



A Suite 2, Level 20, 570 George Street
Sydney NSW 2000
PO Box A989
Sydney South NSW 1235
T 02 9220 5500
W energyconsumersaustralia.com.au
T @energyvoiceau
in /energyconsumersaustralia
f /energyconsumersaustralia
ABN 96 603 931 326

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

By email: AERpolicy@aer.gov.au

Submission: Review of consumer protections for future energy services

Dear Mark

Energy Consumers Australia thanks the Australian Energy Regulator (AER) for the opportunity to provide feedback on their *Review of consumer protections for future energy services*. Energy Consumers Australia is the national voice of residential and small business energy consumers. We advocate for a modern, flexible, resilient energy system that meets consumer values, expectations and needs.

The energy industry is currently operating a mile a minute in a very fluid and uncertain environment. The economic relationship upon which the energy market was built is shifting. Consumers will increasingly be asked to, and choose to, participate in the energy system like never before. For this to occur, consumers need to trust the market and feel protected, capable, and empowered to make decisions in their best interest. We are pleased to see the proposed three models in the review paper aim to address this change, and at times propose ambitious steps away from the status quo to consider consumer protections in a new light. It's a positive step in recognising that what we have now will not work in a future energy market.

However, in our view, there is still some way to go. How we might regulate new and existing energy businesses is only one part of a much larger challenge to ensure a holistic and robust consumer protections framework. This framework needs to go beyond purely regulating supplier conduct and ask businesses to actively consider and deliver good outcomes for the diversity of consumer needs.

In our submission to the first review paper, we said that a fit for purpose consumer protections framework will be reliant on the extent to which the diverse consumer needs and preferences are understood and incorporated and will require three foundational elements.

- The enshrining of consumer agency.
- Consumer protections and rights.
- Access to free and independent external dispute resolution.

It is in this context that we review the three potential reform models.

Models 1 and 2 do not go far enough in addressing future risks

We have spent considerable time over the past months working through potential future consumer risks and needs in a fully renewable energy system. This is to draw out the many touchpoints where consumers will have to make decisions about their energy use in some form. In this process we were not limited by traditional concepts of energy usage or purchase, nor the current framework, which ensured as an exercise we were able to really explore the consumer journey, beyond the typical lifecycle and processes.

From this work, we could see the very uncertain and multifaceted environment we may live in or choose to interact with, and it's impossible to predict all the scenarios and risks that may emerge as new energy services and products come into play. For example, a business that sells a controllable device to apartment dwellers that can split solar energy between units uncovers a plethora of potential questions and issues a consumer may have that go beyond the AER's current risk analysis. Rather than attempting to remedy limitless unpredictable risks, we believe focusing on the outcomes needed by consumers will better ensure a consumer protections framework is nimble to potential future changes and harms as they arise.

Model 1 is described as a tiered conditional authorisation framework, with a reduced exemption framework. It appears that this model would be the simplest to implement and would begin to address issues that surround embedded networks. However, as this model so closely resembles and supports the status quo, it does not adequately address current issues nor those that will emerge in the future. Model 1 also runs the risk that, despite appearing relatively simple to implement, its relevance may wane before it even takes effect.

Model 2 is described as an authorisation framework based on regulatory principles. However, while this principles approach is a step towards a more fit-for-purpose, outcomes-based protections framework, it is a rather complicated model. It is hard to see how a consumer seeking to understand their rights will be able to navigate the various dimensions of the framework. Model 2 also appears to explicitly determine for the business what obligations will apply and largely how they are to meet them. This does not place the onus on the business to demonstrate how their practices will deliver good consumer outcomes. The distinction here is important because, by placing the burden onto businesses, they are forced to understand what good consumer outcomes are and reassess if their overall practices and culture are working to meet them.

Based on this thinking, we do not see Model 1 or 2 as drafted meeting the needs of consumers in a future market. However, we are happy to discuss in more detail our position on the above models outside of this submission, including elements that may be useful to incorporate in another form.

Model 3 is preferred as it is an outcomes-based regulatory framework

We support the use of an outcomes-based regulatory framework, which we believe will deliver better outcomes for consumers now, and into the future as the energy market evolves. In our view, this model starts to shift the focus of the regulatory framework away from conduct of individual business towards consumers' needs – empowering consumers to make good energy decisions and delivering better results when things go wrong.

