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Submitted via www.aemc.gov.au

John Pierce
Chairperson
Australian Energy Market Commission

Dear Mr Pierce

Issues paper one: Consumer Protections in an Evolving Market: New Energy Products and Services - 2020

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Australian Energy Market Commission's (**AEMC**) *Issues paper one: Consumer Protections in an Evolving Market: New Energy Products and Services (Issues Paper)*.

Consumer Action's legal and financial counselling services have regularly assisted consumers experiencing harm as solar technology grows in popularity in Victoria. Our *Power Transformed*¹, *Knock It Off!*² and *Sunny Side Up*³ reports have explored aspects of consumer harm related to the transitioning energy market and have recommendations relevant to the Issues Paper. As other new energy technologies become increasingly available for an even greater number of consumers, robust protections must be implemented to ensure good outcomes for consumers accessing essential energy services.

The AEMC should pursue enforceable protections for consumers that are delivered by regulators and ensure harm is avoided wherever possible. The AEMC should also ensure that appropriate processes are in place to resolve issues that arise. Such processes should be designed to identify and address any systemic issues that arise. This approach is the best pathway to avoiding ongoing harm to consumers.

Our comments are discussed in more detail below and a summary of recommendations is available at **Appendix A**.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

¹ Consumer Action, 2016. [Power Transformed: Unlocking effective competition and trust in the transforming energy market](#)

² Consumer Action, Loddon Campaspe Community Legal Centre, WEstjustice, 2017. [Knock It Off! Door-to-door sales and consumer harm in Victoria](#)

³ Consumer Action, 2019. [Sunny Side Up: Strengthening the consumer protection regime for solar panels in Victoria.](#)

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Consumer Action reporting relevant to this consultation

Based on the issues we have seen arise through requests for assistance in relation to new energy technology from our financial counselling and legal services, Consumer Action has released three reports since 2016 which highlight the need for reform to ensure good consumer outcomes in transitioning energy markets.

Common and pressing issues with the provision of solar services in Victoria reported in our *Sunny Side Up Report* offer learnings as to the issues likely to arise with other new energy technology. These included:

- Failings in solar installations and grid connections;
- Inappropriate or unaffordable finance being offered to purchase solar systems;
- Misleading and high-pressure sales tactics in the context of unsolicited sales;
- Product faults and poor performance;
- A lack of affordable dispute resolution;
- Business closures; and
- Poorly structured and highly problematic Solar Power Purchase Agreements.⁴

To address these issues our report makes a number of recommendations that the AEMC should consider to protect consumers in the evolving energy market:

RECOMMENDATION 1. New energy product and services retailers should be responsible for ensuring that what they provide is properly connected to the main grid unless consumers give Explicit Informed Consent to take responsibility themselves.

RECOMMENDATION 2. The AEMC consider how to appropriately exclude finance arrangements not regulated by the national consumer credit laws from being used to finance new energy technology.

RECOMMENDATION 3. Unsolicited sales of new energy technology should be banned.

RECOMMENDATION 4. A 10-year statutory warranty applying to the whole solar system should be provided by solar panel retailers. Equivalent warranties should be applied to other new energy technology as their reasonable reliability is understood.

RECOMMENDATION 5. The jurisdiction of energy and water ombudsman services be extended to include the retail sale of new energy products and services.

RECOMMENDATION 6. A new energy technology industry default fund or last resort compensation scheme should be established to provide compensation to those entitled to compensation but unable to access it due to the insolvency of a new energy technology retail business.

Our *Knock it Off!* report explored the consumer harm caused by door to door sales in Victoria. The report found that the unsolicited retail sale of solar panels was causing significant harm driven by three factors:

- Firstly, consumer anxiety over rising energy costs;
- Secondly, limited consumer understanding of the product and its appropriate cost; and
- Thirdly, unaffordable and inappropriate finance arrangements offered during unsolicited sales.⁵

Many new energy technologies are likely to present similar factors that would cause consumer harm and even the pending introduction of the New Energy Technology Consumer Code (NETCC) would not prohibit signatories from

⁴ Consumer Action, 2019. [Sunny Side Up: Strengthening the consumer protection regime for solar panels in Victoria](#). p.5

⁵ Consumer Action, Loddon Campaspe Community Legal Centre, WEstjustice, 2017. [Knock It Off! Door-to-door sales and consumer harm in Victoria](#) p.68

offering unregulated finance or from unsolicited selling.⁶ We have seen enough evidence of harm to point to the need to ban unsolicited sales.

