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19 December 2022

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



Submitted via email: 

Dear Mark,

**Re: Review of consumer protections for future energy services - options for reform**

Red Energy and Lumo Energy (Red and Lumo) provide this submission to the Australian Energy Regulator's (AER's) paper on options for reform of the National Energy Customer Framework (NECF) as part of its review of consumer protections for future energy services.

**Context for review**

The paper outlines 3 models for regulating future energy services. We see considerable merit in the AER's project to identify deficiencies in the NECF, to consider how it should account for an evolving energy market and to try to futureproof the regulatory framework. We welcome the AER's willingness to consider a range of regulatory models in recognition that alternatives to the current framework could deliver more effective competition and innovation, while maintaining core consumer protections.

However, the AER faces significant challenges, the most notable of which is that many of the new products and services that stakeholders expect to emerge remain largely in development at this point or haven't yet been adopted on a large scale by the consumers that the NECF protects in its current form.

Following on from the Australian Energy Market Commission's recent decision for the Integrating Energy Storage Systems, it has commenced consultation on a rule change proposal relating to flexible trading arrangements (*Unlocking CER Benefits Through Flexible Trading*). Together, these lead to the creation of new market participant roles who compete with traditional retailers to offer energy products and services. More generally, the Energy Security Board's Consumer Energy Resources workstream envisages a situation where consumers of any size

can engage with multiple service providers simultaneously. This would be a fundamental change from the current arrangement where a single service provider assumes the primary role to provide core protections relating to the supply of an essential service. However, the precise form of this future framework remains highly uncertain at this time. Even though the AER has identified the potential risks that could emerge as the energy sector evolves, there is no easy way to quantify the nature and extent of the problem that any revised version of the NECF would seek to overcome.

This complicates the assessment of the 3 options the AER proposes, particularly those that focus more on principles and outcomes, and to identify which option represents an effective, targeted and proportionate regulatory response. For example, the AER's discussion of option 2 suggests that regulatory obligations could vary based on the potential harms associated with the particular service and/or product. The form of these services, the mechanism through which they will be offered and by whom remain uncertain.

The AER can reassess the merits of more flexible models when the nature of any problems associated with new products and services becomes more tangible and quantifiable. The AER will also be able to assess how other regulatory initiatives, such as the Consumer Data Right and flexible trading proposal, influence the development of the future energy market.

### **Prescriptive versus outcomes based regulation**

We also question the feasibility of less prescriptive regulatory models such as options 2 and 3 in the current regulatory climate. At present, the NECF and other regulatory instruments are highly prescriptive about retailers' obligations and have become more prescriptive in recent years. This includes the type of information that they must provide to their customers and at what point that information must be provided. Examples include the prescribed content of bills, end of benefit notifications, advanced notice of price changes, and prescribed information under the Default Market Offer Code that retailers must display when advertising and include in customer communications.

This is also apparent in the AER's current focus on the support that retailers should provide to consumers experiencing payment difficulties. The AER is considering more prescriptive models, such as the Victorian Payment Difficulty Framework, that would result in a more structured and consistent approach.

The options paper seems to hint at the need to maintain core protections and prescription in its discussion of the importance of regulating new energy products and services. We note the following:

*‘To minimise complexity and support consumers in making decisions about energy products and services that best suit their needs and lifestyle, industry will need to step up and ensure a strong degree of trust in the sector. This will require energy providers to set out clear information detailing the value proposition offered by their products and/or services, fit-for-purpose contracts with clear terms and conditions, and an appropriate level of dispute resolution when things go wrong. This will likely require some degree of formal regulation.’<sup>1</sup>*

The paper also states that Australian Consumer Law (ACL) is not tailored specifically to energy products and services that are ‘likely to have a high degree of complexity’ and that ‘consumers are likely to require very specific information and support to understand what they are buying at the point of sale’. In our view, ACL (and indeed, other current regulations relating to credit, for example) could address many of the concerns about future energy services, particularly through more targeted administration. However, the AER’s paper appears to dismiss this possibility. This is surprising given the advice provided by the Australian Energy Market Commission in their last Retail Market Competition report in 2019.<sup>2</sup> This review specifically compared the ACL to the NECF and assessed what could fall away in the energy framework.

