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# HOW ENERGY CONSUMERS ARE PROTECTED UNDER THE NECF AND ACL

2019 Retail Energy Competition Review

## Introduction

There are two main sources of consumer protection for energy products and services, the National Energy Consumer Framework<sup>1</sup> (NECF) and the Australian Consumer Law<sup>2</sup> (ACL). The ACL is the principal consumer protection and fair trading law in Australia.<sup>3</sup> The NECF regulates the sale and supply of electricity and gas to retail customers, and harmonises most energy consumer protections across participating jurisdictions. The NECF complements and operates alongside the generic consumer protections in the ACL, and state and territory regimes.<sup>4</sup>

The NECF was developed in the context of regulating traditional services and the Australian energy retail market being opened up to competition. At the heart of this framework is the principle that consumers have a right to access energy (as an essential service) on fair and reasonable terms.<sup>5</sup> Since the NECF was established, the energy market has undergone significant transformation due to new technology, innovation in products and services, and changes in consumer preferences. The way in which electricity is supplied to consumers and how consumers engage with the market is changing. These changes have potential regulatory implications, in particular on regulations designed to protect energy consumers.

In previous reviews the Commission has noted that the evolving nature of the energy market provides an opportunity to consider whether the existing energy specific consumer protection framework continues to meet its objective.<sup>6</sup> There are differences between energy-specific consumer protections and more general consumer protections contained within the ACL. In order to understand these differences, and as a first step to reviewing how the NECF can continue to be fit for purpose, this chapter reviews and maps the consumer protection elements of the NECF and the ACL.<sup>7</sup> The review is structured as follows:

- mapping of the consumer protections under the NECF and the ACL identifying consumer outcomes under each framework
- jurisdictional differences within the NECF
- a description of the enforcement powers to compare how consumers are protected under both frameworks and which are the applicable penalties and remedies
- analysis of consumer protection for non-traditional energy services and products.

## Next steps

The market has evolved significantly in recent years in relation to non-traditional energy services and products. The specific nature of the NECF has not adapted to these changes. There is a need to analyse and update the NECF framework to remove barriers to innovation and extend consumer protections to new models of essential service supply. We will commence this second stage of work through our 2020 retail energy competition review.

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1 The NECF is a suite of legal instruments primarily made up of the National Energy Retail Law (NERL) and the National Energy Retail Rules (NERR) that regulate the sale and supply of electricity and gas to retail customers. It is applied in each participating State or Territory through State or Territory laws. Those State or Territory laws can also modify the application of parts of the NERL and NERR in that State or Territory.

2 The ACL is set out in Schedule 2 to the *Competition and Consumer Act 2010* (CCA). The ACL is a single national law enforced in all jurisdictions (states and territories). Each state and territory applies the ACL in its own jurisdictional legislation.

3 Australian Government, Australian Consumer Law guide, *The Australian Consumer Law, A framework overview*, 2013, p. 1

4 The NECF currently applies, with jurisdictional specific modifications, in Queensland, New South Wales, South Australia, Tasmania and the Australian Capital Territory. Victoria has adopted the NECF in a limited manner.

5 NERL (Adoption) Bill 2012, Second Reading Speech.

6 AEMC, *2018 Retail Competition Review*, final report, 15 June 2018, p. 163.

7 There are other consumer protections that are not included in this review, as follows: retailer's authorisation and exemption framework under the NECF, prepayment meter provisions under the NECF and pricing provisions under the ACL. The Commission notes that the Competition and Consumer (Industry Code Electricity Retail) Regulations 2019 introduced an Electricity Retail Code of Conduct with new requirements on retailers in addition to the ACL and NECF provisions. The Electricity Retail Code of Conduct is not included in this chapter.

In this second stage, the Commission will review whether changes to the NECF are necessary to make consumer protections fit for purpose and reduce barriers to innovation. This review will analyse the regulatory approach for new non-traditional energy services and products with a focus on:

- Demand response mechanisms for small consumers (DRM)
- Distributed energy resources (DER)

The AEMC is aiming to release its first consultation paper on this work in September 2019 and will hold stakeholder workshops in November 2019.

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## Mapping the NECF and the ACL

To assist in comparing how consumer protections operate under the NECF and the ACL, the Commission identified five categories of protection that are applicable to both frameworks:

1. the contract (contract terms provisions)
2. retailer and distributor general information obligations before a contract is formed (marketing and offers) and once the contract is formed (additional information requirements)
3. service standards and quality
4. complaints and dispute resolution procedures (ombudsman schemes)
5. additional protections (financial difficulty, disconnection/reconnection, life support equipment).

## Contract Terms

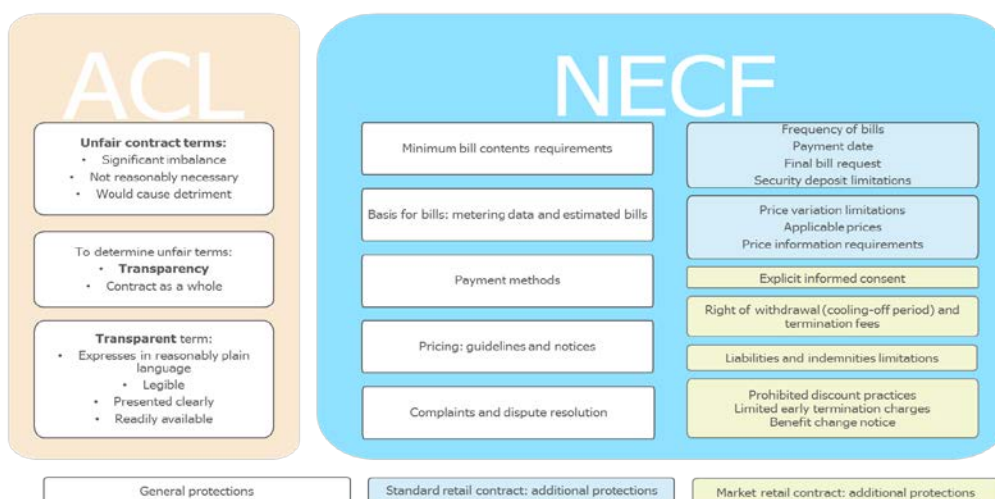
Under the NECF a retailer can only provide retail services to small customers<sup>8</sup> under two types of contracts; standard and market retail contracts.<sup>9</sup> Retailers must comply with minimum requirements under each contract to guarantee the provision of energy. In general, the NECF prescribes what these contracts must and must not include. However, it does not provide any general principles for retailers to follow when designing contract terms. In contrast, the ACL does not specify specific terms applicable to the sale of goods and services but includes a set of principles that businesses must have in mind when designing and entering into consumer contracts, including energy contracts.

Figure 1 below summarises the key consumer protections that both frameworks contain.

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<sup>8</sup> Under the NECF, a small customer is a residential customer or a small business. NERL, Section 5.  
<sup>9</sup> NERL, Section 20(2).

Figure 1: Contract terms consumer protections



Source: NERL, NERR, ACL.

## National Energy Customer Framework

The NECF sets minimum requirements for energy contracts (including both standard and market retail contracts) that are related to four main areas (further detail is provided in):

1. Billing:
  - a. Bill contents: the NERR set the minimum information that retailers must include in energy bills so that a small customer can easily verify that the bill conforms with their contract.<sup>10</sup>
  - b. Basis for bills: the rules also specify how retailers must bill customers, the metering data they must use and the circumstances and requirements where an estimated bill is permitted.<sup>11</sup> Consumer protections are aimed at preventing overestimation, underestimation and bill shock.
2. Payment obligations:
  - a. Payment methods: the rules specify the payment methods retailers must accept to assist customers to comply with their payment obligations.<sup>12</sup>
3. Pricing:
  - a. Price: retailers must comply with the AER's RPIG when presenting standing and market offer prices.<sup>13</sup>
  - b. Price variation: a retailer must notify a customer at least five business days before price variations apply, and must comply with the notice requirements under the rules.<sup>14</sup>
4. Customer complaints and dispute resolution: under the NECF, small customers have two mechanisms to resolve complaints and disputes. Under the NERL, retailers and distributors

10 NERR, Rule 25.

11 NERR, Rules 20, 21, 22, 30, 31.

12 NERR, Rule 32.

13 NERL, Sections 24, 37.

14 NERR, Rules 46 and 12; Schedule 1, Model terms and conditions for standard retail contracts, Clause 8.2.

must have their own standard complaint and dispute resolution procedures. Additionally, energy ombudsman schemes also have the power to resolve complaints and disputes once the retailer or distributor had the opportunity to address these in accordance with their standard procedures.<sup>15</sup>

- a. Terms and Conditions: the NECF requires that retailers, energy marketers and distributors, must include in all energy contracts a provision to inform customers that they have access to both avenues to resolve complaints and disputes (retailer's standard procedures and energy ombudsman schemes).<sup>16</sup>

In addition, the NECF contains specific requirements for standard and market retail contracts.

### Standard retail contract

Following the introduction of retail competition, retailers are required to offer at least one standard retail contract at standing offer prices to provide small consumers access electricity from each retailer. The NECF therefore created the standard retail contract that retailers are obligated to offer:

- when there is no existing connection at the customer premises the designated retailer (local area retailer)<sup>17</sup> must make an offer under the retailer's standard retail contract<sup>18</sup>
- where there is an existing connection but no energy is supplied, the designated retailer must advise the customer of the availability of the retailer's standing offer.<sup>19</sup>

Additionally, the NECF specifies certain circumstances where the standard retail contract is the default contract when the customer does not choose any specific plan<sup>20</sup>, when:

- a customer moves-in and the customer starts consuming energy at the premises<sup>21</sup>
- the customer's previous retail contract terminates and the customers continues to consume energy at the premises<sup>22</sup>
- a customer is designated to a retailer of last resort ROLR.<sup>23</sup>

Further to the above, the NECF requires that once a customer has requested the provision of retail services under a standing offer, the retailer cannot decline to enter into a standard retail contract.<sup>24</sup>

Additionally, the NECF prescribes the model terms and conditions of this standard form contract.<sup>25</sup> Any alterations to these contracts must only be those permitted or required under the NERR. Permitted alterations are those related to a retailer's contact details and identity or minor alterations that do not change the substantive effect of the model terms and conditions.<sup>26</sup> Required alterations are those prescribed by the NERR in relation to matters of each jurisdiction or matters otherwise required under the NERR.<sup>27</sup>

The contract requirements prescribed in the NECF to protect consumers under a standard retail contract include (see for further details):

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15 NERL, Part 4.  
 16 NERR, Rules 50, 56, 64, 68, 80, 81.  
 17 NERL, Section 2.  
 18 NERL, Section 22.  
 19 Unless the customer is a small market offer customer. NERR, Rule 16.  
 20 NERR, Rules 12 and 54, Schedule 1, Model terms and conditions for standard retail contracts; NERL, Section 26.  
 21 NERR, Rule 54.  
 22 Ibid.  
 23 NERL, Part 6.  
 24 If the customer comply with any pre-condition to contract formation in the NERR. NERL, Section 26.  
 25 NERL, sections 25(1), 25(3), 27, 29; NERR, Rule 12, Schedule 1, Model terms and conditions for standard retail contracts.  
 26 NERL, Sections 25(4).  
 27 NERL, Sections 28.

1. Billing:
  - a. Frequency of bills: retailers must issue standard retail contract bills at least once every 100 days.<sup>28</sup>
  - b. Payment date: retailers must set the pay-by-date for standard retail contract bills no earlier than 13 business days from the issue date.<sup>29</sup>
  - c. Other goods and services: retailers must apply any payments to satisfy the charges of energy sale and supply before any other payable amounts for goods and services in the bill, unless the customer otherwise agrees.<sup>30</sup>
  - d. Final bill: a customer can request a final bill and the retailer must use its best endeavours to arrange a meter reading and issue it.<sup>31</sup>
2. Pricing:
  - a. Applicable price: standing offer prices are the prices applicable to standard retail contracts.<sup>32</sup>
  - b. Price variation: any variation to standing offer prices must be made in accordance with any jurisdictional requirements and can not vary more often than every six months.<sup>33</sup>
  - c. Information: if retailers vary their standing offer prices, they have to publish the variation in the tariffs in a newspaper and in their website at least ten business days before it starts.<sup>34</sup>

### Market retail contract

The requirements for a market retail contract are less prescriptive than the standard retail contract under the NECF. There are no model terms and conditions for market retail contracts under the NECF, with most terms being as agreed between the retailer and the small customer.<sup>35</sup> However, this contract must be consistent with the applicable minimum requirements under the NERR<sup>36</sup>, any variation must be consistent with the NERR variation requirements<sup>37</sup> and in case of any inconsistency, the NERR will prevail.<sup>38</sup>

The minimum requirements are related to the following areas:

1. Consent: as a key difference with standard retail contracts, retailers must obtain the explicit informed consent of a small customer when entering into a market retail contract.<sup>39</sup>
2. Withdrawal and termination:
  - a. Rights and obligation of withdrawal: the NERR provides a cooling-off period to act as a safeguard for consumers, enabling them to change their mind about a purchase they have made or contract they have entered into. Energy consumers have a right to withdraw from

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28 NERR, Rule 24(1).

