

12 February 2020

Australian Energy Market Commission
Level 6 201 Elizabeth St
Sydney NSW 2000

By online portal: <https://www.aemc.gov.au/contact-us/lodge-submission>

Dear AEMC,

Re: Consumer Protections in an Evolving Market: New Energy Products and Services – 2020 Retail Energy Competition Review – Issues Paper 1

Thank you for the opportunity to comment on *Consumer Protections in an Evolving Market: New Energy Products and Services – 2020 Retail Energy Competition Review – Issues Paper 1 (Issues Paper)*.

The Energy and Water Ombudsman (Victoria) (**EWOV**) is an industry-based external dispute resolution scheme that helps Victorian energy or water customers by receiving, investigating and resolving complaints about their company. Under EWOV's Charter, we resolve complaints on a 'fair and reasonable' basis and aim to reduce the occurrence of complaints¹. We are guided by the principles in the Commonwealth Government's Benchmarks for Industry-based Customer Dispute Resolution². It is in this context that our comments are made.

EWOV is conscious that the Issues Paper is drafted in relation to a review of the National Energy Consumer Framework (**NECF**), as part of the broader 2020 Retail energy competition review. As the AEMC are aware, Victoria is not party to the NECF. Instead, we have state specific energy consumer protections administered by the Essential Services Commission (**ESC**), through the Energy Retail Code (**ERC**) and other instruments. Nevertheless, many of the questions raised in the Issues Paper are similar to those we have been considering in discussion with the ESC, the Victorian Department of Environment Land Water and Planning (**DELWP**), and others in relation to our own jurisdiction. To that end we are currently in the process of generating a joint investigative report in conjunction with researchers from the Australian National University (**ANU**), (comprising a desktop review compiled by us and qualitative field research undertaken by the ANU),³ which will explore the current and expected future consumer experience of new energy products and services in Victoria. Accordingly, we hope to provide a useful

¹ See Clause 5.1 of EWOV's Charter: <https://www.ewov.com.au/files/ewov-charter.pdf>

² See EWOV's website: <https://www.ewov.com.au/about/who-we-are/our-principles>

³ The field research will be led by Dr Hedda Ransan-Cooper of the Battery Storage and Grid Integration Program at ANU.

contribution to the AEMC's consultation process, and see great benefit in engaging. In our experience, the customer point of view and the true lived experience of the energy market is not always given timely consideration in regulatory debates. When taken into account, this perspective can lend great clarity to important structural questions of the kind raised in the Issues Paper. In the next few months we will be in a position to forward a draft of our desktop review for the AEMC's interest, which will act as a late addendum to this short submission. The ANU's field research report will be available towards the end of 2020.

In terms of this submission we have not responded to all questions in the Issues Paper as many of them are implicitly addressed by our desktop review, to be forwarded shortly. Instead, we have focused on those questions where recent Victorian experience can be especially informative, or which we regard as highly pertinent to the issue of effective dispute resolution in a future energy system. As an Ombudsman scheme, this is naturally our point of primary concern - and is an area where we anticipate regulatory reform will be required. In the near future, there will be far greater uptake of residential Distributed Energy Resources (**DER**). Accordingly, the way consumers relate to energy as a product will change – many will transition into being energy producers, as well as consumers (i.e. 'prosumers'). Further, new entities (primarily aggregators) will emerge and grow in importance, to facilitate the advantageous use of DER through Virtual Power Plants (VPPS) and other innovative energy use models.

While current 'traditional' energy consumer complaints will continue, we will inevitably see the emergence of new kinds of energy consumer complaints being made against new kinds of energy sector entities, many of which are not contemplated by current energy specific consumer protections - and do not currently fall into the jurisdiction of energy ombudsman schemes. Consumer energy disputes can already be complex, (requiring specialist knowledge to resolve), and will only grow more complex as the energy system changes. If this situation is not addressed, it will inevitably lead to very poor consumer outcomes – and could undermine confidence in, (and slow the growth of), residential DER markets. We hope that by addressing these regulatory questions now, a framework can be devised and implemented to 'clear the path' for a smooth transition into a decarbonised, decentralised energy system operating for the benefit of individual consumers, businesses - and the broader energy grid alike.

