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Thursday, 13 February 2020

Ms Stephanie Flechas
Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

Dear Ms Flechas

RE: Consumer Protections in an Evolving Market: New Energy Products and Services

ERM Power Limited (ERM Power) welcomes the opportunity to respond to the Australian Energy Market Commission's Issues Paper 1 on consumer protections in an evolving energy market for new products and energy services, which forms part of the 2020 retail energy competition review.

About ERM Power

ERM Power (ERM) is a subsidiary of Shell Energy Australia Pty Ltd (Shell Energy). ERM is one of Australia's leading commercial and industrial electricity retailers, providing large businesses with end to end energy management, from electricity retailing to integrated solutions that improve energy productivity. Market-leading customer satisfaction has fuelled ERM Power's growth, and today the Company is the second largest electricity provider to commercial businesses and industrials in Australia by load[1]. ERM also operates 662 megawatts of low emission, gas-fired peaking power stations in Western Australia and Queensland, supporting the industry's transition to renewables.

http://www.ermpower.com.au
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General comments

Consumer protections should not hinder innovation, presume to advantage one technology over another, or be a barrier to new products or services. Several new services in the sector challenge the traditional concept of electricity as an essential service, given that energy is no longer just distributed one-way through the grid to the end user. Some consumers are self-supplying through solar PV and batteries while others may soon choose not to consume electricity in return for compensation via demand response arrangements.

As the AEMC looks towards how to manage consumer protections, ERM Power recommends an approach that:

- is technology neutral;
- creates a level playing field;
- does not hinder innovation.

[1] Based on ERM Power analysis of latest published information.

It is important that consumer protections are fit for purpose and do not create an imbalanced market where some businesses face fewer regulatory hurdles, restrictions or requirements, while others need to meet a full suite of protections. There is a further risk in duplicating requirements that multiple parties must provide, which may add to costs yet fail to deliver better results for consumers.

As consumers assert greater control over their energy supply through technology and embedding supply within premises (via solar PV and batteries), the nature of energy as an essential service is changing. Quite reasonably, consumers require protection to enable universal access to electricity as the lack of it could result in profound detriment.

Some level of electricity supply is clearly essential for health and safety needs – e.g. hot water, heating, cooling, lighting for safety, cooking, refrigeration etc. But this will vary markedly between different types of customers. For instance, shifting the operation of a pool pump to off-peak times is likely to have little to no impact on a consumer's utility or health. Shifting the heating of an electric hot water system through a service like demand response could have an impact depending on the household's needs. Cycling an air conditioner or refrigeration service on-and-off may have little noticeable impact for some consumers but could be detrimental to others.

There is no clear-cut way of defining exactly what proportion of total electricity use is essential. The AEMC points to the AER's approach which sets out two key elements to determine whether the nature of a service: is the service optional or discretionary; and is the service the primary source of energy to the premises. This is probably as sound an approach as any at this stage.

ERM Power considers that the nature of electricity as an essential service has led to a proliferation of new energy regulations without an assessment as to whether existing Australian Consumer Law is in fact deficient and already addresses the issue. In the continual cycle of Rules alteration, we see that there has rarely been a meaningful assessment of whether the core issue giving rise to a potential rule change was in fact material and often regulation has been created to resolve minor infractions or issues for a small customer group. Rather than assessing whether there is a genuine need for regulation, rule changes are often made without any genuine quantitative analysis surrounding regulation making. This often leads to costly and complicated compliance, which in turn drives models for cheaper delivery which sit outside the regulated framework.

Far too often, a prescriptive approach to regulation is used in order to protect the most vulnerable consumer segment, which understandably needs a high level of protection. However, because regulations apply to consumers more broadly, they can limit retailers' ability to innovate and interact with more engaged and active consumers. For instance, innovative billing design is prevented by the 25 requirements needed to be on a bill. Ultimately, beyond basic agreements that relate to obligation to offer, retailers and customers should be able to choose how they communicate and interact with their customer. Australian Consumer Law should provide protections to ensure customers are fully informed prior to entering such agreements. This review could be the ideal avenue to remove unnecessary or duplicative regulations, and simplify arrangements where possible to support new entrants and create a truly level playing field.

We consider that the high cost of regulation is driving some of the shift towards new services with new business models such as white-label retailing. The growth in white-label retailers could be seen as evidence that licensing arrangements, compliance requirements and market participant requirements (including prudentials) are barriers preventing new (retail) entrants. However, allowing for white-label retailers also increases consumer choice and the kinds of retailers active in the market and on balance could be a positive result for consumers. Some new businesses for instance may not want to face the wholesale risk management and instead focus on a different offering for consumers. The fact there is an underlying retailer providing its license, prudentials limits the risk to the market and as such should be seen as a valid and valuable contribution to the retail market.

It will be important as part of this process to determine exactly which party is responsible for the various National Energy Customer Framework (NECF) requirements that retailers need to provide. While contractual arrangements between the parties can resolve much of this, clear guidance from the AEMC (and AER) would smooth this process and ensure that retailers are aware of their responsibilities to avoid breaches and ensure customers receive the full set of protections to which they are entitled.