29 NERR, Rule 26.

30 NERR, Rule 27.

31 NERR, Rule 35.

32 NERR, Rule 12, Schedule 1, Model terms and conditions for standard retail contracts, Clause 8.

33 NERL, Section 23(2); NERR, Rule 12, Schedule 1, Model terms and conditions for standard retail contracts, Clause 8.3.

34 NERL, Section 23(2) and (5); NERR, Rule 12, Schedule 1, Model terms and conditions for standard retail contracts, Clause 8.2.

35 NERR, Rule 14.

36 NERL, Section 34.

37 NERL, Section 35.

38 NERL Section 36; NERR, Rule 15.

39 NERL, Section 38.

a market contract and it may be exercised within 10 business days after the customer received the contract information prescribed under the NERR.<sup>40</sup>

- b. Termination notice: energy customers do not have to give more than 20 business days' notice to terminate a market retail contract. Any term and condition that extends this period has no effect.<sup>41</sup>

3. Liabilities and indemnities:

- a. Breach of the contract or negligence by the retailer: retailers must not include any term or condition that limits the liability of the retailer for breach of the contract or negligence.<sup>42</sup>
- b. Limits to indemnities: retailers must not include any term or condition under which a customer indemnifies a retailer in an amount greater than the retailer would otherwise have been able to recover at general law for breach of contract or negligence of the customer.<sup>43</sup>

4. Prices and charges:

- a. Discount practices: a retailer must not include any term or condition offered as discounts that might leave customers worse off with a higher rate than the retailer's standing offer rate.<sup>44</sup> This prevents retailers confusing customers by advertising a larger discount on an inflated base rate.
- b. Early termination charge: the NECF limits the nature of a term or condition that provides an early termination charge.<sup>45</sup>
- c. Benefit change: retailers must notify the customers of a benefit change no later than 20 business days before each benefit change to their market retail contract and must comply with AER's Benefit Change Notice Guidelines.<sup>46</sup>

### Customer connection services

A distributor must provide customer connection services if a customer requests those services and their premises are connected, or they are seeking to have those premises connected to the distribution system.<sup>47</sup> These customer connection services must be provided in accordance with the relevant contract requirements prescribed under the NERL, NERR, NER and National Gas Rules.<sup>48</sup>

For small customers, distributors must, as soon as practicable after the retailer notifies the distributor of the formation of a retail contract, provide customer connection services under the model terms and conditions of a deemed standard connection contract.<sup>49</sup> This provision assists consumer in being supplied with energy connection services from distributors once a retail contract is formed.

The NECF sets out minimum requirements for each customer connection contract, as follows:

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40 NERR, Rule 47.  
41 NERR, Rule 49(2).  
42 NERR, Rule 51.  
43 NERR, Rule 52.  
44 NERR, Rule 46B.  
45 NERR, Rule 49A.  
46 NERR, Rule 48A.  
47 NERL, Section 66(1).  
48 NERL, Section 66(2).  
49 NERR, Part 4; Schedule 2.

1. Deemed standard connection contract: for small customers and large customers for whom there is no applicable deemed AER approved standard connection contract<sup>50</sup>
  - model terms and conditions prescribed under the NERR<sup>51</sup>
2. Deemed AER approved standard connection contracts (large customers)<sup>52</sup>
  - A deemed AER approved standard connection contract may vary or exclude any or all of the other provisions of Part 4, whether by express statement or by implication.
3. Negotiated connection contracts (small and large customers)<sup>53</sup>
  - Liabilities and immunities: a distributor must not include any term and condition in a negotiated connection contract that limits the liability of the distributor for breach of the contract or negligence by the distributor.

## Australian Consumer Law

In contrast, the ACL does not prescribe what consumer contracts must and must not include. In general, it is a principles-based approach to promote competition and fair trading, and for providing consumer protection.<sup>54</sup> The ACL includes legal requirements, penalties and remedies relevant to businesses and individuals that deal 'in trade or commerce'. This means that it essentially covers everybody, whether it is a consumer buying products or services, or whether it is a business that sells products or services to individuals or other businesses.<sup>55</sup>

In particular, the ACL has restrictions regarding unfair contract terms.<sup>56</sup> The ACL's unfair contract term provisions apply to consumer contracts for the supply of goods or services for personal, domestic or household use or consumption.<sup>57</sup> For the purposes of the ACL, electricity and gas are 'goods'.<sup>58</sup> Energy contracts are therefore covered by the ACL and the unfair contract term provisions are applicable to retail energy contracts.<sup>59</sup>

The ACL defines what an unfair contract term is and what a court may take into account when determining whether a contract term is unfair.<sup>60</sup> There are three limbs that are part of the unfairness test under the ACL and all must be proven to exist for a court to decide that a term is unfair:<sup>61</sup>

1. a term of a consumer contract is unfair if it would cause a significant imbalance in the parties' rights and obligations under the contract
2. it is not reasonably necessary to protect the interests of the party that would be advantaged by the term
3. if the term would cause detriment to a party if it were to be applied or relied on.

50 NERL, Part 3; NERR, Part 4.

51 NERR, Section 81, Schedule 2

52 NERL, Part 3; NERR, Section 78.

53 NERR, Section 82.

54 Competition and Consumer Act 2010, Part 1, Section 2.

55 The ACL applies to small business contracts to the extent they meet the definition under Section 23(4), which provides that: a small business contract is defined as the contract for a supply of goods and services (or a sale or grant of an interest in land) and at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and either of the following applies: the upfront price payable under the contract does not exceed \$3000,000; or the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000. ACL, Section 23(4).

56 ACL, Part 2-3.

57 A consumer contract is defined under the ACL as a contract for: a supply of goods or services (or a sale or grant of an interest in land) to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. ACL, Section 23(3).

58 ACL, Section 2.

59 Section 2 of the ACL provides that the definition of 'goods' includes gas and electricity, To the extent that a contract provides for the provision of 'services' (as defined), additional protection may apply.

60 ACL, Section 24.

61 ACL, Section 24(1); see ACCC, Unfair contract terms — A guide for business and legal practitioners, p. 11.



When a court is determining if a contract term is unfair, the term must be considered in the context of the contract as a whole and it may take into account the extent to which the term is transparent.<sup>62</sup> For example, terms that may not be considered transparent are those hidden in fine print or schedules, phrased in legalese or in complex or technical language or are ambiguous or contradictory.<sup>63</sup> This transparency provision is an example of the principle-based regulation under the ACL that is applicable to consumer contracts including energy retail contracts.

There are some contract terms where the ACL unfair contract term provisions do not apply. For example, the ACL unfair contract term provisions do not apply to a term that defines the main subject matter of the contract (the good or service of a consumer contract) or a term that sets the upfront price payable under the contract.<sup>64</sup> This is mainly because a consumer had the choice whether to make the purchase on the basis of what was offered, and with the price that was disclosed before the contract was formed.<sup>65</sup>

The definition of 'upfront price' in the ACL is key to understanding which terms are covered by the unfair contract term provisions.<sup>66</sup> The upfront price includes any payments to be provided for the supply, sale or grant under the contract that are disclosed at or before the time the contract is entered into.<sup>67</sup> If the term that sets the price under the contract includes any other consideration that is contingent on the occurrence or non-occurrence of a particular event, it is not an upfront price as defined under the ACL.<sup>68</sup> For example, terms that impose fees and charges levied as a consequence of something happening or not happening at some point over the period of the contract are not upfront prices and therefore, are covered by the ACL's unfair contract term provisions.<sup>69</sup>

When considering if a future payment is an upfront price or not, the court may take into account whether these payments were transparently disclosed to the consumer. A court may also consider whether the consumer was made aware of the basis on which such payments would be determined, at or before the time the contract was made.<sup>70</sup>

For energy, standing and market retail contract prices are a retailer's standing and market offer prices. The application of the ACL's unfair contract terms provisions to the price terms of an energy retail contract will depend on how these terms are structured. If the retail contract term related to payment is not disclosed at or before the time the contract is formed, or includes any other payment that is contingent on the occurrence or non-occurrence of a particular event, it would not be an upfront price and therefore, the ACL's unfair contract term provisions would apply.

In the energy retail market, price competition using conditional discounts is a very common pricing practice. This practice has led to concerns raised in the ACCC's REPI, the Thwaites Review and the AEMC's 2017, 2018 and this retail energy competition review. There is a view that this form of pricing practice has led to consumer confusion, makes offers by retailers harder to compare and results in lower levels of engagement in the energy sector.<sup>71</sup> For example, if the terms in consumer contracts that set conditional discounts are not upfront prices (as defined under the ACL) then these terms will be covered under the ACL's unfair contract term provisions. Reviewing this retail practice under ACL's could improve retail competition practices and deliver better outcomes for consumers.

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62 ACL, Section 24(2).

63 ACCC, Unfair contract terms - A guide for business and legal practitioners, p. 12.

64 ACL, Section 26.

65 ACCC, Unfair contract terms — A guide for business and legal practitioners, p. 12.

66 ACL, Section 26(2) defines 'upfront price'.

67 ACCC, Unfair contract terms FAQs, *What is the upfront price payable? can be accessed at* <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/unfair-contract-terms-faqs>

68 ACL, Section 26(2).

69 ACCC, Unfair contract terms -- A guide for business and legal practitioners, pp. 9-10.

70 Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 1) 2009 (Cth), cl [2.73].

71 AEMC, 2018 Retail Energy Competition Review, p. 18.

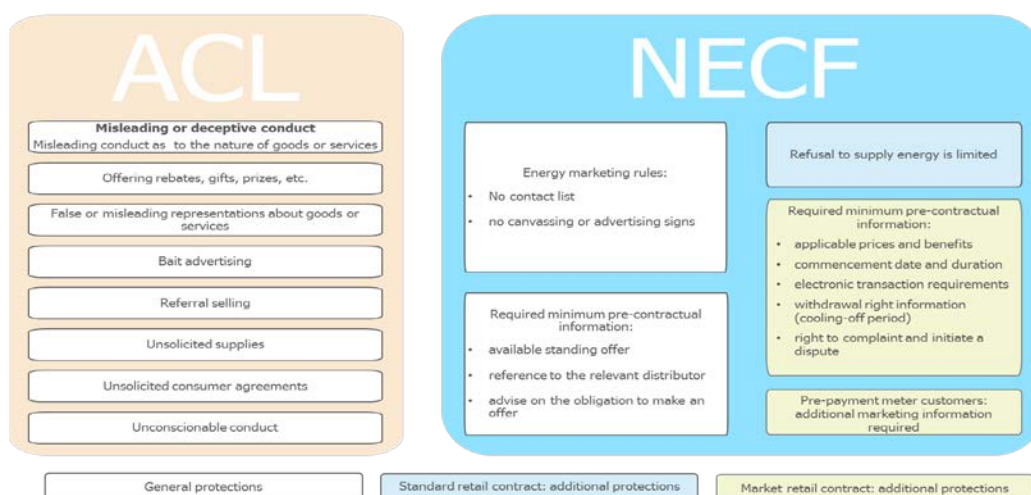
## Marketing and offers

Under the NECF, retailers and retail marketers must comply with legal requirements in terms of information and marketing of retail contracts. In contrast, under the ACL there are no requirements specifically for retailers or retail marketers but there are broadly applicable consumer protections including:

- core consumer general protections prohibiting misleading or deceptive conduct, unconscionable conduct<sup>72</sup>
- specific protections against unfair practices, including (amongst others):<sup>73</sup>
  - false or misleading representations about goods or services<sup>74</sup>
  - misleading or deceptive conduct as to the nature of goods or services<sup>75</sup>
  - offers and unsolicited supplies of goods and services.<sup>76</sup>

Figure 2 below compares key consumer protections for marketing and offerings under both the NECF and the ACL frameworks.

**Figure 2: Marketing and offer consumer protections**



Source: ACL, NERL, NERR.

## National Energy Customer Framework

The NECF sets a specific framework to regulate energy marketing activities and what any person who carries out these activities must comply with.<sup>77</sup> Under the NECF, energy marketing activities are any activities that market, advertise or promote consumer connection services or customer retail services.<sup>78</sup> These activities are regulated not only by the energy marketing rules set out in the NERR<sup>79</sup> but also by the ACL.<sup>80</sup>

<sup>72</sup> ACL, Part 2-1 and 2-2.

<sup>73</sup> ACL, Part 3-1.

<sup>74</sup> ACL, Part 3-1, Section 29.

<sup>75</sup> ACL, Part 3-1, Sections 33-34.

<sup>76</sup> ACL, Part 3-1, Division 2.

<sup>77</sup> NERL, Section 53(2).

<sup>78</sup> NERL, Section 2. 'Customer connection services' include (among other things) a service relating to a new connection or connection alteration and 'customer retail service' is the supply of energy by a retailer to a customer.

<sup>79</sup> NERR, Rule 60.

<sup>80</sup> In addition to the ACL and NECF, there are protections for telemarketing under the *Telecommunication Act 1991* and the *Do not call register Act 2006* that are applicable to the energy sector that are not covered under this chapter. For example, the hours when consumers can be contacted are limited and any contact with consumers must comply with the identification and information requirements contained in these Acts. NERL, Division 8, note; NERR, Division 10, Note.