While we are already having these discussions in Victoria, we are pleased to also engage with the discussion in other parts of the National Energy Market (**NEM**). Clearly, energy businesses and consumers both stand to benefit from a degree of regulatory consistency across jurisdictions.

Our further comments are set out below.

Question 8. New energy products and services: *For the supply of new energy products and services, is there any risk of consumer detriment that needs to be considered to have additional consumer protections (industry-specific regulation) beyond the voluntary framework? Please explain.*

Based on the research we have been undertaking, there is no doubt that consumer protection for DER and BTM products will need to move beyond the current voluntary framework, and instead be written

into energy specific consumer protection legislation. Further, the business models and constitutional arrangements for energy ombudsman schemes will need to be reformed to widen jurisdictional coverage so that energy consumers (and prosumers) continue to have access to specialised energy dispute resolution services.

This will need to occur because in the medium to long term DER and BTM products and services will shift from their current ‘early adopter’ status (where they are essentially niche products, typically engaged with by informed, proactive consumers), to mainstream energy products and services. In many cases they will serve as consumers’ essential energy supply, and thus warrant a higher, more specific degree of protection than the general consumer protections of the Australian Consumer Law (**ACL**) - or the voluntary protection framework. Put simply - ‘new’ energy products and services will soon be ‘standard’ and will service a much broader proportion of the population. Many DER and BTM energy users will be far less informed and active in their relationship to energy than is currently the case.

Without necessary reforms, an unacceptably high proportion of energy users will be left without adequate specialised energy consumer protection. As is the case with the current energy system, the issues future energy users encounter could range from billing disputes, to provision and supply issues, (such as disconnection), payment difficulties, and poor customer service. They will also include new complaint categories, particularly in relation to product or installation failures, or issues with data (either due to data errors or misuse). Many of those future users will be ‘average’ energy users, who should not be expected to navigate an increasingly complex market without the safety net of mandatory consumer protection.

In the short term, the current voluntary framework serves a useful purpose (and, as the Issues Paper points out, is effectively rendered mandatory in many jurisdictions for those wishing to access government funded programs promoting DER uptake), but in the medium to longer term it will not be sufficient. Such a situation would result in a ‘patchwork quilt’ of consumer protection - consumers would not be protected against businesses who choose not to participate in the voluntary framework, and many consumers will not be engaged enough to know whether their provider is a participant or not.

Needless to say, this outcome would be contrary to the general consumer expectation that if one engages with an energy product or service one will be protected by mandatory protections, and have access to a specialised energy dispute resolution body should a dispute arise.

Question 9. Application of energy consumer protections: *Which elements of the energy market are useful to define the scope of the energy specific consumer framework?*

Access to energy is essential to health and social participation – as the Issues Paper highlights through its reference to the *United Nations Guidelines for Consumer Protection (UN Guidelines)*. Clause 76 and 77 of the UN Guidelines are reproduced below:

*76. **Energy.** Member States should promote universal access to clean energy and formulate, maintain or strengthen national policies to improve the supply, distribution and quality of affordable energy to consumers according to their economic circumstances. Consideration should be given to the choice of appropriate levels of service, quality and technology, regulatory oversight, the need for awareness-raising programmes and the importance of community participation.*

*77. **Public utilities.** Member States should promote universal access to public utilities and formulate, maintain or strengthen national policies to improve rules and statutes dealing with provision of service, consumer information, security deposits and advance payment for service, late payment fees, termination and restoration of service, establishment of payment plans and dispute resolution between consumers and utility service providers, taking into account the needs of vulnerable and disadvantaged consumers.⁴*

Energy will not cease to be an essential service with the introduction of new energy products and services. While the citizen relationship to energy will become more multi-faceted (i.e. many consumers will become prosumers), the essential need to ensure access to supply and provide protections to those who struggle to afford energy will remain. The generic consumer protections of the ACL will not be sufficient to meet that need, and the voluntary consumer protection framework will have neither the coverage nor the enforceability to fulfil the social contract highlighted by the UN above.