ERM Power does not consider that a specific industry scheme is required to handle consumer complaints around new energy services. Each of the states currently operates an ombudsman scheme which handles complaints relating to energy retailers and embedded networks. We see no reason that an ombudsman could not handle complaints relating to new products and services provided it is funded on a causer-pays basis, like the current arrangements.

At present however, an ombudsman cannot handle a case that does not involve a retailer (or embedded network), distributor or transmission company. This creates a situation where the same complaint – for instance about a solar installation – would be out of scope for an ombudsman if a dedicated solar installer performed the work, whereas if a retailer facilitated the installation the ombudsman service could take on the complaint. The growth of new technologies may only exacerbate this trend. For example, if a retailer dispatches a consumer's battery or enables demand response, any complaints could go to the ombudsman, whereas a third-party who is not a retailer would not be bound by the ombudsman scheme. This creates a two-tiered and confusing process for consumers with no dedicated point of contact when issues arise.

We consider that the AEMC should direct attention towards investigating how to resolve such issues now before the number of new products and services expands greatly. As part of this, the AEMC should also look at overlap between the NECF and ACL and seek to remove duplication where appropriate. New regulations around supply and access should really only be necessary where there are gaps that lead to market failure and cause detriment to consumers in having access to electricity as an essential service.

Please contact me if you would like to discuss this submission further.

Yours sincerely,

[signed]

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Wednesday, 12 February 2020

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Reference RPR0012

RE: Consumer protections in an evolving market: Traditional sale of energy - 2020 Retail Energy Competition Review

ERM Power Limited (ERM Power) welcomes the opportunity to respond to the Australian Energy Market Commission's (Commission) paper on traditional sales of energy customer protections, which seeks to investigate the required level of customer protections with the digitalisation and technological changes in the electricity market.

About ERM Power

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General comments

We believe this review brings a valuable opportunity to reflect on the consumer protection standards that currently apply to energy supply and consider the transition of the industry; particularly how it is redefining what being a retailer means and redefining what is being sold. There has been a growing concern as to whether the National Energy Retail Law (NERL) and National Energy Retail Rules (NERR) is a suitable framework, given its existing authorisation and exemption regime is only suitable for the regulation of traditional retailers, distributors and providers such as embedded networks. With the rapid expansion of services provided by different models and through new digitalisation and platforms, it is an opportune time to revisit some of the consumer protection standards and ensure regulation provides for competitive neutrality in an objective way, without favouring one technology over another.

The most challenging aspect of this review is future-proofing regulations as objectively as possible, avoiding frequent changes or excessive tailoring of the rules to each new technological advancement or business model as it arises. We believe the review should not only focus on whether existing regulations are hampering innovation now, as that is given, but also how the framework can be 'future proofed' to the greatest extent possible as the industry continues down the path of technological change.

The National Energy Customer Framework (NECF) was originally based on regulatory frameworks that only contemplated retailers and distributors requiring regulation. Over time the exemptions framework has been put in

place to manage the exceptions to the usual retailer and distributor business models, such as to cover embedded networks. The authorisation and exemptions framework has not coped with an influx of new energy service providers competing with retailers, and over time it has clearly become no longer fit for purpose. These alternative sellers may propose to supply energy to consumers where a retailer is already in place, or where the alternative seller is potentially competing with the existing retailer. ERM Power sees that the current framework is not sufficiently objective or sustainable. It also does not account for other categories of service provider, such as energy management services that access data and may control load.

ERM Power understands that this is not an easy exercise, but it is critical to reassess NECF and its ability to reflect the regulatory needs of the existing and future market as a challenge that must meet consumers' expectations and ensure trust in the industry. Policy makers should not be averse to removing regulation that has been made redundant or amending regulation to reflect new technology and players in the market. It is important to recognise that innovation and digitalisation are bringing benefits to consumers now, particularly allowing consumers to take more control of how and when they use energy in the most efficient manner. Regulatory frameworks must not thwart this advancement or impede those who wish to offer or receive new services, products or information.

It is our view the existing customer protections surrounding bill content, notifications, explicit informed consent and cooling off periods need to be future proofed in the following manner:

Principle-based regulation should be used wherever possible to ensure appropriate focus is placed on the outcomes that need to be achieved

Where possible ERM Power believes rule makers should move away from the reliance on detailed, prescriptive rules to those that set the minimum standard of service or product delivery. Compliance should also be risk based, focusing on the outcome associated with non-compliance, rather than the prescriptive rules themselves. By way of example, if this approach was to apply to bill content, most of the content would be agreed between retailers and their customers and would be competitively based on customer preferences and information demand. Regulators would need to ensure that safety concerns of service delivery would be met, for example with access to information for faults and emergency contact numbers, but the method of delivery of this information to a customer would be left to agreement between the customer and their retailer, based on the most reliable and appropriate manner (which may not be suitable on a monthly bill). It would also ensure that critical information is provided or made available, but in the form and manner that is aligned to customers' needs. This will also ensure that regulation does not become out of step with technological change and will allow companies to seek innovative approaches to customer engagement.

