



**EnergyAustralia**

LIGHT THE WAY

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### **AER Review of consumer protections for future energy services – Options Paper**

EnergyAustralia is one of Australia's largest energy companies with around 2.4 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory. EnergyAustralia owns, contracts, and operates a diversified energy generation portfolio that includes coal, gas, battery storage, demand response, solar, and wind assets. Combined, these assets comprise 4,500MW of generation capacity.

EnergyAustralia welcomes the opportunity to make this submission to the AER's Options paper on its Review of consumer protections for future energy services. We applaud the breadth of the AER's options for reform models set out in its Paper, and its openness to departing from the current model for energy regulation. The AER defines the models for reform as:

- Model 1 – Tiered conditional authorisation framework, with reduced exemption framework
- Model 2 – Authorisation framework based on regulatory principles
- Model 3 – Outcomes-based regulatory framework

Overall, our strongest preference is for Model 2 an Authorisation framework based on regulatory principles (without mandatory AER guidelines providing further detailed obligations). However, we note that the ideal solution might adopt elements from across the models, especially as principles-based regulation and outcomes-based regulation are often closely associated and both are effective ways to achieving regulatory objectives.

Our submission below discusses key issues which are relevant to choosing the reform model, along with our conclusion that Model 2 is preferred. Specifically, we set out:

1. The key design principles that the AER should consider when selecting the model
2. What energy products and services should be regulated (including future new services)?
3. Should there be an authorisation or licensing framework?
4. What should be subject to consumer protection? E.g. what aspects of the customer journey should be regulated?
5. What style of regulation should apply e.g. principles-based vs detailed regulation?
6. Our conclusion that our preference is for Option 2.

## 1. Key design principles

We set out some overarching design principles which the AER might wish to consider when choosing the reform model and when making decisions on the authorisation framework and consumer protections for both “traditional” and future energy services:

- Regulations should be competitively neutral or establish a level playing field – we see that this practically means that the same product or service should be regulated in the same way. It should not matter who is supplying the product or service.
- Regulations should be *technologically* neutral – the same regulations should apply to the same (or equivalent) products or services regardless of the technology used to provide them. To take two very relevant examples:
  - The sale of electricity from the grid should be subject to the same regulation as the sale of electricity generated from solar panels, as it is effectively the same electricity service. Previously the AER and AEMC has distinguished the two on the basis of primary supply and ancillary supply but this distinction will be difficult to maintain as battery extends solar PV supply. i.e. is 55% of the customer load still primary supply? It is also difficult to maintain this distinction when solar PV exports is a material proportion of overall NEM electricity supply and where it makes electricity more affordable. As Energy Consumers Australia has said essential electricity is affordable electricity.<sup>1</sup>
  - In a similar way, electricity supplied via an embedded network to a residential or small business customer should be regulated in the same way, as customers who receive electricity via the distribution network directly (i.e. an embedded network is not used to supply it). It should not matter that embedded network infrastructure has been used to supply the customer.
- Principle-based regulation is best practice regulation, especially as traditional electricity services evolve and do not align with standardised offers, and as more and more new services that impact access to electricity are introduced. We discuss what principles-based regulation is and its merits in section 5.

Adhering to the above three principles is key to future proofing regulation and will also help to avoid the pitfalls experienced under the current regulatory framework e.g. embedded networks which are regulated in a different manner despite providing the same service as traditional retailers.

## 2. What energy products or services should be regulated?

In our view, national energy regulation i.e. the National Energy Customer Framework (including authorisation and consumer protections) should apply to two broad categories:

- (i) The sale of energy at a customer’s premises as this is an essential service for customers today.
  - This should apply to the sale of electricity regardless of the device it is charging. E.g. electricity supplied to charge electric vehicles should be included in the scope.
  - This should also apply regardless of the electricity’s source. As above, the sale of electricity sourced from the grid vs solar PV panels (even where stored in batteries after) should be regulated in the same way.