Therefore, we find it hard to reconcile the current approach to retail energy regulation with hypothetical regulatory models that offer far more flexibility to the AER and market participants, particularly option 3. For example, the AER explains that option 3 could incorporate base and flexible obligations, with the latter able to be ‘ramped up or down depending on a matrix of factors’. We do not consider that this offers certainty to regulators, consumers or market participants. As mentioned, it does not appear to us that they align with policymakers’ or consumers’ current expectations for the regulation of an essential service.

## **Discussion of options**

Red and Lumo consider that some version of option 1 as the most feasible in the current political and regulatory climate. It offers the greatest certainty to regulators, consumers and market participants about the protections that apply to the sale and supply of an essential service. Further, what type of fuel and/or supply is considered essential. It would also provide certainty for market participants regulated under the framework about the processes, systems, procedures and controls they must implement when they are assessing which services to offer. Our preferred model is an authorisation framework that is relatively simple for all stakeholders to understand and for the AER to administer. This implies that the number of authorisation

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<sup>1</sup> Australian Energy Regulator (2022), *Review of consumer protections for future energy services: Options for reform of the National Energy Customer Framework*, page 7

<sup>2</sup> Australian Energy Market Commission (2019), *Retail Energy Competition Review: Final report*, 28 June 2019

categories and opportunities for exemption should be small (fewer than the 5 authorisation tiers proposed in the paper).

The paper proposes a reasonable starting point for authorisation, as follows:

- where the energy product or service may impact the customer's ability to access energy needed for health and wellbeing;
- where the energy product or service may impact the customer's ability to access substitute, or related, products and/or services; and
- where the energy product and/or service affects the functionality of other energy products and/or services.

Core protections should apply to any entity that is involved in the sale or supply of these services, regardless of mechanism or business model (i.e. traditional retail, embedded network, aggregator). This would ensure competitive neutrality and while there will be some trade-offs in terms of competition and innovation, this is a necessary outcome of the policy decision to regulate energy as an essential service. Otherwise, some entities could have a cost advantage and/or greater ability to manage their exposure to risk and non-payment relative to their competitors. We see this as a potential risk under options 2 and 3, which offer more discretion to the AER in how it imposes regulatory obligations, both at the point of initial authorisation and ongoing as the authorised entity operates in the market.

Options 2 and 3 also offer far less certainty about the precise obligations that accompany the sale and supply of certain products and services. We find it very difficult to perceive how this would operate in practice. Uncertainty about what is compliant and non-compliant conduct as it relates to different services—and how that might be determined after the event depending on the outcome for a particular customer—could discourage rather than encourage innovation.

We see particular challenges with option 3, as described in the paper. The AER explains the model could set primary principles, requiring the service provider to act in the following ways—proactively, conscientiously, reasonably, demonstrably. The paper then explains what each of these principles could involve. For example, the principle to behave 'conscientiously' is described as offering advice in good faith and '*motivated by ensuring the customer's objectives can be met or can continue to be met, or where objectives cannot be met, then that advice is provided honestly and helpfully*'.<sup>3</sup>

These descriptions are subjective and have the potential to result in misunderstandings or even disputes between customers and their service providers if they have a different view about what action is being taken and what outcome they might expect. Their precise meaning may only

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<sup>3</sup> AER, *ibid*, page 22.

become apparent over time, through trial and error or as precedents are established. They also provide no indication of what the AER considers to be compliant behaviour and this would need to be worked through as the AER considers an applicant's regulatory compliance plan. This AER would need to provide clear guidance to support each service providers' plan proposals and this could become de facto regulation, undermining much of what a more flexible framework is seeking to achieve. Otherwise, we may see substantial differences in the protections and services that these competing entities offer to their customers.

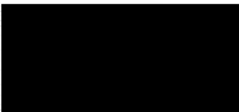
This might be the optimal model for energy regulation at some point in the future but we do not consider it to be feasible at present.

### **About Red and Lumo**

We are 100% Australian owned subsidiaries of Snowy Hydro Limited. Collectively, we retail electricity and gas in New South Wales, Queensland, South Australia, in the ACT and in Victoria to over 1.2 million customers.

We thank the AER for the opportunity to contribute to this review. Should you wish to discuss aspects or have any further enquiries, please contact Geoff Hargreaves or myself.

Yours sincerely



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