The NECF includes, pre-contractual information and marketing rules as follows:

1. Pre-contractual information: under the NECF retailers and retailer marketers have some pre-contractual obligations in terms of the information provided to small customers. If the retailer is the designated retailer (local area retailer) it has to inform the customer about their available standing offer, if it is not the designated retailer it must refer the customer to its relevant distributor and the distributor must advise the customer which retailer has an obligation to make a standing offer.<sup>81</sup> These first requirements are not part of the energy marketing rules defined under the NERL but are related to information requirements before the contract is formed and when retailers or retail marketers are offering retail services.
2. Marketing rules: there are two provisions under the energy-specific marketing regulation defined under the NERL.<sup>82</sup>
  - a. No contact list: energy marketing rules retailers must create and maintain a 'no-contact list' for retail marketers, whether by the retailer itself or by a person or organisation on behalf of the retailer. Small customers may indicate they wish to be placed on the list and a retail marketer must not make contact with a small customer whose name is on the relevant contact list.<sup>83</sup>
  - b. Canvassing and advertising signs: additionally, under the NECF retailers and retail marketers must comply with any signs at a person's premises indicating canvassing is not permitted or no advertising or similar material, is to be left at the premises or letterbox.<sup>84</sup> The protection is intended to stop any undesired marketing activities.

In terms of specific regulation for retail contract (standard and market retail contracts), the NECF sets additional marketing requirements as follows.

#### Standard retail contract

As mentioned, a designated retailer cannot decline to enter into a standard retail contract if the consumer makes the request and complies with the pre-conditions set out in the NERR. Additionally, a designated retailer cannot refuse the sale of energy to a residential customer under a standard retail contract on the grounds that the customer owes the retailer outstanding amounts from an unpaid account.<sup>85</sup> These pre-contractual obligations are part of many other NECF provisions to guarantee the supply of energy.

#### Market retail contract

For market contracts, there is minimum information that must be provided to consumers before the formation of the market retail contract or as soon as practicable once the contract is formed, as follows:<sup>86</sup>

1. Pre-contractual information: the NECF intends that a consumer is well-informed about the contract terms and conditions that will be accepting. Therefore, a retail marketer are required to provide a small customer with the information related to:<sup>87</sup>
  - a. all applicable prices, charges and benefits to the customer (to the extent both are not otherwise part of prices), early termination payments and penalties, security deposits, service levels, concessions or rebates, billing and payment arrangements and how any of these matters may be changed (including, where relevant, when changes to prices will be notified by the retailer to the customer)

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81 NERR, Rules 16-17.

82 NERL, Division 8.

83 NERR, Rule 65.

84 NERR, Rule 66.

85 NERR, Rule 18.

86 NERR, Rule 64.

87 NERR, Rule 64.

- b. the commencement date and duration of the contract, the availability of extensions, and the termination of the contract if the customer moves out during the term of the contract
- c. any requirement that is to be or may be complied with by an electronic transaction—how the transaction operates and, if appropriate, an indication that the customer will be bound by the electronic transaction or will be recognised as having received the information contained in the electronic transaction
- d. the rights that a customer has to withdraw from the contract during the cooling-off period, including how to exercise those rights
- e. the customer's right to complain to the retailer in respect of any energy marketing activity of the retail marketer conducted on behalf of the retailer and, if the complaint is not satisfactorily resolved by the retailer, of the customer's right to complain to the energy ombudsman.

## Australian Consumer Law

Under the ACL, there are general consumer protections, as well as more specific protections to prohibit certain conduct. These include:

1. Misleading and deceptive conduct:<sup>88</sup> any person (including retailers, distributors, retail marketers, in general any energy market participant) must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
2. Unconscionable conduct:<sup>89</sup> the ACL includes provisions prohibiting a person from engaging in unconscionable conduct towards consumers or businesses.<sup>90</sup> The term "unconscionable conduct" is not defined in the ACL, as its meaning has been developed by the courts.<sup>91</sup> Conduct may be unconscionable if it is particularly harsh or oppressive such that it goes against good conscience, and to be considered unconscionable, the conduct must be more than simply unfair.<sup>92</sup>

In considering whether conduct to which a contract relates is unconscionable, a court may, non-exhaustively, consider the terms of the contract and the manner in which, and the extent to which, the contract is carried out, and is not limited to consideration of the circumstances relating to formation of the contract.<sup>93</sup> The ACL sets a number of matters a court may consider when assessing whether certain conduct is unconscionable, which include:

- the relative strengths of the bargaining positions of the supplier and the customer
- whether the customer was able to understand any documents relating to the supply of goods
- whether any undue influence or pressure was exerted on the customer or any unfair tactics were used against the customer
- the amount the customer could have acquired identical or equivalent goods from a person other than the supplier.

3. Unfair practices: additionally, the ACL also provides specific protections for unfair practices which could relate to marketing and offering activities in the energy sector.<sup>94</sup>
  - a. False or misleading representations:<sup>95</sup> under this framework, a person cannot, in trade or commerce, in connection with the supply or possible supply of goods or services,

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88 ACL, Chapter 2, Part 2-1.

89 ACL, Part 2-2.

90 Trade practices amendment (Australian Consumer Law) Bill (No. 2) 2010, Explanatory memorandum.

91 ACL, Part 2-2, Chapter 2. However, the ACL is not limited by the unwritten law relating to unconscionable conduct. See ACL, Section 21(4)(a) The ACL gives recognition to the doctrine of unconscionable conduct at common law level.

92 ACCC, Advertising and selling guide, November 2017, p. 35.

93 Section 21(4) ACL.

94 ACL, Chapter 3, Part 3-1.

95 ACL, Section 29(1).

make false or misleading statements. For example, a person must not make a false or misleading representation with respect to the price of goods or services.<sup>96</sup> This provision, and the ACL's unfair practices provisions more generally, can apply to price competition practices in relation to energy contracts and advertisement in the NEM.

- b. The Australian Competition and Consumer Commission's retail pricing inquiry raised a concern that retailers have made pricing structures confusing and have developed a practice of discounting which is opaque and not comparable across the market.<sup>97</sup>
- c. Offering rebates, gifts, prizes: additionally, the ACL also limits the offer of any rebate, gift, prize or other free item with the intention of not providing it or of not providing it as offered.<sup>98</sup> Consumers are protected of unfair commercial practices that will not deliver what the customer is expecting from the offer.
- d. Bait advertising: the ACL contains a specific prohibition for bait advertising which takes place when an advertisement promotes certain (usually 'sale') prices on products that are not available or available only in very limited quantities.<sup>99</sup> This provision considers the specified offer price, the quantities and the nature of the advertising.<sup>100</sup>
- e. Referral selling: a person must not induce a consumer to buy goods or services by representing that the consumer will receive some benefit, such as a rebate or commission, in return for helping the business supply goods or services to other customers.<sup>101</sup>

When a consumer receives unsolicited supplies of goods or services, the ACL protects them by providing that in such case, the consumer is not liable to make any payment for the goods or services and is not liable for loss or damage as a result of the supply of the goods or services.<sup>102</sup> Energy consumers will be covered by these provisions for the supply of electricity or gas (goods for the purposes of the ACL) and for the supply of any other goods or services such as other energy products or services (i.e. batteries, solar panel, etc.).

Additionally, the ACL includes limitations on marketing practices when suppliers or sales persons approach or call a consumer without requesting it or being invited (unsolicited consumer agreements).<sup>103</sup> Situations that can lead to unsolicited agreements are (amongst others):

- door-knocking and calls to offer the sale of products or services or invitations to switch to a different service provider
- personal approaches at any public place (i.e. shopping centre) with the mentioned purposes
- messages left on answering machines for the customer to respond.

These provisions and the ACL's unfair practices provisions more generally, compliment the consumer protections under the NECF and are applicable to price competition practices in relation to energy contracts and retail advertising in the NEM. For example, on 9 July 2018 the ACCC announced it was taking action against Click Energy for false or misleading marketing claims under the ACL. In March 2019, the Federal Court ordered penalties of \$900,000 against Click Energy for making false or misleading marketing claims by offering discounts 'off-rates' that were higher than Click Energy's standing offer rates available to all consumers.<sup>104</sup> This means that the effective discounts offered by Click Energy were smaller than what was advertised and, in some cases, consumers effectively received no discount at all. Of note, this amount nearly double the amount

96 ACL, Section 29(1)(i).

97 ACCC, retail Electricity Inquiry, final report, p. V.

98 ACL, Section 32.

99 ACCC, False or misleading claims, found at: [www.accc.gov.au/consumers/misleading-claims-advertising/false-or-misleading-claims](http://www.accc.gov.au/consumers/misleading-claims-advertising/false-or-misleading-claims), accessed 27 May 2019.

100 ACL, Section 35.

101 ACL, Section 49.

102 ACL, Sections 40-42.

103 ACL, Part 3-2, Division 2.

104 ACCC, ACCCount report of the ACCC's activities, 31 March 2019.

civil penalties the AER issued to retailers and DNSPs from 2018 for alleged breaches of the NECF, which totalled \$460,000 for allegedly breaching the NECF.

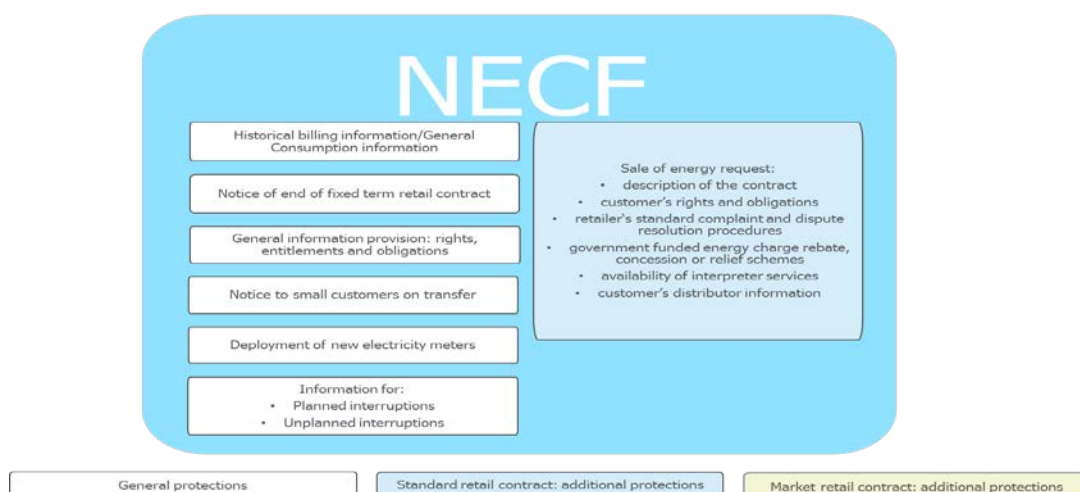
The Click Energy case also demonstrates the overlapping nature of the ACL and NECF in some instances. On 20 March 2018, the Commission received a rule change request from the then Hon. Minister Josh Frydenberg MP, Minister for the Environment and Energy on behalf of the Australian Government, to restrict retailers from similar pricing practices.<sup>105</sup> On 15 May 2018, the Commission made a rule to prohibit confusing retail discounting practices where retailers increase the base rate of a market offer to above the level of its standing offer to advertise a larger discount.<sup>106</sup>

As mentioned, there are other retail pricing practices that raise consumer protection issues. For example, Choice states that in late 2018, Sumo Power allegedly increased some of its customers' prices by over 50 per cent within weeks of signing the customer up with the offered rate.<sup>107</sup> Further, this original lower priced offer was still available to new customers who wanted to switch to Sumo Power.<sup>108</sup> The ACCC has announced through its Compliance and Enforcement Priorities that in 2019 a focus will be on opaque and complex pricing practices of essential services, in particular energy and telecommunications. Within this framework, the practice of retailers significantly raising prices soon after a customer transfers on a variable priced contract is likely to be a focus.<sup>109</sup>

## NECF additional information requirements

Most of the information requirements are related to pricing and are included as contractual requirements in the previous section (Contract Terms). In addition, the NECF contains other requirements related to consumer information requests, general information for the supply of energy, and notification for new meter deployments and energy interruptions. Under the ACL there are no equivalent consumer protections to these information requirements under the NECF. Figure 3 below summarises these additional information requirements.

**Figure 3: Information requirements**



Source: NERL and NERR

105 AEMC, Preventing discounts on inflated energy rates, rule change request, 15 May 2018.

106 AEMC, Preventing discounts on inflated energy rates, final determination, 15 May 2018.

107 Choice, *Bait and switch?*, 10 December 2018, found at: [www.choice.com.au/shopping-for-services/utilities/articles/sumo-powers-big-rate-increase](http://www.choice.com.au/shopping-for-services/utilities/articles/sumo-powers-big-rate-increase), accessed 27 May 2019.