Model 3 has similarities to the new consumer duty created by the United Kingdom (UK) Financial Conduct Authority (FCA), which comes into force in July 2023. The FCA have described this package of reforms as a 'paradigm shift' in what is expected of firms. The FCA expects to see from these reforms a 'higher standard of customer care and protections, and (for firms) to go further to equip consumers to make effective decisions in their interest.'¹

While this approach is for the finance industry in the UK, there is clear lineage with the current review of Australia's energy consumer protections including the rationale for change. The FCA noted that not all firms were prioritising good consumer outcomes and as such, trust had eroded.² They want all firms to 'get it right' from the onset by putting consumer interests truly at the heart of the product or service they are offering and at the culture of the business, recently commenting that 'culture drives conduct'³. On the approach itself, the FCA state they are on their own transformational journey to be more 'assertive, innovative and adaptable in their regulatory approach.'

While only time will tell whether the FCA have gotten it right, we feel a model like the one proposed in Model 3, that comes from a similar position and aims to address the issues at the root cause, is a positive place to start.

Below we provide comment on the different elements of the AER's drafted Model 3, and we suggest ways that may improve the overall clarity of the structure as well as enhance the visibility of the business's duty to consumers.

Comments on the overarching objective

We support an approach of having an overarching objective that clearly focuses on consumer outcomes and encourage the AER to consider the wording of the objective in this light. We note that the FCA, in their final decision on the consumer duty, determined that requiring firms deliver 'good outcomes' instead of 'acting in the best interests' of consumers best reflected 'the outcomes focus of the Duty'⁴. This distinction recognises that good outcomes will look different depending on the consumer and their journey. It encourages businesses to proactively acknowledge and cater to this diversity and the way every consumer may experience good outcomes. In this context, we would also encourage the AER to draft the objective such that it would apply not just at the point of sale, but for the life of the supplier's arrangement with the consumer.

¹ PWC, *The FCA's new consumer duty: Raising the bar on consumer outcomes*, <https://www.pwc.co.uk/industries/financial-services/understanding-regulatory-developments/fca-proposes-new-consumer-duty-in-paradigm-shift-for-firms.html>.

² *In our December Energy Consumer Sentiment Survey only 35% of consumers felt confident that the energy market is working in their long-term interests*. <https://ecss.energyconsumersaustralia.com.au/sentiment-survey-dec-2022/confidence-household-sentiment-dec-2022/>. Financial Conduct Authority 'A new consumer Duty: Feedback to CP21/13' 2021 <https://www.fca.org.uk/publication/consultation/cp21-36.pdf> pg3 accessed 10.12.22

³ E Shepperd, *From Zero to Heroes: How culture in financial services can change for everyone's benefit*, <https://www.fca.org.uk/news/speeches/zeroes-heroes-how-culture-financial-services-can-change-everyones-benefit>, accessed 2.12.22.

⁴ Financial Conduct Authority, *A new Consumer Duty Feedback to CP21/36 and the final rules*, 2022 <https://www.fca.org.uk/publication/policy/ps22-9.pdf> pg. 31 accessed 14.12.22

The proposed Regulatory and Compliance Plan provides an avenue for transparency and oversight over businesses that fall within this duty. It also gives means to potentially monitor and enforce compliance although this will require a significant increase in manpower for the AER if to be successful. As we noted in our first submission, enabling the AER to have the ability to change and alter their decisions is a worthwhile change and we also consider it beneficial to have conditions on plans. This could include that if the business changes, such as moving from only servicing small businesses to residential customers, a new or modified plan is required demonstrating how they will be meeting the best interests of their new target market(s). But we assume that if Model 3 is put forward, there will be further consultation on the details of these plans, with additional time to fully consider what they should look like and include.

Comments on the primary principles

The primary principles listed here are a good example of how a business may better enable consumer agency and better outcomes, and places onus on the business to identify the necessary information provisions without prescription on how it is delivered.

However, we are unsure whether these are really principles in this manner, or whether they may be better served in a guidance document. By these actions being situated within a guidance instrument it sets an expectation of behaviour across the entire framework and is not limited to advice provisions (which in drafting appear again to be at point of sale).