Our *Power Transformed* report drew on the expertise of the Demand-side Energy Reference Group to map potential detriment to consumers (see Figure 2) and establish the principles needed to 'unlock' effective competition in emerging energy technology. The three principles that were formulated to 'provide a competitively neutral, balanced and fair platform to underpin further development of Australia's energy market, ensuring consumers can make good decisions, get the expected outcomes and trust their rights when things go wrong' are listed in Figure 1.

Figure 1



Figure 1: Consumer Action, 2016. *Power Transformed; Unlocking effective competition and trust in the transforming energy market*. Page 8.

We also recommended that the Australian Consumer Law's (ACL) fitness for purpose guarantee be applied in contracts between consumers and new energy technology businesses. As this guarantee only applies where the consumer discloses their purpose for purchasing a product, we consider that energy service providers should be required to identify the consumer's purpose in acquiring a service and note it in contractual documentation. This would allow consumers to rely on the ACL during dispute resolution during dispute resolution and deter mis-selling of services by businesses.

RECOMMENDATION 7. The ACL fitness for purpose guarantee be applied in contracts between consumers and new energy technology businesses

Responses to questions for consultation

QUESTION 1: MARKET DEVELOPMENTS AND CONSUMER PROTECTIONS

Are there any other key market developments the Commission should consider when assessing consumer protections for new energy products and services?

Several other developments or potential developments in energy markets should be considered by the AEMC. The AEMC should also be cautious to not conflate the experience of those most able to successfully access and utilise new technology as a signal that protections should be adjusted for all in the market. Many people face significant barriers to accessing new technology successfully, such as:

⁶ ACCC, 2019. *Determination: Application for authorisation AA1000439 lodged by AEC, CEC, SEC, ECA in respect of the New Energy Tech Consumer Code*.

- Increasing complexity in electricity supply arrangements when current arrangements are not often understood;
- Affordability and cost;
- Inability to trust current market players due to mis-selling and other misconduct;
- Unsuitable dwellings for installing technology; and
- Split incentives between renters and rental providers for investing in technology with a long payback periods that benefit renters.

Protections should be enhanced instead of eroded for consumers. The optimistic framing of some consumer's possible experiences in the Issues Paper should be balanced with the reality that most, particularly vulnerable and disadvantaged consumers, still need the current protections or more.

Consumers becoming locked into 'guinea pig' arrangements in embedded networks to test new models of delivering essential services shows that regulation is lagging. Embedded networks offer new technology providers a way to implement systems that may not be allowed in the rules. These may not necessarily be in the interests of consumers as embedded networks are often monopoly environments where consumers have less ability to resolve disputes. The AEMC should ensure that there are other means available to test new delivery models for essential energy services with appropriate regulatory protections or at the very least make requiring providers to seek approval from the regulator and:

- Prove the genuine benefits to consumers;
- Be subject to regular reporting requirements in relation to consumer outcomes; and
- Be subject to regulator intervention where consumer harm is evident.

A development not explicitly mentioned in the Issues Paper is that consumers engaging with new technology will often have relationships with multiple businesses and be subject to outstanding issues when a business closes. Currently the Retailer of Last Resort rules are in place to protect people's access to traditional energy supply where licensed energy businesses close. As described above, we recommend a default fund for new energy technology be implemented to address issues that might arise after, or be unresolved at the time of, a business closure. For example, a consumer could be left without savings on essential energy services costs due to a failed solar inverter and have no means to pursue an insolvent business, which makes the consumer's significant investment to lower the cost of accessing essential services a failure. Being able to draw on a default fund will provide redress in this circumstance.

Another scenario where the closure of a business results in harm to consumers is where this further complicates disputes about which of several businesses are responsible for resolving a consumer's issue. If a piece of technology by company A, such as a battery, is supplied:

- two years after company B installed a solar PV system on a house;
- while company C is also separately providing automation services for the battery and other household appliances; and
- the consumer's energy retailer and distributor supply as per usual.

It would be difficult for a consumer who has engaged other experts to provide complex energy services to determine the source of an issue and their rights when one of these products or services or a combination of the products or services is interrupting their essential electricity supply. This complex dispute causing significant harm would be further complicated by one business having closed. As above we recommend that the jurisdiction of energy and water ombudsman be expanded to provide expert free, fair and reasonable resolutions where issues like this arise.