108 *ibid.*

109 ACCC, 2019 ACCC Compliance and Enforcement Priorities, December 2018.

Retailers and distributors have the obligation to provide information in accordance with the NECF. In general, the following are additional information requirements applicable to retail contracts including the following:

1. Historical billing data request: under the NECF, an energy customer can request historical billing data (for the previous two years) from their retailer and distributor. Both the retailer and distributor have an obligation to provide the data without charge. If the customer has requested this information an earlier period or more than 4 times in the past 12 months for electricity or once in the previous 12 months for gas, the retailer or distributor may charge a reasonable amount.<sup>110</sup> The NECF also provides that this energy information must be provided in the manner and form required under the metering data provision procedures.<sup>111</sup>
2. Bill review: a retailer must review a bill if requested by a small customer. In reviewing the bill the small customer may request a meter reading or metering data be checked or the meter tested. The retailer may require the customer to pay for the cost of the check or test if the check or test shows that the meter or the metering data was not faulty or incorrect.<sup>112</sup>
3. End of fixed term contract notice: a customer must be informed when their energy contract is due to end. Retailers must send this notice no earlier than 40 days and no later than 20 business days before the end date of the contract and must follow the rules in terms of content and manner when sending it.<sup>113</sup>
4. General information provision:
  - a. Retailers: must publish on their website a summary of a small customer's rights, entitlements and obligations and if a customer requests any of this information, retailers must provide a copy without charge.<sup>114</sup> The information must include:
    - retailer's standard complaints and dispute resolution procedures
    - contact details for the energy ombudsman
    - in case of electricity, energisation and re-energisation time frames.
  - b. Distributors: have different contractual relationship with retail customers. However, under the NERR they have similar obligations to retailers with respect to publishing certain general information on their website. For example, they must publish the details of their connection contracts, the applicable energisation and re-energisation time frames, the details of customer connection services charges, the distributor's standard complaints and dispute resolution procedures, among others. Like retailers, they must also publish information on the rights, entitlements and obligations of small customers, including the distributor's standard complaints and dispute resolution procedure and contact details of the energy ombudsman.<sup>115</sup>  
A distributor must also maintain a 24-hour fault information and reporting telephone number for customers.<sup>116</sup>
5. Customers on transfer: retailers must, after receiving notice that they are responsible for a transferring customer, notify the customer that they have commenced selling energy and the date on which they commenced selling that energy to that customer.<sup>117</sup>
6. New electricity meter deployment: if a retailer proposes to undertake a new meter deployment, it must inform the relevant customer of the proposed deployment, which the customer can elect not to have their meter replaced and the applicable rates for the new meter.<sup>118</sup>

<sup>110</sup> NERR, Rules 28 and 86A-86B.

<sup>111</sup> NERR, Rule 56A.

<sup>112</sup> NERR, Rule 29.

<sup>113</sup> NERR, Rule 48.

<sup>114</sup> NERR, Rule, 56.

<sup>115</sup> NERR, Rule 80.

<sup>116</sup> NERR, Rule 85.

<sup>117</sup> NERR, Rule 58.

<sup>118</sup> NERR, Rule 59A.

## 7. Information when energy is interrupted:

- a. Retailers: a retailer may arrange a planned interruption by obtaining the customer's consent and must notify the affected customers that the supply of energy will be interrupted (planned interruption). If the retailer does not obtain the consent, the retailer must notify the affected customer by any appropriate means at least 4 business days before the interruption. In some specific cases, such as life support, retailer's need customer's explicit consent to interrupt the supply of energy.<sup>119</sup>

In case of an unplanned interruption, if a customer contacts a retailer by phone about a fault or emergency, the retailer must refer the customer to the distributor's fault enquiries or emergency telephone number.<sup>120</sup>

- b. Distributors: a distributor may arrange a planned interruption by obtaining the customer's consent and must notify the affected customers that the supply of energy will be interrupted.<sup>121</sup> If the retailer does not obtain the consent, the retailer must notify the affected customer by any appropriate means at least 4 business days before the interruption.

A distributor must also, within 30 minutes of being advised of an unplanned interruption, or otherwise as soon as practicable, make available a 24-hour telephone service, provide the information on the nature of the interruption and an estimate of the time when supply will be restored or when reliable information on restoration of supply will be available. Additionally, the distributor must use its best endeavours to restore supply to affected customers as soon as possible.<sup>122</sup>

Distributors and retailers must cooperate and refer a customer to each other depending on the type of planned interruption (distributor or retailer planned interruption) to provide relevant information to the customer.<sup>123</sup>

### Standard retail contract

Once a small customer requests the sale of energy under a retailer's standing offer, the retailer must provide the customer with the following information:<sup>124</sup>

- a description of the retailer's standard retail contract and how copies can be obtained
- a description of the retailer's and customer's rights and obligations
- a description of the retailer's complaints and dispute resolution procedures
- on the availability of government funded energy charge rebates, concession or relief.

## Service standards and quality

In terms of services standards and quality, the NECF has a provision to ensure that consumers continue to receive electricity and/or gas supply in the event of retailer failure.<sup>125</sup>

Additionally, the NECF has certain specific requirements that are limited to distribution services, and connection and disconnection standards. The ACL has a broader scope and provides consumer guarantees for consumer transactions relating to the supply of goods. These consumer guarantees do not apply to the supply of electricity and gas but may apply to other energy

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119 NERR, Rule 59C, NERR, Rule 111.

120 NERR, Rule 100.

121 NERR, Rule 90.

122 NERR, Rule 91.

123 NERR, Rule 99.

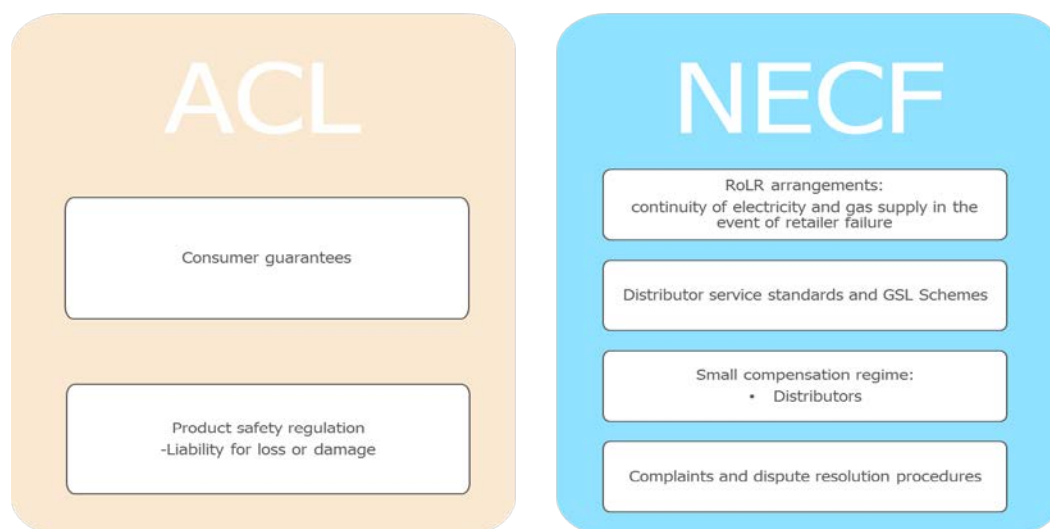
124 NERR, Rule 19.

125 NERL, Part 6, RoRL.



products or services.<sup>126</sup> Figure 4 below lists the different consumer protections under both frameworks.<sup>127</sup>

**Figure 4: Service standards and quality consumer protections**



## National Energy Customer Framework

The NECF contains a small compensation claims regime to enable small customers to make small claims for compensation from distributors who provide customer connection services to their premises.<sup>128</sup> At present, the scope of this regime is limited to compensation for property damage on a customer's appliances or equipment due to voltage variations. However, no participating jurisdiction has opted-in to the small claims compensations framework to date.

Under the NECF, distributors must also comply with any applicable distributor service standards, including Guarantee Service Level (GSL) schemes.<sup>129</sup> Customers (small customers only in some jurisdictions) who are connected directly to the distributor's network are subject to, by way of local legislation or codes, GSLs covering areas such as reliability customer service and connection and disconnection. Each jurisdiction prescribes GSL schemes, generally for each distribution business. These GSL schemes are determined by jurisdictional regulators and are usually included in a code or license conditions administered by the jurisdictional regulator.<sup>130</sup>

Additionally, distributors and retailers are required to be members of a jurisdictional ombudsman scheme. Energy ombudsmen provide independent dispute resolution services for disputes relating to energy. Small customers can access jurisdictional energy ombudsman to resolve disputes and complaints with their retailer and/or distributor whom are bound by the ombudsman's decision.<sup>131</sup> Customers have the right to refer a complaint against retailers and distributors before the relevant ombudsman and which could be in relation to an energy service, as is explained in more detail in Complaints and Dispute Resolution.

<sup>126</sup> ACL, Section 65.

<sup>127</sup> There is also other legislation that is relevant to the energy market that is out of scope for this first stage of the review. Some jurisdictions have legislative frameworks for the regulation of consumer safety in relation to gas and electrical products and services. For example, *Gas and Electricity (Consumer Safety) Act 2017 (NSW)*.

<sup>128</sup> NERL, Part 7.

<sup>129</sup> NERR, Rule 84.

<sup>130</sup> Chapter 5 in the NER details some power system performance and supply standards (technical requirements), as well as conditions for connection, but do not cover reliability. AEMC, *Review of the regulatory frameworks for stand-alone power systems, Priority 1 - Draft*, 18 December 2018, p. 117.

<sup>131</sup> AEMC, *Review of the regulatory frameworks for stand-alone power systems, Priority 1 — Draft*, 18 December 2018, p. 123.

## Australian Consumer Law

The ACL provides general protections related to consumer guarantees for the supply of goods and services, and liability of manufacturers for goods with safety defects. Under the ACL, the term 'goods' include, among other things, gas and electricity.<sup>132</sup> However, the ACL excludes the application of consumer guarantees to the supply of electricity and gas.<sup>133</sup> The term 'services' include duties, work, facilities, rights or benefits provided in the course of business.<sup>134</sup> Therefore, the ACL has a broad application and will not apply to the supply of electricity and gas, but may apply to other energy services and products acquired by consumers.

### Consumer guarantees

Consumer guarantees provide consumers with a set of rights for the goods and services they acquire.<sup>135</sup> Suppliers and manufacturers automatically provide guarantees about certain goods they sell, hire or lease, and services they provide to consumers. These rights exist regardless of any specific warranty provided by the supplier or manufacturer.<sup>136</sup>

In particular, the ACL excludes the application of consumer guarantees to the supply of electricity and gas. However, these provisions may apply in relation to the provision of other goods, such as solar panels or batteries. In general, other energy goods and other types of energy related services may be covered by consumer guarantees when they are sold in trade or commerce and bought by an energy consumer.

Consumers are provided with the following guarantees applicable to goods. A supplier and manufacturer will guarantee that:<sup>137</sup>

- the goods are of acceptable quality
- will match any description provided
- and any express warranties must be honoured.

A supplier guarantees that a consumer is buying goods:

- that have clear title, unless otherwise stated
- that do not have undisclosed securities
- that are fit for any disclosed purpose
- with the right to undisturbed possession
- that match the sample or demonstration model provided.

In terms of services, a supplier guarantees that services are provided:

- with due care and skill
- which are fit for any specified purpose
- within a reasonable time (when no time is specified).<sup>138</sup>

### Liability of manufacturers for goods

Consumers can also seek compensation for the amount of loss or damages caused by a safety defect in goods supplied by a manufacturer (such as batteries or solar panels). A manufacturer of goods is liable to compensate an individual if they supply a good with a safety defect and the

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132 Ibid, p. 38.

133 ACL, Section 65.

134 Ibid, p. 39.

135 ACCC, Consumer guarantees, a guide for business and legal practitioners, 2016.

136 Ibid p. 7.

137 ACL, sections 51-64A.

138 Ibid.

consumer or another individual suffers injury because of the safety defect.<sup>139</sup> The manufacturer is also liable to compensate an individual if they supply a good with a safety defect and:

- other consumer goods are destroyed or damaged by the safety defect<sup>140</sup>
- land, buildings or fixtures are destroyed or damaged by the safety defect.<sup>141</sup>

Energy customers are protected by the specific provisions under the NECF for the supply of energy and by the core principles of ACL's consumer guarantees for the supply of other energy goods and services, such as batteries or solar panels.

## Complaints and dispute resolution

As mentioned earlier, under the NECF, energy customers have two mechanisms to resolve complaints and disputes. Under the NERL, retailers and distributors must have their own standard complaint and dispute resolution procedures and, must also be members of an energy ombudsman scheme to resolve any relevant matter concerning the customer and a retailer or distributor.<sup>142</sup>

The NECF provides certain circumstances where the customer can initiate a dispute or submit a complaint to the retailer or distributor, under their standard complaints and dispute resolution procedures, or to the relevant energy ombudsman. Below are some examples of disputes that customers can initiate under the NECF:<sup>143</sup>

- the carrying out of an energy marketing activity by a person
- retailer's obligations before and after a customer retail contract is formed
- deemed standard connection contracts between small customers and distributors and deemed standard arrangements between small customers and retailers
- a negotiated connection contract between a small customer and a distributor
- a distributor's decision under the small compensation regime<sup>144</sup>
- billing disputes.

## Additional protections under the NECF

In addition to the above mentioned protections, the NECF provides other protections that recognise energy as an essential service. These additional protections for energy consumers are related to:

- guaranteed connection and limitations on disconnections and energy interruptions
- customers facing financial difficulty
- customers requiring life support equipment.

## Disconnection and reconnection

Under the NECF, retailers and distributors must comply with different requirements before disconnecting a customer's premises, there are certain limitations for interruptions and there is a general obligation to maintain customer connection.

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139 ACL, Sections 138, 139.