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<sup>1</sup> [Contemporary Consumer Protections in Energy \(energyconsumersaustralia.com.au\)](http://energyconsumersaustralia.com.au) p 27

- (ii) In line with the AER's views, any product or service that impacts access to energy. These services should be regulated as they directly affect the supply of an essential service and its affordability. We refer to these as "Future energy services" in this submission. This would cover both:
- Energy management services to *control when electricity is supplied from the grid or generation/storage* to the customer.
  - Energy management services which control the customer's consumption (Demand management), usually via controllable smart devices at the customer's home. This would cover some services supplied by distributors. This is appropriate because poor control of the customer's consumption (i.e. failure to divert use to non-peak times) could result in very high electricity bills. Again, we see energy affordability as playing an increasingly important role in the essential supply of electricity.

We discuss specific use cases that fall within the two categories in greater depth in our previous submission.<sup>2</sup>

In its Options paper, the AER discusses services and products that fall under other categories such as services that enable access to competition and energy interoperability. We struggle to understand these two categories and what they aim to identify. They could lead to the regulation of services far removed from the central concept of essential electricity supply. E.g. Access to competition could mean the supply of a new meter in an embedded network, where a customer wishes to gain access to other Retailers but does not have compliant metering to do so. Services which enable energy interoperability could stray into regulating assets like solar PV panel inverters (which convert DC to AC current) or meter data protocols to ensure consistent data. While these are important features, they are peripheral to the provision of electricity as an essential service and should therefore not fall under the NECF regulatory framework.

### 3. Should there be a licensing or authorisation framework?

It is theoretically possible to remove a requirement for authorisation if the National Energy Retail Law defined the product/services to be regulated with sufficient certainty. i.e. consumer protections would apply to those products and services. However, we recognise the AER uses the authorisation framework to assess new entrant requirements such as compliance maturity, technical ability and financial capacity to meet the prudential requirements of the energy market. We consider there is value in this assessment and so the authorisation requirement around new entry should be retained.

Options 1 and 2 both explore reducing the exemption categories for embedded network sellers, with the overall goal to move most exemption holders to full retail authorisation. We strongly agree with this approach as it aligns with a technology and competitively neutral approach to regulation. We also note that EnergyAustralia's embedded network business holds a retail authorisation. We also agree with the alignment of consumer protections so that embedded network businesses need to comply with the same obligations as standard, non-embedded network retailers, however we consider some obligations do not make sense in the embedded network context and need to be modified. We also highlight the overlap between the AER's current consideration of embedded networks and the AEMC's *Final report on the Review of regulatory arrangements for embedded networks* which also recommended a new licensing regime for embedded network businesses.<sup>3</sup>

Lastly, we agree with the AER that authorisation might need to be conditional, to ensure that the authorisation only applies to what it was originally granted for. However, to address potential changes in circumstance, like a change in business model or the authorised business being acquired,

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<sup>2</sup> [EnergyAustralia submission.pdf \(aer.gov.au\)](#)

<sup>3</sup> [Embedded-networks-review-RPR0006-final-report-published.pdf \(aemc.gov.au\)](#)

the onus should be placed on the authorised business to notify the AER of any material changes, which the AER can then assess.

#### 4. What should be subject to consumer protection?

Consumer protections under a revised energy regulatory framework should be designed with a clear focus on the risk to the customer and that level of risk. This discussion applies regardless of the reform model adopted. Consumer protections will necessarily be different for traditional sale of electricity versus future energy services because the services are inherently different.

On the one hand, the sale of electricity (including sale of solar PV generated electricity and electricity for EV charging) will naturally be subject to more consumer protections, given the risks for this service are known and based on the gravity of the risk e.g. no supply for life support customers. However, there could be some rationalisation of the current consumer protections to focus on key consumer protection areas, as set out in Table 1 in the attachment below.

On the other hand, consumer protections for future energy services, where future energy services are still evolving and the risks are unknown, should be limited to begin with. The AER should proceed cautiously to avoid over-regulation, barriers to innovation and negative impacts to consumers. We expect only few obligations to apply, and new regulation should only be introduced when there is evidence of serious, systemic customer harm across the industry.

Table 1 in the Attachment also sets out each consumer protection category and whether it should apply to “traditional” sale of electricity and new energy services.