Simplicity of rules

Over time energy regulation has become extremely complex and over prescriptive. This has been a symptom of markets moving more quickly than the regulations (with regulations being on 'catch up'), but also the ever-increasing layering of new rules, without establishing a case for regulatory action. Too often new rules are considered the quick 'go to solution for problems' and often rule making becomes absent of sufficient quantitative analysis to the magnitude of the issues that new rules are trying to address. As the market evolves, rules become more obsolete, and further rules are layered in to address perceived failures. This cycle in the industry has seen a proliferation of rules, increasing ambiguity with regulations and large compliance costs that are eventually felt by customers.

It is important that the rules governing the operation of the electricity market are clear and easily interpreted by participants and industry organisations. We believe that improvements would be made to keeping it simple – again focussing on the outcomes of the rules and not on *how* to achieve the outcome. By way of example, for price change notifications, we suggest the rules should simply stipulate that customers need to be made aware of changes to their price in advance and given appropriate information to make informed choices, relevant to the customer.

Removing duplication of regulations

It is our view regulatory instruments should not be overlapping and duplicating obligations, which leads to inconsistency and increasing compliance costs. Currently precontractual disclosure obligations exist within AER guidelines, NERR, the Australian Consumer Law (ACL) and the new ACCC Electricity Retail Industry Code and Guidelines. Much of the inconsistency has arisen from rule makers and politicians 'creating something' to address a perceived failure, rather than reviewing the appropriateness of existing regulations. As a result, obliged parties must refer to numerous instruments for compliance.

Recently the case of duplication and inconsistency has been evident in the new ACCC Electricity Retail Industry Code (Code) and Guidelines which has placed further prescription to the content of notices, overlaps with regulatory requirements under the National Energy Retail Law and the National Energy Retail Rules and entrenches jurisdictional inconsistencies in regulations at a cost to retailers and ultimately consumers. Retailers of small business customers now require at least 6 different versions of a price change letter with different regulatory content requirements depending on the jurisdiction, tariff type, NECF derogation and now Code application. Not only does this make compliance complex and unwieldy but costly with system changes required to cater for the application of relevant regulations.

Currently retailers are required to obtain consent from customers before transferring customers or entering a customer into a market retail contract. When obtained, the NERL requires the consent to be both explicit and informed. This obligation ensures that customers have information adequately disclosed so that they are fully aware of the contractual provisions and are not in any way misled. Further a customer's consent must be given either in writing, verbally or electronically and retailers must maintain a record of each EIC provided by the customer.

The ACL applies to interactions between a business and a consumer, including precontractual behaviour. The ACL already provides protection to consumers, ensuring that customers do not enter into contracts by being misled or without knowing their rights. In this respect, it largely duplicates the obligations of the NERL, ensuring an appropriate level of disclosure occurs, that customers are informed, and contracts are not misrepresented. It is our view, much of the duplication and inconsistency could be addressed by ensuring that precontractual and disclosure requirements exist in one instrument, and it makes sense that this should be the existing provisions of ACL, which provides clear obligations to ensure customers are able to make informed choices. Unlike the NERL which applies to those authorised or exempt, the ACL compliance applies to all service providers in a competitively neutral way, and in this respect allows for all parties to operate on a level playing field.

Removal of excessive regulation

In future proofing the framework it is important that the changing needs and expectations of consumers are met and that regulation that has been made redundant is removed. It is clear that an overwhelming majority of customers no longer want to wait for contracts in the post nor take days to make decisions. Technological change has responded to time poor consumers and has increased the speed of decision making. An example of where consumer expectations are currently impeded by regulations is the lengthy periods for cooling off, frustrating customers who want to switch providers or gain new services without waiting.

With respect to the cooling off period, ERM Power believes the provisions are excessive and out of date. In our view, 10 day cooling off provisions are far too long in a market where small customers are not penalised for contract cancellation (early termination fees) and receive contractual information often instantaneously through digital communication. For customers that have solicited agreements with providers, a 10-day cooling off is a frustrating delay.

We also note that the industry is currently investigating ways of negating the impact of an excessively lengthy cooling off period, with the bypassing of cooling off rights through the AEMO MSATS system with a recent review into customer switching being pursued by AEMO. AEMO is proposing a 'cooling off switch', reversing transfers for

customers who wish to cancel during the cooling off period. We have advocated that the duration of the cooling off period should be explored by policy makers rather than AEMO, given the proposal to deal with the length of the cooling off period via the system change and reversing transfers will layer in complexity and operational costs. It is our view, cooling off provisions should be removed for solicited contracts and be reviewed for unsolicited contracts, commensurate with the risk.

Please contact me if you wish to discuss the matters raised in this submission.

Yours sincerely

[signed]

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