140 ACL, Section 140.

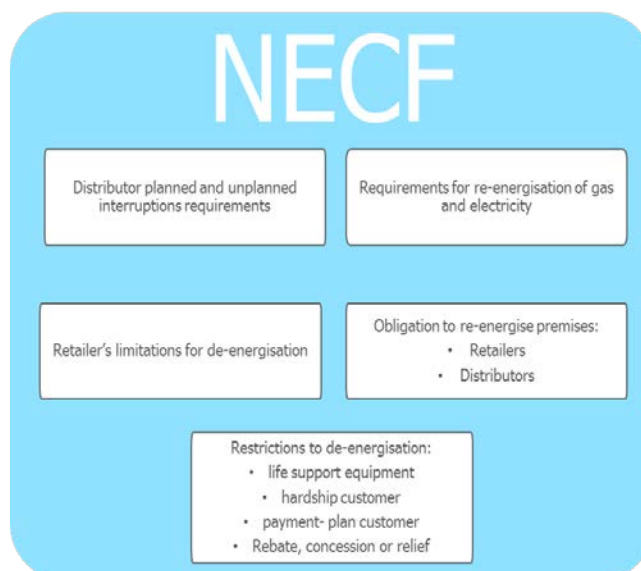
141 ACL, Section 141.

142 NERL, sections 80-86.

143 Customers can request the review of their energy bill and the retailer must review it, reply to the customer and inform that the customer may lodge a dispute with the energy ombudsman after the retailer reviews the bill if the customer is unsatisfied with the decision. NERR, rule 29.

144 NERL, Section 79.

**Figure 5: Disconnection/reconnection protections**



These consumer protections include:

1. Distributor planned interruptions: a distributor must use its best endeavours to restore the customer's energy supply as soon as possible.<sup>145</sup>
2. Limitations for de-energisation: retailers and distributors must not de-energise a customer's premises except in accordance with the rules.<sup>146</sup> The circumstances where retailers or distributors may de-energise a customer premises are prescribed by the rules as follows:
  - a. when the customer does not pay the energy bill<sup>147</sup>
  - b. when the customer does not pay the security deposit<sup>148</sup>
  - c. when the customer denies access to the meter<sup>149</sup>
  - d. for illegally use of energy or interference<sup>150</sup>
  - e. for non-notification by move-in or carry-on customers<sup>151</sup>
  - f. other specific reasons for distributors (health and safety, false information, safe access, among others).<sup>152</sup>
3. Requirements for de-energisation: retailers and distributor must not arrange the de-energisation of a customer's premises where:<sup>153</sup>
  - a. the premises are registered as having life support equipment
  - b. the customer has made a complaint directly related to the reason for the de-energisation

145 NERR, Rule 90(3).

146 NERR, Rule 107.

147 NERR, Rule 111.

148 NERR, Rule 112.

149 NERR, Rule 113.

150 NERR, Rules 114, 119.

151 NERR, Rule 115.

152 NERR, Rules 119.

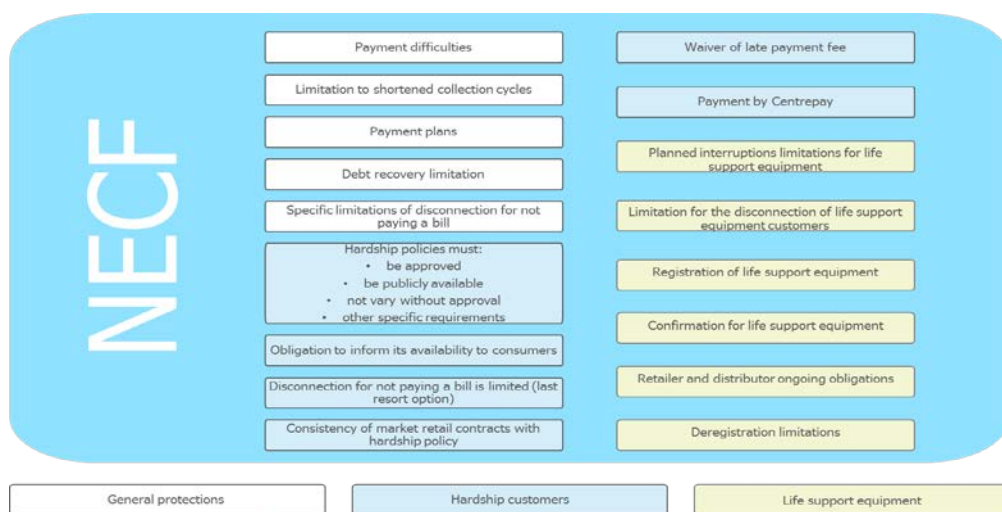
153 NERR, Rule 116.

- c. the customer has contacted the retailer raising the issue that no explicit consent was obtained and the issue remains unresolved
  - d. the customer is a hardship customer or a residential customer into a payment plan
  - e. the retailer is aware that the customer has formally applied for assistance to an organisation responsible for a rebate, concession or relief
  - f. the de-energisation ground is for non-payment of other goods and services other than the sale of energy
  - g. the amount outstanding that has not been paid by the customer is less than an amount approved by the AER
  - h. the customer is going to be disconnected for not paying the bill during extreme weather event or during a protected period.
4. Re-energisation of gas and electricity: retailers and distributors are required to re-energise a customer gas and electricity supply in accordance with the energy laws. Retailers and distributors must notify each other that the premises have been re-energised as soon as practicable.<sup>154</sup>
  5. Obligation to re-energise: retailers and distributors must arrange the re-energisation of premises if, within ten business days, the customer rectified or made satisfactory arrangement to solve the matter that lead to the de-energisation.<sup>155</sup>

## Financial difficulty

The NECF has additional protections for consumers when they are experiencing payment difficulties with their energy bills, they are in financial difficulty due to hardship, or they need life support equipment. As the NECF is an energy specific framework, these types of regulations are focused on energy consumers and therefore, the ACL does not contain any similar provisions. Figure 6 below lists these additional consumer protections under the NECF.

**Figure 6: Additional protections**



Under the NECF, retailers are required to provide support and assistance to their customers who are experiencing financial difficulty to pay their energy bills. The following are the additional consumer protections that the NECF provides:

154 NERR, Rule 106.

155 NERR, Rules 121, 122.

1. Payment difficulties: retailers must provide, to hardship customers or other residential customers experiencing payment difficulties, information about the availability of government funded energy charge rebate, concessions or relief schemes.<sup>156</sup>
2. Shortened collection cycles: retailers may place a small customer on a shortened collection cycle, unless the customer is experiencing payment difficulties.<sup>157</sup>
3. Payment plans: a retailer must offer and apply payment plans for hardship customers and customers experiencing payment difficulties.<sup>158</sup> A retailer must comply with the requirements on how to offer and when to offer payment plans.<sup>159</sup>
  - a. The payment plan must consider:<sup>160</sup>
    - the customer's capacity to pay
    - any arrears owing by the customer
    - the customer's expected energy consumption needs over the following twelve months
    - including an offer of advance payments or in arrears by instalment payments.
  - b. Information: a retailer must inform the customer of certain information about the plan and payment instalments.<sup>161</sup>
4. Debt recovery: retailers must not commence proceedings for recovery of a debt if the customer is complying with a payment plan or other payment arrangement or the retailer has failed to comply with the requirements of its hardship policy, payment plans and assistance for customers experiencing hardship or payment difficulties.<sup>162</sup>
5. Specific limitations of disconnection for not paying the bill: once a customer (hardship customer or residential customer) informs the retailer that the customer is experiencing payment difficulties, a retailer must not arrange the de-energisation of the customer's premises for not paying the bill. It may only arrange the de-energisation if the retailer has offered the customer 2 payment plans in the previous 12 months and:
  - the customer agreed to neither of them
  - the customer has agreed to a plan but it has been cancelled due to non-payment.<sup>163</sup>
6. Hardship policy: retailers must develop and maintain a hardship policy for residential customers that must be approved by the AER and be publicly available on the retailer's website.<sup>164</sup> Any variation to a hardship policy is subject to the approval of the AER.<sup>165</sup>
  - a. Obligation to inform consumers: the NERL requires that where it appears to the retailer that a customer did not pay its energy bill due to hardship, the retailer must inform the residential customer the availability of the policy.<sup>166</sup> A retailer must inform a hardship customer of the retailer's hardship policy as soon as practicable after the customer is identified as a hardship customer. A retailer must also provide the hardship customer with a copy of the customer hardship policy on request and at no expense.<sup>167</sup>
  - b. Policy requirements: a retailer's customer hardship policy (or variation) submitted to the AER must:<sup>168</sup>

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156 NERR, Rule 33.

157 NERR, Rule 34.

158 NERL, Section 50(1).

159 NERL, Section 50(2).

160 NERR, Rule 72.

161 Ibid.

162 NERL, Section 51.

163 NERR, Rule 111.

164 NERL, Section 43.

165 NERL, Section 43(4).

166 NERL, 46.

167 NERR, Rule 71.

168 NERR, Rule 75B.

- i. comply with the customer hardship policy guideline
  - ii. include standardised statements informing customer of how the retailer will comply with the minimum requirements and providing guidance on customer rights and retailer obligations
  - iii. contain clear and specific statements of the actions the retailer will take to meet the minimum requirements
  - iv. be submitted within 3 months of any amendment to the AER's guideline
  - v. be implemented as approved by the AER
  - vi. be published on the retailer's website as soon as practicable after it has been approved.
- c. Disconnection as last resort: a retailer must give effect to the general principle that de-energisation (disconnection) of the premises of a hardship customer due to the inability to pay is a last resort option.<sup>169</sup>
  - d. Contractual consistency: the terms of a market retail contract have no effect to the extent they are inconsistent with the application of the retailer's hardship policy to the relevant customer.<sup>170</sup>
  - e. Payment by Centrepay: any standard retail contract offered to a hardship customer must have Centrepay available as a payment option.<sup>171</sup>
  - f. Waiver of late payment fee: a retailer must waive any fee payable for late payment under a customer retail contract with a small customer who is a hardship customer.<sup>172</sup>

## Life support equipment

Additionally, the NECF protects customers that require life support equipment. The following are the specific consumer protections for these customers:

1. Planned interruption limitations: a retailer or distributor may only arrange a planned interruption to the premises of a person that requires life support equipment by obtaining the affected customer's explicit consent to the interruption occurring on a specific date.<sup>173</sup>
2. Limitations for disconnection: a retailer or distributor must not arrange the de-energisation of a customer's premises where the premises are registered as having life support equipment.<sup>174</sup>
3. Registration of life support equipment: when a retailer is advised by a customer that a person residing or intending to reside at the premises requires life support equipment, the retailer or distributor must:<sup>175</sup>
  - a. register that a person at the premises requires life support equipment and the date from which the life support equipment is required
  - b. inform the customer that is being registered within five business days
  - c. notify the retailer or distributor (as applicable) that a person residing or intending to reside at the premises requires life support equipment and the date from which the life support equipment is required.
4. Medical confirmation requirements: the retailer or the distributor must give the customer fifty business days to give medical confirmation and send in the meanwhile two reminder notices that this must be provided.<sup>176</sup>

169 NERL, Section 47.

170 NERL, Section 48.

171 NERR, Rule 74.

172 NERR, Rule 73.

173 NERR, Rules 59C, 90.

174 NERR, Rules 116, 120.

175 NERR, Rule 124.

176 NERR, Rue 124A.

5. Ongoing obligations: the retailer or the distributor must not arrange for the de-energisation of registered premises as requiring life support equipment, except in the case of an interruption.<sup>177</sup>
6. Deregistration of premises: a retailer or distributor may only deregister a customer's premises that requires life support equipment if:<sup>178</sup>
  - a. the customer did not provide medical confirmation and the retailer or distributor has:
    - i. complied with the timeframe and notification requirements (medical confirmation requirements)
    - ii. taken reasonable steps to contact the customer
    - iii. provided the customer with a deregistration notice no less than fifteen business days from the issue of the second confirmation reminder notice.
  - b. the customer has advised that the person from whom the life support equipment is required has vacated the premises or no longer requires life support equipment, the retailer or distributor provided the required written notice with the date of deregistration.
  - c. the distributor becomes aware that the customer has transferred retailers at that premises, the distributor may deregister with the required written notice and the date of deregistration.

## Jurisdictional modifications

The NECF applies in each participating jurisdiction through state and territory laws.<sup>179</sup> Each jurisdiction has adopted the NECF at different periods of time.<sup>180</sup> Also, jurisdictions can (and have) modified the application of parts of the NERL and NERR in their state or territory for example, by creating additional consumer protections or obligations on retailers or distributors.

The NECF was designed to regulate the sale and supply of electricity and gas to retail customers across the NEM. As noted in, state or territory modifications are creating regulatory inconsistency across jurisdictions which can potentially increase costs and barriers to entry and expansion in the retail market. In previous reviews the Commission noted that jurisdictions should consider harmonising their energy consumer protection arrangements so that barriers and costs are minimised.