As mentioned, we believe this will also reduce the complexity of the overall structure. Model 3 will be a significant step away from the current regime and to ensure we are setting up for success, the model should be as clear as possible for new and existing businesses to follow.

Comments on the obligations

We agree in principle with the approach the AER has suggested in having obligations or outcomes (as is in the FCA consumer duty) to further give substance to what is expected of businesses in order to meet their duty. But there is significant work that needs to happen first to better understand how it will work, what it looks like and subsequently how to get it right. This includes clarification on how the AER intends to slice the current energy rules for this new framework to operate, how it will interact with other legal instruments and the parameters behind what is considered a base or flexible obligation.

If Model 3 is progressed, we recommend the AER use the FCA outcomes as guidance when considering the drafting of the base and flexible obligations. The FCA have spent considerable time consulting on the outcomes as they now stand and, while not perfect, they clearly focus on enabling consumer agency through their obligations to 'support customers to pursue their financial objectives' while placing onus on the business to act proactively in the interests of their customers and 'avoid causing foreseeable harm.' We believe the FCA's approach, with their focus on consumer outcomes, encourages businesses to work alongside others in the industry to deliver what consumers reasonably expect in the circumstances.

If this approach is taken, whether flexible obligations apply to a particular business or not, and the application of the obligations should also be flexible and change as the business model and subsequent landscape does.

Additional matters for consideration

In addition to the above, for Model 3 we also suggest the AER consider the following.

A) Guidance document

Both Model 1 and 2 recommend a guideline for businesses. We believe there is a strong case for this also forming part of Model 3 to help businesses interpret the overarching objectives and their obligations. These could demonstrate examples of business practice in order to meet the objective(s). However, we maintain that this document should be complementary and support businesses who may need further guidance or clarification. It should also remain flexible to the changing environment and innovative business models.

B) Customer facing promise

Our Energy Consumer Sentiment Survey tells us that only 35% of consumers feel confident that the energy market is working in their long-term interests⁵. If trust is low, consumers will feel reluctant to engage and participate. A customer facing promise, or customer charter of sorts, may help build trust while providing a clear mechanism for consumers to know what they should expect from this business. However, we don't see this as a lengthy document like a policy but rather a very clear promise, upfront, that the business is bound to act in their best interest. This could also act like a signal to consumers, and to regulators, that this business is obligated under this energy objective, while highlighting those that are 'not' (but perhaps should be).

Concluding comments

The task at hand is not easy, but the task is of significant importance to consumers and there is work already underway in the sector that has called out reliance on this review. But haste, or limiting our thinking to the current state, will only ensure that what we design and build will not be fit for purpose in an enduring way.

The road ahead is, and will be, complex and consumers will face questions never before considered that regard matters beyond 'typical electricity consumption.' For example, if I buy into a solar access scheme for my rental property, does this impact my rental agreement or my rental history? Who ensures I am receiving the promised benefits? Who is my 'go to' for issues? Or will I even realise there is one if it's a shared system?

In this sense, the term 'energy' and what this means to consumers has already surpassed the definitions set way back when the regulatory framework was crafted. Innovative business models such as flexible trading arrangements are being introduced alongside changing usage behaviours due to COVID-19 working from home and flexible working environments. They demonstrate that how we think about and typically use energy has drastically changed as well as our ability to be more receptive and adaptable to this change (provided we are taken on the journey correctly).

Consumers have told us they want an energy market that is simple and affordable where energy is reliable and clean. What makes up these elements individually for a consumer may differ, but the general outcomes remain the same and this should be at the heart of how and what we do, if we are to succeed to net zero.

⁵ Energy Consumers Australia, *Energy Consumer Sentiment Survey December 2022*, <https://ecss.energyconsumersaustralia.com.au/sentiment-survey-dec-2022/confidence-household-sentiment-dec-2022/>.

We look forward to continuing to engage with the AER on this review and on work that will better enable a robust and future proof consumer protections framework. If you have any questions, please contact Melissa McAuliffe Senior Policy Associate on melissa.m@energyconsumersaustralia.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. Crawshaw', written in a cursive style.

Jacqueline Crawshaw
Director, Energy Service and Markets