Accordingly, there will be a continued need for energy specific consumer protection, and existing protections will need to be extended to encompass energy supplied or accessed through a new energy product and/or service. While energy accessed through a new energy product or service will not always serve as the consumer's only available energy source, in many cases it will – such is the nature of the fragmented system that will emerge, with far more permutations and potential product and service configurations (and interactions) than is currently the case. In such an environment, attempting to strip out what is 'essential' energy versus 'non-essential' energy and provide differing levels of consumer protection on that basis would only serve to create uncertainty and risk leaving consumers inappropriately exposed, with inadequate protection.

From a dispute resolution perspective, it would create obvious inequity if one consumer was able to access an energy ombudsman service for the same complaint that another was denied access for, based on the deemed 'essentiality' of the product or service failure forming the basis of their complaint. This would cause great (and arguably justified) frustration on the part of those denied access; would send mixed signals to industry about the standards of service that must be met; and would inevitably create the risk of services that are essential being erroneously deemed 'non-essential', potentially leading to

⁴ United Nations Conference on Trade and Development, *United Nations Guidelines for Consumer Protection*, 2016, p. 24. Available at: https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf

significant consumer harm. Further unnecessary complications may arise if ‘part’ of a complaint is deemed to relate to the ‘essential’ nature of a product or service, but another part isn’t.

Question 13. Vulnerable consumer: *For new energy services and products, what characteristics of a vulnerable consumer should be considered under the energy-specific regulatory framework different to any other industry? Why?*

Energy is not just ‘another’ industry. Access to energy is critical to human health through heating and cooling, bathing and food storage and preparation. Energy is also critical to meeting basic human needs of social participation, and accessing other essential services such as health-care and education. For this reason, the current range of existing consumer protections - designed as they are to protect energy access and supply; to mitigate payment difficulty and provide for effective communication between consumers and suppliers and/or retailers (amongst other factors) - will need to be maintained and updated as the energy system transitions into a more DER based, BTM system. For highly vulnerable consumers, effective energy supply can literally be a life or death issue - hence the specific protections for customers dependent on life-support equipment.

The characteristic that should be considered when crafting the energy-specific regulatory framework is not the vulnerability of the customer, but the *essential* nature of energy as a service. This does become particularly important when one considers customers who are vulnerable (remembering that ‘vulnerability’ is not a defining characteristic, but instead a state that *any* customer could find themselves in at any given time), and specific measures *are* needed to address the needs of those who are less able to afford energy than others, or are vulnerable for any other reason. But the more pertinent point is that energy itself is essential to everybody, vulnerable or not, and the energy-specific regulatory framework should be constructed on that basis.

Question 14. Consumer protections for vulnerable consumers: *For new energy services and products, are there additional risks to vulnerable consumers that should be considered and are not already addressed by the ACL and the voluntary codes?*

Yes. The life-support protections referred to in our answer to question 13 above is one example, but beyond that, the need for a detailed process for handling payment difficulty (rather than simply disconnecting supply), and/or to assist a customer who is experiencing family violence both spring to mind.

These are issues that are currently dealt with by energy specific consumer protections in Victoria. These protections operate on a level of industry specificity that is not appropriate or practical to write into the broad, generic consumer protections provided by the ACL – and they are too important to be left to voluntary codes, which run the risk of leaving vulnerable consumers unprotected if they happen to contract with the wrong provider.