Lastly, a market development that must be considered is the entry of unregulated finance products commonly sold with new energy technology. Our legal services have represented many consumers to resolve disputes with solar services sold with 'Buy Now Pay Later' (BNPL) finance not regulated by the National Credit and Consumer Protection Act (NCCPA) because the consumers would have had little prospect of resolving these disputes otherwise. Often these arrangements were made in unsolicited sales. There is an effective prohibition on unsolicited sales of regulated credit sold by a vendor like solar panel provider.⁷ Solar retailers take advantage of the lack of regulation that applies to BNPL to make unsolicited sales.

The AEMC must consider the increasing overlap of issues between energy and finance regulators. Industry codes do not deliver timely solutions for consumers when issues like this arise. Consumer Action has committed extensive resources in the development of the NETCC to address the issues described above. Despite this the code's authorisation, its implementation has been stalled by an application to the Australian Competition Tribunal from a BNPL provider to review protections that the ACCC determined were appropriate.⁸ The NETCC is also voluntary so not all businesses will participate and those that do are likely to be subject to less compliance and enforcement or consequences to deter consumer harm than if mandatory regulation was developed and enforced by a regulator.

RECOMMENDATION 8. The AEMC ensure robust regulation is developed that means new energy technology providers do not use embedded network arrangements to test new ways of delivering essential energy services or make robust processes for requesting an exemption and for regulators to intervene where exemptions are not benefitting consumers.

QUESTION 2: NEW BUSINESS MODELS AND INNOVATION IN THE MARKET

Are there other business models the Commission should consider in its analysis of new energy products and services?

Other business models that the AEMC should consider include Solar Power Purchase Agreements – we have assisted consumers with unfair contract terms included in these agreements.⁹ The AEMC should also refer to the *Power Transformed* principle that "It should be easy for people to engage to make effective decisions." Analysis about protections for new business models should consider this principle and not rely on information provision as the sole form of protection as this is often not sufficient.¹⁰

Disruptive business practices like the trading of electricity peer to peer may also arise and cause harm where regulations are adjusted. Currently regulations around retail licencing and energy distribution should address most issues that could arise. However embedded networks may allow some exploitation of consumers in such peer to peer arrangements and we reiterate our views on embedded networks stated earlier in this submission.

RECOMMENDATION 9. The AEMC should avoid relying on information disclosure as the main form of consumer protection.

⁷ NCCP Regulations, regulation 23(4).

⁸ Australian Competition Tribunal, 2019. [Notice Of Lodgement: Application to Tribunal for Review from Flexigroup Limited](#)

⁹ Consumer Action, 2016. [Power Transformed; Unlocking effective competition and trust in the transforming energy market p.62-65](#)

¹⁰ See ASIC's recent work in relation to the limitations of information disclosure as a consumer protection: Australian Securities and Investments Commission and the Dutch Authority for the Financial Markets, 2019. [Disclosure: Why it shouldn't be the default](#)

QUESTION 3: OTHER KEY PRODUCTS AND SERVICES TO CONSIDER

Are there other energy products and services the Commission should consider in its analysis of new energy products and services?

The AEMC should consider the potential for third party business advising on a tailored combination of services to suit consumer's needs and whether protections need to address harm that may arise with these businesses. Such business may or may not utilise energy data for analysis or be incentivised to direct a customer to pursue certain technology based on commissions. They may also ignore existing technology that better suits the consumer's purpose. For instance, a consumer seeking to reduce their energy costs may be better placed to install insulation as opposed to a solar system but may not be informed of this. Our above recommendations in relation to the jurisdiction of ombudsman and requirements to record consumer's purpose would help address such issues. Issues with comparison services were also flagged in the ACCC Retail Electricity Pricing Inquiry and we support the development of a mandatory code of conduct for third party intermediaries.¹¹

We also reiterate our support for consumer access to demand response services that automate some devices behind the meter along with the introduction of consumer protections as appropriate for other products to enable full access for optimising consumer participation over time.¹² Demand response could offer significant benefits to the whole community by reducing peak demand and the associated costs borne by all.

RECOMMENDATION 10. The AEMC should require a mandatory code of conduct for third party intermediaries that includes a robust process as to how these businesses can give EIC on a consumer's behalf.

QUESTION 4: EFFICIENCY OF REVENUE STREAMS

Which regulatory provisions may be preventing value creation through the adoption of new technology?