The Queensland Government has commenced a review to assess whether the NERL (as adopted in Queensland) has met its objectives in terms of increased efficiencies and consumer protections, and to ensure the regulation is delivering a net benefit to Queensland customers.<sup>181</sup> Specifically the review is focussed on the impact of the NERL, including the state specific modifications, on consumers of energy and whether the implementation of the Law has resulted in increased efficiencies or adversely affected customer protection in pursuit of national consistency.<sup>182</sup>

The Commission supports this type of review and notes that other jurisdictions may wish to consider this process as a way to continue with regulatory consistency across the NEM. The Commission encourages that any jurisdictional modification should be considered as changes across the national framework and done through the rule change process. In addition to these jurisdictional actions (reviews), states and territories should recommit to pursue nationally consistent energy regulation wherever possible.

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177 NERR, Rule 124B.

178 NERR, Rule 125.

179 NERL, Part 2.

180 The NECF commenced in the Australian Capital Territory and Tasmania on 1 July 2012, followed by South Australia on 1 February 2013, New South Wales on 1 July 2013 and Queensland on 1 July 2015. Victoria has adopted the NECF in a limited manner.

181 Queensland Government, Review of the National Energy Retail Law in Queensland, Discussion paper, January 2019.

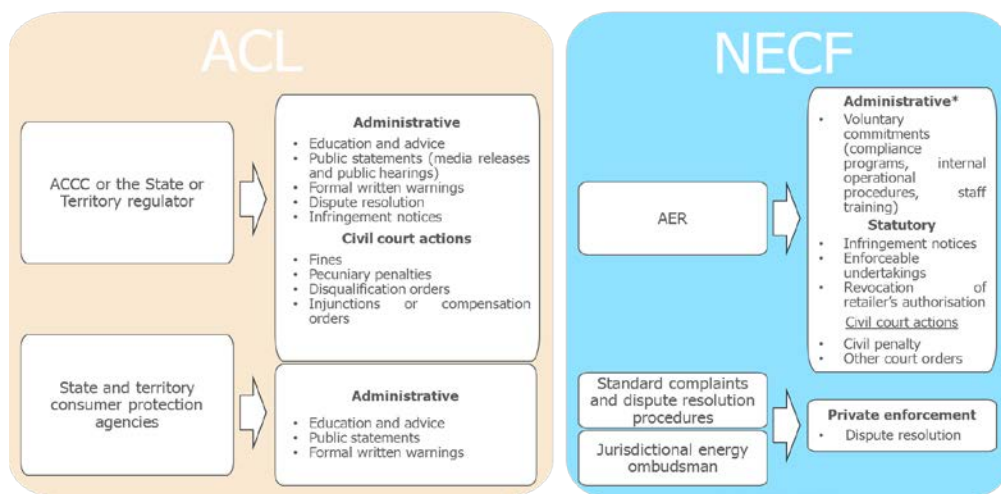
182 Ibid.



## How the NECF and the ACL are enforced

Under the NECF and the ACL, compliance and enforcement powers are exercised in different ways. Each framework has its own regulators, agencies and processes to ensure consumer protection. The NECF contains civil and private enforcement remedies. In addition to these, the ACL contains civil and administrative remedies but also criminal enforcement remedies. Figure 7 contains more detail about these elements of compliance and enforcement.

**Figure 7: Remedies and enforcement**



Note: \*The NECF does not set administrative responses/actions.

## National Energy Customer Framework

Under the NECF, the AER has responsibilities for enforcement of the laws and rules relating to electricity and gas retail markets in participating jurisdictions. One of the guiding principles when introducing the national energy market was the need to achieve consistency in energy regulation. The aim of consistency is one of the reasons for the enforcement regime and remedies under the NECF (including quantum of pecuniary penalties) being similar to those on the NEL and the National Gas Law.<sup>183</sup> Many of the information, contract terms, hardship and life support requirements under the NERR are civil penalty provisions and, as such, carry a more significant consequence in case of a breach.

### Enforcement functions and power of the AER

The AER is responsible for monitoring, investigating, enforcing and reporting on compliance by regulated entities under the NERL and NERR.<sup>184</sup> The AER has a range of enforcement responses to breaches of obligations under NECF, which can be categorised broadly as either 'administrative' or 'statutory' actions.<sup>185</sup>

### Administrative responses

Administrative responses are informal enforcement options, which are not expressly provided for under the statutory framework. For example, such responses may include voluntary commitments to rectify non-compliance by implementing a compliance program, improving internal operational

<sup>183</sup> COAG, Review of enforcement regimes under the National Energy Laws.

<sup>184</sup> See section 204 of the NERL for AER's functions.

<sup>185</sup> While terms 'administrative' and 'statutory' responses are not formally used in the NERL, they have been adopted by the AER under its Compliance and Enforcement — Statement of approach.

procedures or conducting staff training. The AER has no legal power to enforce voluntary commitments.<sup>186</sup>

As stated in the AER's current Compliance and enforcement — Statement of approach, the AER is more likely to act administratively where the effect of an actual or potential contravention is limited, and the business has taken (or agreed to take) appropriate steps to end the conduct and to remedy any harm done.<sup>187</sup> A decision by the AER to resolve a matter by way of an administrative response does not amount to an acceptance or approval of the conduct, nor does it remove a business's responsibility for the breach. In each case the AER reserves the right to take statutory enforcement action in the event that information on which they based their initial assessment is subsequently found to have been incomplete, inaccurate or misleading or if the administrative action proves to be ineffective.<sup>188</sup>

### Statutory enforcement

Statutory enforcement action involves the AER taking action under its enforcement powers under the NERL. For example, by issuing an infringement notice or initiating court proceedings.

The AER undertakes a risk assessment of each obligation in the NECF to assist in targeting and prioritising monitoring and compliance activities. The risk assessment involves an analysis and ranking of each obligation to determine its compliance risk, based on two criteria:<sup>189</sup>

- the impact on businesses, consumers and other stakeholders of a breach of the obligation
- the probability that a breach would occur.<sup>190</sup>

The AER is more likely to institute civil proceedings in cases where conduct:

- resulted in significant detriment
- demonstrated a blatant, ongoing or serious disregard for the law
- is widespread, such that enforcement action is likely to have a significant deterrent effect
- is that of a person, business or sector that has a history of previous breaches of energy laws
- is of significant public interest or concern
- involves a new or emerging market issue.<sup>191</sup>

### AER's statutory enforcement actions

The AER has certain statutory rights of action that it may take in respect of a breach (or purported breach) of the NERL and NERR prior to (or as an alternative to) initiating Court enforcement proceedings. These include the power to:

- issue infringement notices<sup>192</sup>
- seek enforceable undertakings.<sup>193</sup>

186 AER, Compliance and Enforcement — Statement of approach, April 2014.

187 AER, Compliance and Enforcement — Statement of approach, April 2014, p. 13.

188 *ibid.*, p. 13.

189 *ibid.*

190 *ibid.*, p. 5.

191 *ibid.*

192 An infringement notice provides the recipient the option of either paying a penalty, or choose to have the matter heard in Court. Under s. 308 of the NERL, the AER's infringement notice regime in Part 7 of Chapter 8 of the NGL apply to civil penalty provisions in the NERL in the same way as they apply to civil penalty provisions in the NGL.

193 Under s. 288 of the NERL, the AER may accept a written undertaking from a person in respect of a breach by that entity of the NERL, NERR or Regulations. An entity may withdraw or vary the undertaking at any time, but only with the consent of the AER. If the AER considers the entity person has breached the terms of the undertaking, it can apply to a Court for an order - e.g. an order that: (a) the party comply the undertaking; (b) the party pay the Cth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach; (c) an order directing the party to compensate any person who has suffered loss or damage as the result of the breach.

## Infringement notices

Under the NERL, the AER may serve an infringement notice on a person that the AER has reason to believe has breached a civil penalty provision. The AER must serve an infringement notice no later than 12 months after the date on which it forms a belief that there has been a breach of a civil penalty provision.<sup>194</sup>

Infringement penalties are set at \$4,000 for a breach by a natural person or \$20,000 for a breach by a body corporate. In each case, this represents 20 per cent of the maximum civil penalty that may be imposed by a Court in respect of the same breach. Once the AER issues an infringement notice, it cannot subsequently start formal proceedings unless the recipient of the notice fails to comply with the notice within the time for payment specified or the AER has not otherwise withdrawn the infringement notice. If the infringement penalty is not paid, then proceedings may be instituted.

## Civil proceedings

The AER may, institute civil proceedings in a Court in relation to an alleged breach of any provision of the NERL and NERR, provided the provision is not an 'offence provision'.<sup>195</sup>

Where an application is made, a Court may make an order declaring that a person is in breach of a provision of the relevant NERL, NERR or regulations.<sup>196</sup> The Court's order may include one or more of the following:

- *civil penalty* — an order that the person pay a civil penalty (provided it is a breach of a civil penalty provision)
- *order to cease* — an order that the person cease, within a specified period, the act, activity or practice constituting the breach
- *order to remedy breach* — an order that the person take such action, or adopt such practice, as the Court requires for remedying the breach or preventing a recurrence of the breach
- *compliance program* — an order that the person implement a program for compliance with the NERL, NERR or regulations
- *other orders* — an order of a kind prescribed by the Regulations.<sup>197</sup>

Where the order requires payment of a civil penalty, the Court must (when determining the quantity of the penalty) have regard to:

- the nature and extent of the breach
- the nature and extent of any loss or damage suffered as a result of the breach
- the circumstances in which the breach took place, whether the person in breach has engaged in any similar conduct and whether the person had established and been complying with any compliance policies systems and procedures.<sup>198</sup>

The NERL defines a civil penalty as:<sup>199</sup>

- in respect of a breach by a natural person, an amount not exceeding:
  - \$20,000
  - \$2,000 for every day during which the breach continues
- in respect of a breach by a body corporate, an amount not exceeding:
  - \$100,000

<sup>194</sup> NGL, Section 277 (which is adopted by way of NERL, Section 308).

<sup>195</sup> Civil penalty provisions and conduct provisions are not "offence provisions" for the purposes of the NERL. The NERL defines an offence provision as a provision of the NERL "the breach or contravention of which by a person exposes that person to a finding of guilt by a court".

<sup>196</sup> NERL, Section 291.

<sup>197</sup> NERL, Section 291(2).

<sup>198</sup> NERL, Section 294.

<sup>199</sup> NERL, Section 2.

- \$10,000 for every day during which the breach continues.

In addition to the orders set out above, the Court may also, on application by the AER, grant an injunction restraining a person from engaging specific conduct or otherwise requiring the person to undertake an act.<sup>200</sup>

### Revocation of retailer's authorisation

The AER also has the powers under the NERL to revoke a retailer authorisation if it is satisfied that there has been a material failure by a retailer to meet its obligations under the NERL, and there is a reasonable concern that the retailer will not be able to meet its obligations in the future. Revoking a retailer authorisation prohibits a retailer from selling energy in any participating jurisdiction.<sup>201</sup> The AER is required to provide reasons for any revocation and provide the retailer with an opportunity to demonstrate why its authorisation should not be revoked and to present a proposal to address the AER's concerns.<sup>202</sup>

### Private enforcement

Under the NERL 'a person other than the AER' may seek an order from a Court to recover the amount of loss or damage based resulting from a breach of a conduct provision.<sup>203</sup> However, currently there are no conduct provisions nominated in the NERL.

### Small compensation claims regime

Additionally, as mentioned (see section Services standards and quality), the NERL also provides a small compensation claims regime which enables residential and small business customers to make claims for compensation from distributors. Under the regime, customers do not have to establish fault, negligence or bad faith on the part of a distributor in order to receive compensation from the distributor.<sup>204</sup> However, no participating jurisdiction has opted-in to the small claims compensation framework to date.

### Customer dispute resolution via energy ombudsman

As explained (see section Complaints and dispute resolution), the NERL provides for small customer complaints management by jurisdictional energy ombudsman. Ombudsman services are free to consumers. Under that framework, jurisdictional energy ombudsman:

- receives small customer complaints and disputes
- investigates those complaints and disputes
- facilitates the resolution, and resolve, those complaints and disputes
- identifies and advises on systemic issues as means of preventing complaints and disputes.<sup>205</sup>

Retailers must be a member of, or subject to, an energy ombudsman scheme for each jurisdiction where it sells electricity to small customers or engages in an energy marketing activity. Distributors must also be members of, or subject to, such schemes for each jurisdiction where it has small customers connecting to their distribution system.<sup>206</sup>

### Coordination of the ACCC and the AER

The AER works together with the ACCC to ensure that misconduct in the energy market is addressed and that they seek to avoid duplication and ensure they apply a consistent and coordinated approach. Businesses operating under the NECF also have obligations under the ACL that apply to their relationships with energy customers, including obligations relating to unsolicited

200 NERL, Section 291(3) and (4). AER, Compliance and Enforcement — Statement of approach, April 2014, p. 17

201 NERL, Section 120. AER, Compliance and Enforcement — Statement of approach, April 2014, p. 17.

202 NERL, Section 120(3) and (4). AER, Compliance and Enforcement — Statement of approach, April 2014, p. 17.

203 NERL, Sections 292, 293.

204 NERL, Part 7.

205 NERL, Part 4.

206 NERL, Section 86.

consumer agreements. The AER notes that the ACL and the NECF operate together, providing the framework in which these businesses are required to operate.<sup>207</sup> There is an information policy between the AER and the ACCC which provides guidance on the collection, use and disclosure between the two agencies.<sup>208</sup>

## Australian Consumer Law

The ACL is administered and enforced jointly by the ACCC (national), the jurisdictional regulators and the state and territory consumer protection agencies, with the involvement of Australian Securities and Investments Commission on relevant matters.<sup>209</sup> For the purposes of the application of the ACL, each state and territory regulator is independent and has its own enabling legislation and exercises its powers and functions accordingly.<sup>210</sup> The ACCC has national responsibilities and can act in all states and territories.