Question 16. Other characteristics for consideration: *Do new energy products and services have specific characteristics that require additional protections to prevent unfair practices or conduct against good faith that should go beyond the ACL? Please explain.*

The ACL does provide protection against poor practice in unsolicited sales, misleading and deceptive conduct, unfair contract terms and unconscionable conduct – all of which are important good faith protections. Theoretically, these protections should be sufficient to ensure consumers have recourse against poor business practice in the new energy products and services sector.

In practice, however, the question of whether a consumer realistically has recourse or not will often hinge on the forum in which they are able to pursue their complaint, and/or the agency responsible for enforcing the provisions the business is alleged to have breached. For that reason, there is great benefit in writing good faith provisions into energy specific consumer protections – that way they can be enforced by specialist energy regulators, and/or dealt with by energy ombudsman schemes. While this may appear - from a high-level - to be an unnecessary duplication of consumer protections, such provisions provide a very useful and direct avenue for consumers to seek recourse and redress, far more effectively than if they were required to pursue their matter through a more general dispute forum, or were reliant on a broad based consumer protection agency.

Further, there may be some instances in which energy specific consumer protections may need to go further than the ACL in order to protect consumer from poor business conduct, particularly given the essential nature of energy as a service.

In Victoria, DELWP are currently in the process of instituting a range of reforms termed the ‘*Energy Fairness Plan*’, which were promised by the Andrews Government during the 2018 Victorian Election Campaign. The reforms include a ban on unsolicited selling (through door-knocking or tele-sales) of retail energy plans.⁵ While it would be possible to rely on the ACL to protect consumers against poor practice in unsolicited sales of energy plans, experience has shown that these protections were not sufficient. It has been deemed necessary to implement reforms designed to prevent poor business conduct, which are actually more specific and stringent than protections available under the ACL.

Question 17. Additional redress mechanisms: *Does the nature of the market (new energy services and products) require an industry specific system/scheme to handle consumer complaints?*

Yes. As it is, energy complaints are often complex and require specialist industry knowledge to resolve. Unravelling billing and/or tariff errors, wrongful disconnections, debt collection breaches, transfer issues, provision and supply cases and/or customer service failures (amongst others), is difficult to do without a thorough understanding of the industry and the processes involved. As the system transitions

⁵ To be introduced into the Victorian parliament in 2020, to take effect in 2021.

into a DER, BTM dominated energy system energy related complaints will only grow more complex – and the need for an energy specific ombudsman service will only grow more acute.

This issue has been recognised by Australian and New Zealand Energy and Water Ombudsman Network (**ANZEWON**), who commissioned a 2019 independent study by academics at Sydney Law School⁶ to examine the changes that would be necessary for various energy ombudsman services to remain fit for purpose as new energy products and services enter the market. While this is currently a ‘fringe’ issue, it is gaining urgency. For example, in the 2018-19 financial year EWOV received 2,156 solar related cases, of which 573 (27%) were outside of our jurisdiction – very often because they concerned to an installation issue, which we are currently unable to assist with. As the solar market continues to grow, it is hard to see how this situation can be considered sustainable – energy consumers have a reasonable expectation that energy ombudsman services should be able to deal with energy related complaints, and a complementary expectation that government will ensure this is the case. Currently, we refer these solar installation related complaints to Consumer Affairs Victoria (**CAV**) but as the number of new energy product and service related complaints increases, (and as they become more complex), it will be unreasonable to expect a generalist consumer protection agency to have the expertise necessary to handle them appropriately – and within an acceptable time-frame.

This is especially true given the imminent introduction of the Consumer Data Right (**CDR**) into the energy sector, which will inevitably result in highly technical data related errors and complaints, which will require an intimate knowledge of meter data, concessions and/or tariff structures.

Question 18. Effects of different redress mechanisms: *What are the risks of having different redress mechanisms under different consumer frameworks? Please explain.*

The obvious risk is that consumers subject to one framework would receive less protection (and therefore be exposed to more poor business conduct) than consumers under another framework.