The AEMC should be cautious in asserting that regulatory provisions are hindering value creation. There may be significant detriments to unwinding regulation that far outweigh potential benefits. The example discussed in the Issues paper of a 'white label' retailer that provides retailer functions to new businesses. This model could simply result in the consumer paying additional margins to another intermediary in the supply chain. The efficiency gained by the new product may not counter this additional charge.

RECOMMENDATION 11. The AEMC analyse the costs and benefits to consumers of bringing additional businesses into essential energy service supply

QUESTION 5: THE SUPPLY OF ENERGY IS AN ESSENTIAL SERVICE

What are the elements that define the supply of energy as an essential service?

Consumers should be entitled to, and able to maintain, affordable access to the energy they need to maintain their ongoing health and wellbeing through a comfortable home environment. Our *Heat or Eat* report discusses the way in which not having access to essential energy services due to disconnection can compound consumer's financial hardship and contribute to issues with physical and mental health or family violence.¹³ VCOSS's *Power Struggles* report discusses the consequences to consumer's health and quality of life where they under-utilise energy as a response to it being unaffordable.¹⁴

¹¹ ACCC, 2018. *Retail Electricity Pricing Inquiry – Final Report*.

¹² PIAC et al, 2019. [AEMC – Draft Determination allowing demand response service providers to participate in the wholesale market – joint submission](#).

¹³ Consumer Action, 2015. *Heat or Eat; Households should not be forced to decide whether they heat or eat*.

¹⁴ VCOSS, 2017. *Power Struggles; Everyday battles to stay connected*.

QUESTION 6: CHANGES IN THE NATURE OF ENERGY SERVICE

Has the essential nature of the sale of energy changed with the market's evolution?

Energy services are still essential but the variety of business, products and services that can impact consumer's access to essential energy services has changed. On top of the harm caused by consumers being disconnected by traditional energy providers or under-utilising energy where they cannot afford to pay, consumers now face the prospect of higher costs for essential energy supply over a long period time where new technologies are not appropriately supplied.

For example, a consumer seeks to reduce the cost of essential energy supply and is advised by a business to install a new system. Misleading claims about savings can be common, and it is very difficult for the consumer to reverse to their previous arrangements if they find the new system is more expensive. The additional costs may be even worse where the solar system does not function at all or has a fault and the consumer is unable to resolve the issue with the business.

QUESTION 7: REGULATORY IMPLICATIONS

If the answer to Question 6 is yes, what are the implications for the NECF as the energy specific consumer framework?

RECOMMENDATION 12. The NECF and other energy regulation in Australia should be broadened to ensure appropriate regulation of services that may increase the ongoing cost of, or interrupt, consumer's essential energy service supply.

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.

The AEMC's framing of voluntary codes as a sufficient complimentary measure to energy regulation and the ACL ignores that these codes do not commonly offer comprehensive and enforceable protections to all consumers. The AEMC should work towards mandatory regulation to protect consumers where new energy technology can interrupt essential energy supply or significantly increase costs of essential energy supply.

The assertion that voluntary codes can respond dynamically is not supported by the fact that almost two and a half years after the COAG Energy Council requested industry formulate a code for behind the meter products, it is still uncertain as to when this will be implemented. It is also uncertain as to how many businesses will become signatories, let alone how effective the NETCC will be in offering protections. It is also likely this code will not include a ban on unsolicited sales despite the considerable evidence of harm we have presented throughout the code's development and approval.

The AEMC is right to recognise interruption as a significant risk that warrants mandatory regulation not a voluntary code. The impact this can have on consumer's essential energy supply and corresponding wellbeing is discussed in a previous response. In the most extreme scenario, a new energy technology could interrupt supply of life support equipment and this demonstrates how unacceptable it is to leave such activity without compulsory protections. The mapped detriment that may arise because of new energy technology from *Power Transformed* in Figure 2 should also be considered by the AEMC to assess where robust regulation is necessary beyond industry codes.