#### 5. What style of regulation should consumer protections take?

Energy regulation needs to evolve to principles-based regulation. This can be defined as:

“In general terms, principles-based regulation means moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules or principles to set the standards by which regulated firms must conduct business”

The AER distinguishes this from outcomes-based regulation (performance-based regulation), but the two are sometimes conflated and are closely related in concept. For example, the Australia Law Reform Commission explains in the context of privacy laws:

“Principles-based legislation relies on principles to articulate the outcomes to be achieved by the regulated entities...<sup>4</sup> It is based on the idea that firms and their management are better placed than regulators to determine what processes and actions are required within their businesses to achieve a given regulatory objective. So regulators, instead of focussing on prescribing the processes or actions that firms must take, should step back and *define the outcomes that they require firms to achieve*. Firms and their management will then be free to find the most efficient way of achieving the outcome required.”<sup>5</sup>

We consider both principles-based and outcomes-based regulation have a role in the future energy regulatory framework. It is well accepted that the benefits of using principle-based regulation are that they provide flexibility and future-proofing, and are more likely to produce behaviour which

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<sup>4</sup> [Regulatory theory | ALRC](#)

<sup>5</sup> [lse.ac.uk storage LIBRARY Secondary libfile shared repository Content Black, J Principles based regulation Black Principles based regulation 2015.pdf](#) p 5

fulfils the ultimate regulatory objective.<sup>6</sup> On one view, detailed rules provide certainty but they can lead to gaps, inconsistencies, rigidity and the need for constant adjustment to new situations and to the ratchet syndrome, as more rules are created to address new problems or close new gaps.<sup>7</sup>

The National Energy Retail Rules and AER guidelines contain very detailed obligations and there are clear examples of this ratchet problem. For example, instead of a principles-based obligation to notify customers of key changes to their electricity plan which might change what they pay, the AEMC introduced a rule change to notify customers ahead of price changes. However, this didn't cover changes to discounts (rather than prices), and so the AEMC then made a rule change about changes to benefits (including discounts) with very prescriptive guidelines specifying the sentences and sections that need to be in the letter.

An example of detailed/prescriptive regulation compared to principles-based/outcomes-based regulation is the Required information vs the Clear advice obligation under the National Energy Retail Rules (NERR) and Energy Retail Code of Practice (ERCOP).

- Required information<sup>8</sup> (which must be provided for the customer's consent to be Explicit *Informed* Consent) states that Retailers must convey 15 matters to a customer before the customer enters into the contract (Rule 64 of the NERR)
- In contrast, the Clear Advice obligation under the ERCOP (clause 38 of the ERCOP) states before obtaining a customer's explicit informed consent to enter a contract, a retailer must communicate to the small customer in a readily understandable way:
  - any terms under which the amounts payable by the small customer may vary due to the customer's or retailer's actions
  - any terms pursuant to which a benefit change may occur
  - the retailer's other plans or a VDO which the retailer reasonably believes may be more suitable.

In our view, the Clear Advice obligation is a better form of regulation which will result in more meaningful outcomes for customers.

Principles-based regulation may not suit every consumer protection. We agree for high-risk issues, prescriptive regulation may be warranted. Table 1 in the Attachment sets out for each consumer protection topic, the style of regulation that should apply.

Lastly, for completeness, we note the AER proposes under Option 3, outcomes-based regulation which could align with an obligation to act in the best interest of the customer. We have reservations about this obligation.

- An obligation to act in the best interest when *designing a product* would go much further than current regulation of the energy sector (where there is none) and could directly impinge on innovation. The obligation (having no precedent interpretation) could introduce uncertainty into the design process and inhibit innovation. There is also no evidence that would suggest poor product design for future energy services to justify the obligation. We believe that the process of competition will itself eliminate products which produce little value to customers or result in customer harm.
- Obligations based on best interest of the customer have firmer foundations in the finance sector. Best-interest obligations originated in the context of a principal/agent relationship and where the service is advice-based and where there is an incentive for an agent to place their interest above the principal's e.g. due to payment of commissions/risk of conflict of

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<sup>6</sup> [lse.ac.uk storage LIBRARY Secondary libfile shared repository Content Black J Principles based regulation Black Principles based regulation 2015.pdf](#) p 7

<sup>7</sup> [lse.ac.uk storage LIBRARY Secondary libfile shared repository Content Black, J Principles based regulation Black Principles based regulation 2015.pdf](#), p 7

<sup>8</sup> Clause 64 of the NERR

interest. This concept may not translate well to the energy sector where these characteristics are less relevant.