A clear example would be if protections for new energy products and services were not incorporated into energy specific consumer protection legislation, but were instead left to a voluntary framework. Not only would this mean that some consumers may not receive any energy specific consumer protection at all (i.e. if their provider had chosen not to participate in the voluntary framework), but even those who did receive that protection would find that it is likely to be less effective and comparatively “toothless” when compared to the protections available to ‘traditional’ energy consumers subject to energy specific consumer protection legislation. Not only are penalties likely to be lesser under a voluntary framework, (if, indeed, they exist at all), but the processes set out may be less detailed and less customer-focused, and would be unlikely to require mandatory membership of an

⁶ University of Sydney: *What will energy consumers expect of an energy and water ombudsman scheme in 2020, 2025, and 2030?* Led by Dr Penny Crossley for ANZEWON.

external dispute resolution body specialising in energy complaints, thereby likely removing the right to free, fair and independent dispute resolution.

Question 19. Redress mechanisms beyond the ACL: *Is there a better way to provide access to effective and strong redress mechanisms for consumers of new energy products and services?*

Yes - by writing adequate penalty provisions into energy specific consumer protection legislation, as will shortly be occurring in Victoria.⁷ The ACL is not suited as a “catch-all” for every imaginable industry specific consumer protection, but instead provides a broad set of generic consumer protections across the entire economy. Inevitably, this means the ACL can only be expressed in generic terms – this of course makes it more difficult to apply ACL protections to energy complaints than it is to apply more specific protections, which may be written with an understanding of the particular issues that consumers may face in relation to new energy products and services.

Beyond this obvious point, industry specific regulation invites a range of efficiencies. For consumers (and businesses, and for that matter dispute resolution bodies), it provides clarity and helps ensure that complaints can be managed quickly, with a high degree of certainty. For business too, industry specific protections provide certainty and clarity even before that stage – they set the ‘guide-rails’ of acceptable conduct, and lessen the risk of inadvertent exposure to a regulatory penalty.

In summary – as the energy system transitions to a DER, BTM based system (and energy consumers transition to being prosumers along with it), the need to ensure that energy specific consumer protections protect citizens’ access to energy as an essential service will not abate. What now qualify as ‘new’ energy products and services will in the medium term simply be standard energy products, and will be the means by which many energy users access their essential energy supply. This will be true for vulnerable and non-vulnerable energy users alike. Energy specific consumer protections will therefore continue to be necessary, and will continue to provide the clearest and most efficient means to ensure that consumers are able to seek appropriate redress when necessary. At a higher level, they will continue to be important to ensuring that the state fulfils its social contract to citizens to provide safe and affordable access to energy, as highlighted by the UN Guidelines. As part of providing an effective consumer protection framework, energy ombudsman schemes will also need to widen their jurisdiction so that they can assist consumers with DER, BTM related complaints.

Many of the complaints and issues that will arise in relation to new energy products and services are as yet unclear, but they form the subject of the investigations that we are currently undertaking in conjunction with the ANU. As these become more known over time, it will become easier to craft energy specific consumer protection. In the short to medium term, relevant protections may be broad and

⁷ These reforms are also part of the ‘Energy Fairness Plan’, to be introduced into Victorian parliament in 2020 to take effect in 2021. See the Andrews Government media release, announcing the policy here – ‘Time is up for energy companies ripping off Victorians’, November 20 2018: <https://www.danandrews.com.au/policies/time-is-up-for-energy-retailers-ripping-off-victorians>

principles based - but they will benefit from growing more specific as our knowledge of new energy products and services (and the issues they generate) develops. As already mentioned, we will forward our desktop review and the ANU report in due course – both documents seek to identify likely consumer complaints related to new energy products and services.

We trust these comments are useful. Should you like any further information or have any queries, please contact Zac Gillam, Senior Policy and Stakeholder Engagement Officer, on (03) 8672 4285.

Yours sincerely



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