The ACCC is the national regulator responsible for monitoring, investigating, enforcing and reporting on compliance with obligations under the ACL in respect of systemic conduct in trade or commerce at a national level and consistent with published priorities.<sup>211</sup> Each state and territory regulator is responsible for the same compliance functions and powers but at a jurisdictional level. The ACCC and the jurisdictional regulators (ACL regulators) can choose how they will use their resources to pursue particular cases to achieve the most effective outcomes for both individual consumers and consumers in general.<sup>212</sup>

Because ACL regulators cannot pursue every complaint received, they must consider complaints carefully and exercise discretion, directing resources to matters that can result in industry-wide change or provide the greatest overall benefit for consumers. As these discretionary matters may vary within or between jurisdictions, priorities for enforcement action differ accordingly.<sup>213</sup> Each year, the ACCC sets out its compliance and enforcement priorities. In 2019, its priorities include 'consumer and competition issues arising from opaque and complex pricing of essential services, in particular those in energy and telecommunications'.<sup>214</sup>

The ACCC is not a complaint handling body, and rarely becomes involved in individual consumer or small business disputes. For example, there are certain matters that are less likely to be pursued by an ACL regulator that:

- are one-off, isolated events
- are more appropriately resolved directly between the parties under an industry code (for example, by mediation or an industry dispute resolution body such as the energy ombudsman)
- involve issues more effectively dealt with by another agency
- are best deal with between private parties.<sup>215</sup>

Instead, consumers are encouraged to bring complaints related to these matters to the consumer protection agency in their state or territory. Each state and territory has its own consumer protection agency that administers the ACL in its jurisdiction.<sup>216</sup> These agencies have signed a

207 AER, Compliance and Enforcement — Statement of approach, April 2014.

208 See [www.aer.gov.au/publications/corporate-documents/accc-and-aer-information-policy-and-disclosure-of-information](http://www.aer.gov.au/publications/corporate-documents/accc-and-aer-information-policy-and-disclosure-of-information).

209 Some consumer protection provisions in the ACL are mirrored in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to financial products and services. ASIC is responsible for administering and enforcing the ASIC Act.

210 Compliance and enforcement: How regulators enforce the Australian consumer law, p. 12.

211 Compliance and enforcement: How regulators enforce the Australian consumer law, p. 5.

212 Compliance and enforcement: How regulators enforce the Australian consumer law, p. 8.

213 Compliance and enforcement: How regulators enforce the Australian consumer law, p. 8.

214 Compliance and enforcement: How regulators enforce the Australian consumer law, p. 8.

215 *ibid.*

216 ACT: Access Canberra; NT: Northern Territory Consumer Affairs; VIC: Consumer Affairs Victoria; NSW: NSW Fair Trading; QLD: QLD Office of Fair Trading; SA: Consumer and Business Services South Australia; WA: WA Department of Commerce, Consumer Protection.

Memorandum of Understanding which sets out the way in which they will work together to administer and enforce the ACL.<sup>217</sup>

ACL regulators have a range of enforcement tools and strategies to facilitate compliance with the law. In addition to those, the ACL provides private rights that consumers can enforce through federal, state and territory courts and tribunals. Each of these compliance and enforcement options are explained below.

### Enforcement tools and remedies

Each ACL regulator carries out its compliance and enforcement obligations using its own framework, tailor-made for its own jurisdiction, but aimed at consistent application of the ACL across all jurisdictions. ACL regulators take a risk-based approach to enforcement. Compliance and enforcement activity targets areas of strategic priority, with a focus on incidents with evidence or likelihood of consumer detriment.<sup>218</sup>

To be effective, compliance measures must be supported by a range of escalating enforcement options that can be used if a trader fails to comply or when there is a serious contravention of the ACL. The ACL regulators have a range of civil, administrative and criminal enforcement remedies at their disposal under the ACL and supporting state and territory legislation.<sup>219</sup>

ACL regulators will choose the most appropriate enforcement tools to achieve these outcomes in a timely and proportionate manner. The regulators have a range of possible enforcement responses to breaches of obligations under the ACL, including both administrative style enforcement options, as well as civil and criminal enforcement remedies. Administrative tools and strategies include:<sup>220</sup>

- providing education and advice to traders
- making public statements such as media releases and public warnings
- issuing formal written warnings
- encouraging dispute resolution
- issuing infringement notices.

Civil court action may result in fines, pecuniary penalties, disqualification orders, injunctions or compensation orders.<sup>221</sup>

The pyramid below (Figure 8) summarises the general compliance approach under the ACL.

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217 See the MOU here: [consumerlaw.gov.au/files/2015/06/acl\\_mou.pdf](https://consumerlaw.gov.au/files/2015/06/acl_mou.pdf).

218 Compliance and enforcement: How regulators enforce the Australian consumer law, p. 5.

219 Compliance and enforcement: How regulators enforce the Australian consumer law.

220 *ibid.*

221 ACL, Chapter 5.

**Figure 8: Compliance and enforcement options**



Source: Commonwealth of Australia, Compliance and enforcement, How regulator enforce the Australian Consumer Law, January 2017, p. 12.

The ACL is enforced by courts and tribunals in each jurisdiction subject to the specific rules that apply to enforcement processes, courts and tribunals in each state and territory jurisdiction. Litigation is costly compared to administrative compliance and enforcement actions. Aside from compliance and enforcement by the ACL regulators, the ACL creates private rights that consumers can enforce through Commonwealth, state and territory courts and tribunals.

In order to take enforcement action in this way, consumers need to be aware of their rights and responsibilities, and how to obtain redress. Providing information and advice to consumers for this purpose is a key function of the ACL regulators. It is often recognised that there are substantial barriers to seeking redress through the formal court mechanisms discussed above, which makes it difficult for individuals to seek redress. These barriers include the intimidating nature of the legal process, lack of awareness about existing legal rights, the time and cost of seeking redress as well as the emotional stress involved. For this reason, more informal forms of redress are considered important in ensuring more effective implementation and enforcement of consumer law.

As mentioned, the ACCC does not handle individual disputes; rather it prioritises enforcement action on more widespread issues that reflect the potential for greater consumer detriment. State and territory ACL regulators therefore play an important role in resolving disputes between consumers and traders about goods and services covered by the ACL. These local regulators provide information on their websites about dispute resolution and trader engagement programs.

If a consumer has a complaint about a business, they are first encouraged to contact the business to resolve or settle the dispute informally. If the consumer cannot resolve the concern in this way, they may contact their State or Territory ACL regulator. The local ACL regulator can investigate a business when a law may have been broken, even if the complaint was resolved. Where a dispute cannot be resolved directly between the consumer and business, alternative dispute resolution schemes can help consumers to resolve issues with businesses without going to court, such as energy ombudsman schemes.

Table 1 contains more detail on how courts and regulators apply the enforcement tools and who is the person that can start the process (claimant) under the ACL (as contained in the *Competition and Consumer Act 2010*).

**Table 1: Tools and remedies**

<b>TOOL OR REMEDY</b>	<b>ENFORCEMENT BODY</b>	<b>DESCRIPTION</b>
Pecuniary penalties	Court	<p>A Court may order a person to pay to the Commonwealth, State or Territory, as the case may be, a pecuniary penalty where it is satisfied the person has contravened or attempted to contravene a relevant provision.</p> <p>However, pecuniary penalties do not apply to unfair contract term provisions (ACL, Part 2-3).</p> <p>The pecuniary penalty must not exceed the amount worked out using the table set out in the ACL. If the person is a body corporate, the greatest of:</p> <ul style="list-style-type: none"> <li>\$10,000,000</li> <li>if the court is able to determine the value of the benefit obtained directly or indirectly attributable to the conduct – then 3 times the value of that benefit</li> <li>if the court cannot determine the value of the benefit – 10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the conduct occurred or started to occur.</li> </ul> <p>If the person is not a body corporate, \$500,000.</p>
Injunctions	Court or Regulator	<p>A court may grant an injunction if satisfied that a person has engaged in conduct that would constitute a contravention of the general protections (ACL, Chapter 2). This includes unfair contract term provisions, misleading or deceptive conduct, unconscionable conduct.</p> <p>The injunction may be granted on application by the regulator or any other person.</p>
Damages	Court	<p>If a person suffers loss or damage because of the conduct of another person and the conduct contravened the general and specific protection under the ACL (Chapter 2 and 3), the claimant may recover the amount of the loss or damage by action against that other person.</p>
Compensation orders for injured person	Court	<p>An injured person may apply to a court for an order where the person has suffered loss or damage because of the conduct of another person contravened the general and specific protection under the ACL (Chapter 2 and 3), or constitutes applying or relying on a term of a contract that has been declared under section 250 to be an unfair term.</p> <p>The order must compensate the injured person or prevent or reduce the loss or damaged suffered.</p> <p>A regulator may make an application for an order on behalf of one or more persons where those persons have consented in writing to the making of the application.</p>
Declarations	Court	<p>A court may declare that a term of a consumer contract is an unfair term, on application by a party to the contract or by the regulator. However, such an order can only be made where the contract is a standard form contract and unfair contract terms provisions apply to the contract.</p>



## Non-traditional energy services and products

The evolving nature of the market provides an opportunity to analyse the regulatory challenges, many which lie behind the consumer protection framework under the NECF and the ACL. The Commission will describe three examples to underline specific regulatory challenges that have been identified to start the second stage of the consumer protections review. The examples are the following:

- Distributed energy resources (DER)
- embedded networks
- bulk hot water.

### Consumer protection for distributed energy resources

The NECF was originally developed with the view that all small consumers would be supplied through the interconnected electricity system and would need to enter a retail contract to access energy supply. However, as technology has developed, many products and services, such as solar and battery systems, are now provided by different entities (other than traditional retailers) and the roles of both retailers and these new entities is becoming less distinct.

Currently, the NECF and ACL can apply in different ways depending on the way in which an energy related product or service is provided. Consumers who invest in DER may not have the same protections as customers of traditional grid-supplied electricity. Further, it may not always be clear to a customer what the correct avenue is to resolve a particular complaint relating to DER products.<sup>222</sup>

#### Solar PV and battery system bought from a third party

Under the NECF, the sale of electricity to consumers is prohibited unless the seller holds a current retailer authorisation or an exemption. Where energy is supplied by an exempt seller, the ACL applies in addition to any conditions placed on the exempt seller under the NECF through their exempt seller authorisation.

Currently, when a customer buys a solar PV and battery system from a third party, they will (most likely) be connected to the grid and therefore must purchase electricity from an authorised retailer. In this case, the applicable consumer protections are the:

- NECF for the electricity purchased from the grid
- ACL for the solar PV and battery system.

#### When things go wrong

Customers need to know which is the applicable consumer protection framework when things go wrong. For example, if a customer finds that something has gone wrong in relation to their energy contract with a traditional retailer, the customer is able to contact its retailer in accordance with the dispute resolutions provisions under the NECF. If the result is not satisfactory, the customer is able to escalate the issue to the jurisdictional ombudsman for resolution.

If there is an issue with the solar PV and battery system the customer must contact the original supplier to resolve the fault. If the solar PV and battery components are sourced from different suppliers, they must determine which component is at fault, then contact that supplier. If the manufacturer has gone out of business, the customer must seek resolution elsewhere, possibly the importer (whereas grid supplied customers are protected in the event of a retailers going out of business under the RoLR provisions of the NECF). The customer may also raise any issues with its

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<sup>222</sup> The Clean Energy Council provides customers with guidelines on how to address disputes under different scenarios, and these may provide assistance to reduce some level of customer confusion. For further information see: Clean Energy Council, *Guide to installing solar for households*, Clean Energy Council, Melbourne, 2014.

state-based fair trading agency or the ACCC. Both can assist customers with the mediation of commercial matters, such as warranties, payments and contract issues.

The COAG Energy Council requested industry, consumer groups and other stakeholders to develop an industry-wide Code of Conduct for sellers of distributed energy resource products, systems and services including solar and storage technologies. On 30 April 2019, the Clean Energy Council, the Australian Energy Council, the Smart Energy Council and the ECA lodged an application for authorisation for a New Energy Tech Consumer Code. The proposed voluntary code will set "minimum standards of good practice and consumer protection that will be provided by signatories covering all aspects of the customer experience". The Commission support the industry taking steps to develop a code to address consumer protections for new energy service providers. The Commission will take the proposed voluntary codes into account when assessing whether changes to the NECF are also required to protect consumers for DER.

## Consumer protection for embedded network customers

### What are embedded networks?

Embedded networks are private electricity networks — that is, they are owned and operated by parties that have been exempted from the requirement to register with AEMO — which serve multiple customers and are connected to another distribution or transmission system through a parent connection point. Generally, the exempt network service provider also purchases electricity at the parent connection point and on-sells it to customers at child connection points within the embedded network. Such sales are referred to as being 'off-market', in that they are not conducted through the NEM. On-selling entities must hold a retailer authorisation from the AER or be exempted by the AER from having to hold a retailer authorisation.