- Option 3 could cause regulatory uncertainty about how the AER might interpret and enforce an obligation to act in the best interests of consumers. The AER, retailers, and consumers may have different views as to what 'best interests' means in a particular scenario. The interests of one energy consumer will differ from others and may also change from time to time.
- The UK Financial Complaints Authority "Consumer Duty" which is referred to in the Options Paper to discuss a best interest obligation, does not commence until July 2023. We do not know what the impacts of this obligation will be.

Finally, we note that under the AER's proposed Option 3, retailers would need to submit a regulatory compliance plan on how they will meet outcomes to the AER for approval. Outcomes-based regulation and compliance plans are different concepts. i.e. outcomes-based regulation can be implemented in high level rules, without compliance plans. The deficiencies of a compliance plan approach are that it may not capture all scenarios relevant to future energy services requiring updates to ensure it remains fit for purpose. Moreover, the approval process itself for compliance plans may slow and deter innovation. For these reasons, we do not support the compliance plan concept in Option 3.

## **6. Preference is for Reform model 2**

In conclusion, our preference is for the sale of electricity and future energy services to be regulated using an authorisation framework (which covers new entry); and Model 2's principles-based approach to regulation, where possible. However, we do not support the AER's suggestion that the principles-based regulation would be supported by AER guidelines, if the guidelines are mandatory and enforceable like the AER's guidelines are today. E.g. Better bills guideline, Benefit change guideline, Retailer Pricing Information Guideline, to name a few. These guidelines essentially impose mandatory and very prescriptive regulation which would undermine the benefits and flexibility of principles-based regulation. We would support however, guidelines which are not binding but seek to inform what the principle could mean in practice, while giving clear flexibility for regulated entities to define how they meet the regulatory principle or outcome.

In the attachment, we detail what consumer protections should apply to the sale of electricity and future energy services and what style of regulation should apply e.g. principles-based regulation or detailed regulation.

**Attachment - Table 1**

Consumer protections that should apply	Which service should it apply to		Rationale	What style of regulation should apply
	Sale of electricity	Future energy services		
1. Regulations around access to energy supply, such as notifications about disruptions and prohibitions around disconnection	Yes	No	These protections relate to the essential nature of electricity supply, not future energy services	Detailed
2. Vulnerable customer – life support	Yes	No	These protections relate to the essential nature of electricity supply for life support customers. Future energy services not impacting on life support customer supply should not be regulated.	Detailed
3. Vulnerable customer – payment difficulty/hardship	Yes	Potentially yes	Future energy services can make energy more affordable by shifting use to non-peak times or using cheap solar PV generation. The quality of these services will directly affect customer bills and affordability.	Principles-based, regulation needs to maintain discretion for Retailers to design hardship measures considering their experience with hardship customers.
4. Point of sale information	Yes	Yes	Point of sale information to clearly inform the customer what they are buying. This will be important in describing “traditional” and new energy services. Clear information will also pre-emptively solve for other concerns e.g. an obligation to design a product in best interest does not need to exist, if	Principles based. There is a significant opportunity to reframe pre-contractual information to be principles based rather than prescribing each detail that must be presented to a customer. See the clear advice obligation in Victoria for an example of principles-based regulation for point of sale information.

			customers are provided clear information to inform their decision to buy the product.	
5. Explicit informed consent	Yes	Yes	Both traditional and future energy services are complex. Explicit informed consent is an important safeguard	Principles based. As above, the information that is presented to the customer to ensure there is "informed consent" should not be detailed and can be expressed in principles. See the clear advice obligation in Victoria for a better way informed consent could operate.
6. Dispute resolution	Yes	Yes	Access to ombudsmen is a critical fall back for customers. It provides the customer redress for any complaints/ disputes, it also allows for some monitoring of systemic issues which might require further regulation in the future.	N/A
7. Supplier of last resort	Yes	No	While there are risks around new future energy service providers failing, our position is that the supplier of last resort protections are only required for the essential supply of electricity. The risks to customers of their VPP or demand response service being suspended are much lower. Cross-economy insolvency/administration processes are adequate for future energy service provider failures.	Detailed