Figure 2

Table 1: Potential detriment for consumers in the new energy market

Detriment	Example
1. Lack of access to basic consumer protections	Many new products and services may fall outside of the current regulatory framework, and protections that ensure a right to supply, hardship arrangements and access to Ombudsman schemes may not apply
2. Buck-passing and blame shifting	When disputes arise in new products and services which may require a network of relationships to deliver, the potential for buck-passing and blame shifting between parties is high
3. Mis-selling	As products get more complex, some companies may turn to sales tactics relying on product complexity to mask inappropriate or unsuitable products and services
4. Poor decision-making	Consumers may find it difficult to make decisions in their own interests when the number and complexity of choices increases
5. Long lock-in contracts	Long lock-in contracts (e.g. 15 years for a solar lease) reduce consumer choice and flexibility
6. Complex financing tools	New financing arrangements for products and services (e.g. solar leases and power purchase agreements) are complex and may include unclear costs and inconsistent regulatory oversight
7. Inability to access the new market	Some consumers may face systemic barriers to participation in the new, personalised electricity market; this may include those with low incomes, poor literacy skills, language barriers and renters
8. Difficulty comparing products and services	Bundled products and services which are increasingly marketed to individuals based on their personal usage profiles may become difficult to compare where inclusions, exclusions and terminology differ
9. Market failure due to segmentation	Downward pressure on energy prices through mass market competition may be undermined in a market where retailers can increasingly identify and target active, affluent households with individual deals
10. Exclusion through complexity	People who could benefit from switching to new products and services may not engage if information and price signals are too complex, or the reason for participating is not clear
11. Hardship in off-grid scenarios	Off-grid households may experience reduced supply or loss of supply if they fall into hardship, or during a dispute with their technology provider
12. Reduced choice in off-grid communities	Consumers in off-grid communities may have reduced ability to choose their preferred electricity provider and may face higher costs where retail competition is reduced

Figure 2: Consumer Action, 2016. *Power Transformed; Unlocking effective competition and trust in the transforming energy market. Page 16.*

The AEMC should also pursue mandatory regulation where a technology can result in someone paying far more than necessary for their essential energy supply. This could occur because of the long payback time for technology or because a service is not structured in a way that is tailored to a consumer’s purpose. The consequences of paying too much for a service you have no choice but to purchase (whether through traditional supply or contractual arrangements with significant costs for exiting) can compound or cause significant financial hardship and associated social issues.

RECOMMENDATION 13. The AEMC should pursue robust regulation as opposed to industry codes to deliver appropriate protections for all consumers.

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?

The AEMC's comment that voluntary codes are useful as their broad definitions do not capture businesses who choose not to participate ignores the need for comprehensive monitoring and universal protections necessary for appropriate outcomes. Mandatory regulation could adopt the definitions from the NETCC and implement a robust exemption process where regulators will have oversight of activity impacting consumers as well as the ability to ensure consumers benefit from the evolving energy market. This approach would also allow appropriate compliance and enforcement activity towards any business inappropriately impacting on the cost or interrupting consumer's essential energy supply.

QUESTION 10: OBJECTIVES OF AN OVERARCHING CONSUMER FRAMEWORK

Do you agree with the objectives identified by the Productivity Commission? Are there other objectives the AEMC should consider?

We generally support the objectives identified by the Productivity Commission's review into Australia's consumer policy framework but repeat our comments to that process 12 years ago; that competition is a tool to achieve good outcomes for consumers and that frameworks should remain focused on good outcomes for consumers not simply assess competitive processes.¹⁵ In completing analysis of the adequacy of the ACL, NECF and voluntary codes the AEMC should emphasise the scrutiny of voluntary code's ability to deliver appropriate and timely redress for all customers accessing a new technology product or service where detriment occurs, particularly those who are vulnerable and face additional barriers to pursuing any rights they may have. The AEMC should also consider the ability of voluntary codes to adequately deter misconduct and consider the Financial Services Royal Commission's findings around the need for robust regulation to protect consumers.

QUESTION 11: INTEGRATING THE ENERGY CONSUMER FRAMEWORK

How can the three consumer frameworks be better integrated to make it easier for energy customers and businesses in terms of information requirements? Please give specific examples.

Broadening the scope of energy regulators to provide protections for all ways in which consumers access essential energy supply with requirements to issue clear guidance on expected outcomes would simplify consumers and business's ability to understand the rights and obligations. Similarly, the extension of energy and water ombudsman jurisdictions to cover all energy products and services that may interrupt or increase the cost of supply will simplify the search for information and balancing of requirements in the interests of fair and reasonable outcomes where disputes arise.

In repeating the Productivity Commission's assertion that a confident and well-informed group of consumers may combat inappropriate supplier conduct,¹⁶ the Issues Paper ignores the potential for price discrimination for other cohorts and the incentives these consumers may have to leave others behind in relation to practices like loss-leaders. There are clear barriers to many people being informed of potential inappropriate practices and consumers should not be left unprotected from harm in accessing essential energy supply.

