. Collectively, we retail gas and electricity in Victoria, New South Wales, Queensland and South Australia and electricity in the ACT to over 1 million customers.

Red and Lumo thank the Commission for the opportunity to respond to its two issues papers. Should you wish to discuss aspects or have any further enquiries regarding this submission, please call Geoff Hargreaves, Regulatory Manager on 0438 671 750 or Stefanie Macri, Manager - Regulatory Affairs on 0481 009 645.

Yours sincerely

A handwritten signature in black ink, appearing to read "Ramy Soussou".

**Ramy Soussou**  
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**Red Energy Pty Ltd**  
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