Common examples of embedded networks include shopping centres, retirement villages, apartment complexes and caravan parks. Embedded networks may occur as new developments or as retrofits of existing buildings. In recent years, there has been a significant increase in the number and scale of embedded networks, with the residential apartment market being the primary driver of this growth. The Commission estimates there are more than 500,000 customers within embedded networks and this number is growing.

### How are embedded networks regulated?

The NERL requires that a person must be authorised to sell energy to a person for premises unless exempted by the AER from obtaining an authorisation. Similarly, the NEL requires that an entity which owns, controls or operates a transmission or distribution system register with AEMO unless exempted by the AER from doing so. The development of embedded networks brought both opportunities for innovation and potentially new risks for consumers, which challenged the regulatory framework under the NECF.

### Problems with embedded networks

To address this regulatory challenge, the Commission started the *Review of the regulatory frameworks for embedded networks* which was completed in December 2017. From this, the Commission found that the exemption framework is no longer fit for purpose in the face of the growth in the number and scope of embedded networks. The current framework does not strike an appropriate balance between innovation, consumer protection and facilitating consumer access to retail market competition.

In particular, the Commission found significant practical barriers to customers in embedded networks accessing retail market competition, despite earlier regulatory reforms that sought to put in place arrangements to allow for this. Currently, customers of exempt on-sellers in embedded networks are not included in AEMO's retail market systems, and so competing NEM retailers are unable to quote, transfer and bill customers using standard market processes. Bespoke embedded network tariffs and billing arrangements also require NEM retailers to adapt product offerings and

operate manual processes to manage transactions with embedded network customers. These issues mean that, in practice, embedded network customers have limited ability to change supplier if they are unhappy with the price they are paying or the level of service they are receiving.

Embedded network customers do benefit from some consumer protections imposed by the AER as conditions of exempting embedded network operators from registering as an NSP and being authorised as a retailer. However, these consumer protections are more limited than those applicable for standard supply arrangement customers. Consumer protection gaps exist in areas such as:

- de-energisation and re-energisation obligations
- obligations to provide connection services
- life support arrangements
- information provision and ROLR arrangements
- reliability standards and guaranteed service level payments for outages
- safety obligations in some jurisdictions
- access to concessions and ombudsmen schemes in some jurisdictions.

Finally, the current exemption frameworks suffers from an inadequate compliance and monitoring regime. The AER does not place reporting requirements on exempt parties and therefore has no visibility over their compliance with exemption conditions. There are also limited enforcement options available to the AER.

### Next steps

Given the above problems with embedded networks, the Commission recommended changes to the regulatory framework for embedded networks to address the identified issues. The proposed package of changes included:

- improving consumer access to retail market competition in legacy and new embedded networks, by capturing all embedded network customers in AEMO's market systems and by standardising network billing arrangements between embedded networks and NEM retailers
- elevating new embedded networks into the national regulatory frameworks, including through the registration of embedded network service providers (ENSPs), the authorisation of on-selling retailers and the extension of standard NEM metering arrangements to embedded networks
- narrowing the network service provider and selling exemption frameworks for new embedded networks to apply only to circumstances where the costs of registration as an ENSP and retail authorisation would outweigh the benefits to consumers and where the need for regulatory oversight is low
- enhancing consumer protections in legacy and new embedded networks through improving the AER's ability to monitor and enforce exemption conditions, addressing gaps in the NERL and NERR for embedded network customers supplied by an authorised retailer and improving the information provided to consumers entering embedded networks or involved in the conversion of a property to an embedded network.

In its June 2019 final report, the Commission set out a comprehensive package of law and rule changes to implement these recommendations. These are discussed further in .

## Consumer protection for bulk hot water customers

New apartment buildings, usually high rise buildings, have common hot water systems to heat water in a centralised water plant and distribute it to each unit instead of having individual heaters (known as, bulk hot water). This service is being provided to consumers by energy retailers and embedded network operators. The provision of this service has created consumer confusion as it is not clear if it is an energy service, how it is charged and if the NECF is applicable (see Box 4 for further detail).

#### BOX 4: HOW BULK HOT WATER IS PROVIDED

Consumers that are tenants in buildings with a centralised hot water plant, are facing different supply models depending on:

1. Hot water plant ownership: the hot water plant can be developed, maintained, operated and owned by three different persons; a body corporate, an embedded network operator or a retailer.
2. Boundary meters: the hot water plant usually has two boundary meters, one to measure the amount of energy (electricity or gas) that is required to heat and maintain the water heated and another one to measure the amount of water that enters the water plant. In some cases the energy boundary meter does not comply with the energy metering regulations.
3. Hot water meter: hot water is distributed through water pipes and each apartment has a water meter that individually measures the amount of hot water consumed in each unit. However, the ownership and the meter reading responsibilities vary, depending on each building. For some buildings, individual hot water meters are provided by DNSPs. In others, a retailer or embedded network operator is responsible for metering.
4. Other meters: each apartment also has energy and water meters to measure electricity, gas (cook tops) and water individually. However, there are cases where the gas (cook tops) meters are not installed and consumers are charged a fixed rate.\*
5. Billing: a consumer can be billed by an embedded network operator, by a retailer or by a body corporate depending on each case. It is possible that the consumer is billed by different retailers for hot water, gas and electricity.

In general, the retailer or embedded network operator is chosen by the body corporate and consumers (tenants) are not likely to be able to choose the provider for hot water and gas. If implemented, under the new embedded network framework being proposed by the Commission, consumers will be able to choose an electricity provider.

Note: \*the network provider only charges the embedded network for the site's total gas consumption by its energy retailers. Gas meter readings are supplied by the network provider.

### Problems with bulk hot water

#### Is bulk hot water an energy service?

The NECF does not provide a definition for 'sale of energy' or if it is limited to the supply of electricity and gas.<sup>223</sup> Under the NECF it is not clear if the sale of bulk hot water is a sale of energy. Hot water is being provided to customers, in some cases, by energy market participants (authorised or exempted sellers) however, this does not mean that this service is covered by the regulatory framework under the energy laws and rules.<sup>224</sup>

Different energy bodies have provided different regulatory approaches to bulk hot water. For example, the AER states in their retail guidelines that the sale of bulk hot water cannot be considered a 'sale of energy' under the NERL and the NERR.<sup>225</sup> AEMO, without mentioning if the

223 NERL, Section 88.

224 In 2006, Victoria modified the Energy Retail Code to introduce bulk hot water definitions and billing requirements. Energy Retail Code, Part 1, Division 1; Part 2, Division 4, section 20A; Schedule 6, bulk hot water formulas.

225 "Energy selling covers a wide range of activities, from energy retailing by authorised retailers to households and businesses to landlords recovering energy costs from their tenants. Energy 'sales' do not necessarily have to be for profit—even passing on energy at cost to another person is a sale. But we do not consider energy is being sold where energy costs are only one part of another fixed charge (for example, a hotel tariff or rent that includes energy costs), or where the costs are shared (for example, in a group house or a community facility)". AER, Retail Exempt Selling Guideline, March 2018.

sale of hot water is sale of energy or not, provides in their retail market procedures information on how to calculate energy for hot water (common factor) and a hot water meter definition.<sup>226</sup>

Because it is not clear if bulk hot water is a sale of energy, some retailers are including their own definition of bulk hot water in their contracts and applying the contract terms and conditions of a standard retail contract. For example, in the contract terms and conditions of a bulk hot water contract, retailers are including as a requirement that this service must be consistent with the NERL, NERR and the standard retail contract.<sup>227</sup> Under these contractual arrangements, most bulk hot water consumers are paying standing offer prices.

### How is bulk hot water metered and billed?

Retailers and embedded network operators are metering hot water with different types of water meters. The meter used to measure bulk hot water in each building unit is a water meter and not an energy meter. Therefore, it is unclear which metering requirements are applicable and if the energy metering regulation would apply.

For billing, retailers and embedded network operators issue hot water bills or an energy bill that includes separately hot water charges. To calculate the hot water price in cents for each building unit (consumer), providers use a conversion factor (or common factor). The way this factor is calculated and how hot water consumption is disclosed in the bill (in MJ's or litres) may vary depending on each provider.

As a result of these arrangements, consumers are paying an estimated amount of the cost to heat the water they consume which will depend on other external factors as follows:

- Vacancy of the building: the conversion factor will vary depending on the number of people that are consuming hot water in the building. This factor is usually calculated as an average of energy consumed to heat the water plant and the hot water consumers in the building. The boiler will consume the same amount of energy to maintain the water heated at a predetermined temperature and that cost will be divided in the number of hot water consumers. Therefore, each unit will pay a higher price if there is a low rate of vacancy in the building for that billing period.
- Water plant maintenance: if the water plant is not well maintained it will need greater amounts of energy to heat the water at a predetermined temperature.
- Temperature settings: the temperature is set by a designated body (Body Corporate Strata, Owners Corporation, etc.). The higher the temperature is set the more energy is needed to heat the water and it cannot be altered by tenants (for example for saving purposes).
- Water plant efficiency: the water plant needs to be well-designed and insulated to avoid high distribution losses (in terms of energy) that usually happens if the water is stationary in the pipework.
- Individual meters: when the hot water meter is inside the unit and there is no meter data logger (which transmits the meter reading from the internal hot water to a panel elsewhere in the building) customers receive estimated bills for the amount of hot water consumed.

It is therefore likely that consumers are paying high or inaccurate bills for hot water because of these external factors.

### Are there other relevant regulations?

Other regulations, such as the Residential Tenancy Acts, include general requirements to charge tenants for the supply of electricity, gas or in general other services. For example, only if

<sup>226</sup> AEMO, Retail Market Procedures (NSW and ACT) version 20 (Clean) — Effective 14 December 2018.

<sup>227</sup> "Bulk Hot Water System" means the system by which water is centrally heated by gas and delivered to multiple premises located within the premises, but does not include the Meter. EnergyAustralia, Terms and Conditions, [www.energyaustralia.com.au/sites/default/files/legacy/817/740/bhw\\_final\\_ts\\_and\\_cs\\_28062016.pdf](http://www.energyaustralia.com.au/sites/default/files/legacy/817/740/bhw_final_ts_and_cs_28062016.pdf)

the premises are metered separately, providers may charge the tenant.<sup>228</sup> The NSW Civil and Administrative Tribunal decided that the way bulk hot water service is metered does not appear to meet the requirements of the Residential Tenancies Act.<sup>229</sup> The Tribunal found that the supply of gas is indirect and the charges are based on a calculation that includes *extraneous factors*. The Tribunal concluded that is not satisfied with the system disseminating the cost of gas supplied to the premises of every resident and that it is not separately metered.

### Is bulk hot water covered by the Ombudsman schemes?

The government approved ombudsman schemes to solve complaints and dispute resolution between energy consumers and retailers and distributors in each state. However, it is not clear when consumers can access these schemes for hot water services.

The main issues identified by these agencies are:

- inability of customers to access market offers (lack of competition)
- limitation in access to NECF consumer protections
- limitation in access to dispute resolution schemes
- bundles with other services, electricity/bulk hot water, chilled water for air conditioning, air conditioning, telephone and internet services, pay TV, amongst others.

For example, EWON reports that it is able to investigate billing disputes but not those related to the following matters:<sup>230</sup>

- the efficiency, age or condition of the hot water system itself
- the occupancy rate of the dwelling
- action or inaction of a strata corporation, property manager or landlord.

In Victoria, where bulk hot water is being regulated, EWOV has declared that there are certain cases that it cannot investigate, such as:<sup>231</sup>

- most issues with the bulk water system (storage tank and heating equipment)
- most issues related to switching bulk hot water companies
- any complaint related to an Owner's Corporation or Building Management as EWOV can only receive complaints about Scheme Participant.

Currently, some ombudsman agencies have no jurisdiction to provide dispute resolution to embedded network customers or bulk hot water services. Some retailers (if it is the case that hot water is provided by an authorised retailer) have included in their hot water contracts provision to give end users full access to energy ombudsman schemes, Office of Fair Trading and hardship programs. These commercial decisions provide more benefits to consumers and improve competition between retailers and embedded network operators when supplying this service. However, it is unclear how these provisions will fully cover consumers especially if it is not defined as an energy service.

228 Residential Tenancies Act 2010 —NSW, Residential Tenancies Act 1997 — VIC, Residential tenancies Act 1995 — SA, Residential Tenancies Act 1987 — WA, Residential Tenancies Act — Northern Territory, Residential Tenancies and Rooming Accommodation Act 2008 — QLD.

229 Application to the Tribunal concerning UNIT 28/1-17 Alice Street Newtown NSW 2042 Australia, Applicant: Eva Tiborcz, Respondent: NSW Land & Housing Corporation. File No. SH 17/34768.

230 EWON, [www.ewon.com.au/page/making-a-complaint/what-can-i-complain-about/common-hot-water](http://www.ewon.com.au/page/making-a-complaint/what-can-i-complain-about/common-hot-water).

231 [www.ewov.com.au/files/fact-sheet-25-bulk-hot-water\\_0.pdf](http://www.ewov.com.au/files/fact-sheet-25-bulk-hot-water_0.pdf).