¹⁵ National Consumer's Roundtable on Energy, 2008, *Productivity Commission Draft Report – Review of Australia's Consumer Policy Framework Joint Submission*

¹⁶ Issues Paper p.23

QUESTION 12: POTENTIAL RISKS TO CONSIDER

Are there additional risks to consumers that should be considered and are not already addressed by the NECF, ACL and the voluntary codes?

In addition to the risks identified in the issues paper the AEMC should also consider the risk that consumers have no access to the expertise to define and resolve disputes arising from complexity in new energy technology arrangements. This could be caused by cost to access these experts or none being available in some areas. The expansion of energy and water ombudsman jurisdiction and membership being required is the best way to ensure free, fair and reasonable dispute resolution for consumers.

Other risks that should be considered and have previously been discussed in this submission include:

- The unsolicited selling of complex products presents unacceptable risks to consumers and should be addressed with a regulated ban, as recommended in the *Sunny Side Up* report;
- Business closures – (CHOICE reports an estimated 600,000 of 1.9 million solar PV systems were installed by companies not longer trading²⁷) present risks to consumers and this should be addressed with a default fund; and
- The gap in consistent application and enforceability of voluntary codes must also be addressed through mandatory regulation.
- The examples given in Figure 2.

QUESTION 13: VULNERABLE CONSUMERS

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?

The AEMC should recognise that any consumer can become vulnerable at any time. It only takes one life event, like a serious accident or the death of a household's main income earner and a short period of time for a consumer to end up in financial hardship and at risk of being unable to access their essential energy services. By making this consideration the AEMC will ensure it is considering the level of protection needed by all consumers.

Table 1 below is a non-exhaustive list of vulnerabilities consumers may experience¹⁸ and the potential detriment that might occur or be unable to be resolved without appropriate energy specific regulation that covers new technologies which can increase the cost or interrupt essential energy supply.

Table 1.

Vulnerability experienced.	Potential Detriments (list at bottom of table)
Family Violence including Economic Abuse	B, C, D
Age related vulnerability such as elder abuse	B, C, D, F
Family and/or relationship breakdown	A, C, D, E
A consumer needing a representative's assistance to engage with a business	B, C, E
Death or serious medical condition of a spouse or family member	A, C, E, F
Disability or caring for someone with a disability	B, C, E, F
No or limited English skills	B, C, E

²⁷ CHOICE. *What to do if your solar company goes out of business*. Retrieved 28 January 2020 from: <https://www.choice.com.au/home-improvement/energy-saving/solar/articles/what-to-do-if-your-solar-company-goes-out-of-business>

¹⁸ Adapted from: ESC, 2017. *Energy Compliance and Enforcement Policy: Guidance note – Payment difficulty and disconnection*, p 19-20

Lack of access to electronic communication (digital exclusion)	B, C, E
Serious illness or health condition (including mental health) that impacts a consumer's ability to engage or communicate with a business.	A, B, C, E, F
Loss of employment or regular source of income	A, C, E
Variable income such as seasonal or casual work	A, C, E
Recipient of government assistance payments	A, C, E
Unexpected and essential cost of living expenses (urgent house repairs, car repairs, medical expenses, schooling or childcare expenses).	A, E
Debt on accounts with a different energy business	A, E
Acute financial hardship or personal hardship	A, E
Being temporarily uncontactable (e.g. due to hospitalisation or disconnected telephone or internet services)	A, B, C, E, F
Low literacy or numeracy, or lack of confidence in speaking to service providers.	B, C, E
<p>Potential detriments.</p> <ul style="list-style-type: none"> A. Being unable to afford a product or finance for a product due to unsuitability or a change in circumstances. B. Increased likelihood of harm from misleading or high-pressure sales in both solicited and unsolicited contexts. C. More barriers to accessing resolutions when issues arise. D. Paying for products or services used by others. E. Not being able to cease arrangements that are inappropriate. F. Immediate danger to a person's health where energy supply is interrupted 	

The AEMC should address these vulnerabilities in robust energy specific regulation to ensure that:

- Consumers are appropriately sold energy products and services in the first place;
- Consumers are directed to the appropriate support for their needs when their circumstances change, and they need assistance;
- Barriers to resolving disputes are minimised by the extension of Ombudsman jurisdiction; and
- Arrangements can be ceased or adjusted where a consumer has been coerced into contractual obligations or may face serious danger due to a product or service interrupting energy supply.

RECOMMENDATION 14. The AEMC ensure robust protections for all consumers because any consumer can experience vulnerability.

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?

The AEMC should ensure energy specific protections exist to ensure that all consumers access any entitlements that may be available for free as opposed to paying for a service. For instance if a consumer identifies that they want to participate in demand response because they cannot afford energy, the demand response provider should be required to discuss their entitlements for assistance from their energy retailer or the availability of government and non-government support as opposed to or in addition to providing demand response services.

Also, VCOSS's *Power Struggles* report¹⁹ highlights the need to consider the way in which vulnerable consumers can underutilise to their detriment, and that this is sometimes exacerbated by business conduct. For example, demand response providers may encourage some people in hardship to under-utilise electricity when this may pose risks to their health and quality of life.

Unsolicited selling of complex products that impact the provision of an essential service supply, particularly where there may be misleading claims or high-pressure sales tactics, have consequences for all consumers but an even greater impact on those who may be less able to compare complex products or afford what is on offer. Energy specific regulation should go further than the ACL or voluntary codes and ban unsolicited selling.

Some of the examples in Figure 2, are also relevant to this consultation question.

RECOMMENDATION 15. The AEMC pursue energy specific protections to ensure all consumers receive appropriate assistance when facing potential harm through the provision of new energy technologies.

QUESTION 15: POLICY RISKS

What are the risks of extending the obligation of having policies that identify and protect consumers under vulnerable circumstances to new energy services and products suppliers?

Appropriate protections for consumers ensure that businesses act to benefit all consumers. There is a risk that the drafting of obligations to just protect those experiencing vulnerability will create barriers to consumers accessing protections or assistance as appropriate. Because anyone can experience vulnerability, protections should be universal so that they are accessible without barrier and enforceable.

Consumers are often unaware of their current rights to assistance under traditional supply. Protections should be designed to ensure they do not rely on consumers awareness to be effective. They should also be designed to protect people, not to punish those experiencing vulnerability by making them overcome barriers to pursue a fair outcome.

We reject the discussion of potential 'moral hazard' issues paper.²⁰ The fact is that consumers regularly fall victim to unfair practices without even realising it. To take a recent example in the energy sector, households that chose deals based on large discounts probably had little idea that they were in fact paying more than other deals that offered lower benefits. Moreover, even where consumers are aware of unfair practices, there may be no way of avoiding them. Consider the situation where people commonly give up their data to firms that collect it for marketing purposes. It's unlikely that consumers value marketing; rather it is because they must give up personal information to access the service.

¹⁹ VCOSS, 2017. *Power Struggles; Everyday battles to stay connected.*

²⁰ Issues Paper p.27

This discussion in the Issues Paper is framed as though only a small group of consumers will ever be vulnerable when nearly all consumers are at risk of vulnerability. Measures like our recommendation that the consumers purpose in engaging a service being sought and recorded could be one measure that rebalances what businesses are reasonably expected to deliver.

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 AEMC should also consider a provision prohibiting unfair trading which could give consumers, ombudsman and regulators more options to pursue practices with new technology causing harm to people's essential energy supply. Specifically, this could deal with issues about unfair pricing of services that are more likely to arise, cause harm and not be obvious to many consumers in the provision of new products and services that are unfamiliar to most. High pressure sales tactics may obscure such price gouging for many consumers as well as those experiencing vulnerability.

RECOMMENDATION 16. The AEMC consider a prohibiting unfair trading to protect consumers from issues like price gouging on essential energy service provision through new technology.

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? Please explain.

As discussed above, evidence from our services shows there is a clear need for expanding the jurisdiction of energy and water ombudsman and requiring membership for providers who can impact essential energy supply. The Issues Paper correctly identifies that often consumers must pursue claims outside of the current energy frameworks to state based regulators or small claims tribunals. These are often ineffective or have a number of barriers to reaching a resolution, such as needing to enforce a VCAT order or find and cover the costs of an expert witness. There should also be an industry funded default fund established to address issues with business closures.

QUESTION 18: EFFECTS OF DIFFERENT REDRESS MECHANISMS

What are the risks of having different redress mechanisms under different consumer frameworks? Please explain.

Where there are different mechanisms a consumer must engage with to resolve disputes, the reality is that people will become fatigued and give up. Coverage of all parties by energy and water ombudsman would allow for fair and reasonable outcomes.

There is also the risk that some mechanisms are not accessible for all consumers when compared to free energy and water ombudsman services.

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?

As above we recommend extended compulsory coverage of energy and water ombudsman as well as a default fund that addresses business closure.

QUESTION 20: ENFORCEMENT OF THE ENERGY CONSUMER FRAMEWORK

How could the enforcement tools and actions under the voluntary framework be better integrated with the ACL and the NECF? Please explain.

Instead of relying on voluntary frameworks to fill gaps in regulation, the AEMC should look to address gaps in protections with mandatory regulations, the compulsory membership of energy and water ombudsman schemes and well-resourced regulator enforcement teams. The Issues Paper is correct in identifying the issues with accessing rights through current arrangements on pages 33 and 34. The enforcement tools available under voluntary frameworks are likely to be under resourced to ensure consistent compliance for good consumer outcomes. Voluntary frameworks are also limited by the fact that businesses can simply stop being a signatory to avoid consequences and can often do so without consequence to the business. Ultimately these frameworks are a step in the right direction, but comprehensive regulation is needed to best deter businesses harming consumers through the supply of new energy products and technology.

QUESTION 21: PRINCIPLES

Are there any other principles the Commission should consider?

The AEMC should also consider how regulation can contribute to benefits for all consumers not just individuals accessing new energy technology. As nearly all must purchase essential energy services that are delivered through a centralised grid, regulation must consider the environmental and cost implications of technology. The AEMC should also be cautious in extending regulatory flexibility too far and imposing inappropriate risk on consumers. As discussed above, all consumers can experience vulnerability and need protection.

RECOMMENDATION 17. The AEMC also consider the regulation's ability to provide benefits to all consumers from energy technology.

RECOMMENDATION 18. The AEMC should be cautious about making regulation too flexible as to not place appropriate risk on consumers.

Please contact Jake Lilley at **Consumer Action Law Centre** on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

APPENDIX A - SUMMARY OF RECOMMENDATIONS

- RECOMMENDATION 1.** New energy product and services retailers should be responsible for ensuring that what they provide is properly connected to the main grid unless consumers give Explicit Informed Consent to take responsibility themselves.
- RECOMMENDATION 2.** The AEMC consider how to appropriately exclude finance arrangements not regulated by the national consumer credit laws from being used to finance new energy technology.
- RECOMMENDATION 3.** Unsolicited sales of new energy technology should be banned.
- RECOMMENDATION 4.** A 10-year statutory warranty applying to the whole solar system should be provided by solar panel retailers. Equivalent warranties should be applied to other new energy technology as their reasonable reliability is understood.
- RECOMMENDATION 5.** The jurisdiction of energy and water ombudsman services be extended to include the retail sale of new energy products and services.
- RECOMMENDATION 6.** A new energy technology industry default fund or last resort compensation scheme should be established to provide compensation to those entitled to compensation but unable to access it due to the insolvency of a new energy technology retail business.
- RECOMMENDATION 7.** The ACL fitness for purpose guarantee be applied in contracts between consumers and new energy technology businesses
- RECOMMENDATION 8.** The AEMC ensure robust regulation is developed that means new energy technology providers do not use embedded network arrangements to test new ways of delivering essential energy services or make robust processes for requesting an exemption and for regulators to intervene where exemptions are not benefitting consumers.
- RECOMMENDATION 9.** The AEMC should avoid relying on information disclosure as the main form of consumer protection.
- RECOMMENDATION 10.** The AEMC should require a mandatory code of conduct for third party intermediaries that includes a robust process as to how these businesses can give EIC on a consumer's behalf.
- RECOMMENDATION 11.** The AEMC analyse the costs and benefits to consumers of bringing additional businesses into essential energy service supply
- RECOMMENDATION 12.** The NECF and other energy regulation in Australia should be broadened to ensure appropriate regulation of services that may increase the ongoing cost of, or interrupt, consumer's essential energy service supply.
- RECOMMENDATION 13.** The AEMC should pursue robust regulation as opposed to industry codes to deliver appropriate protections for all consumers.
- RECOMMENDATION 14.** The AEMC ensure robust protections for all consumers because any consumer can experience vulnerability.
- RECOMMENDATION 15.** The AEMC pursue energy specific protections to ensure all consumers receive appropriate assistance when facing potential harm through the provision of new energy technologies.
- RECOMMENDATION 16.** The AEMC consider a prohibiting unfair trading to protect consumers from issues like price gouging on essential energy service provision through new technology.

RECOMMENDATION 17. The AEMC also consider the regulation's ability to provide benefits to all consumers from energy technology.

RECOMMENDATION 18. The AEMC should be cautious about making regulation too flexible as to not place appropriate risk on consumers.

