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Submitted via www.aemc.gov.au

John Pierce
Chairperson
Australian Energy Market Commission

Dear Mr Pierce

Issues Paper 2; Consumer Protections in an Evolving Market: Traditional Sale of Energy - 2020 Retail Energy Competition Review

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Australian Energy Market Commission (**AEMC**) *Issues Paper 2; Consumer Protections in an Evolving Market: Traditional Sale of Energy - 2020 Retail Energy Competition Review (Issues Paper)*.

As new energy products and services create more options for consumers to access energy offers with non-conventional pricing or features, the complexity of making decisions increases and poses more risks to consumers. The AEMC must be cautious not to assume that all consumers are able or willing to be actively engaged with energy retail services. These assumptions may lead to an erosion of necessary consumer protections.

Consumer Action's legal team has regularly assisted people with issues arising from the emergence of distributed energy technology. Consumers experience of harm with solar technology is discussed in our *Sunny Side Up* report.¹ While this Issues Paper discusses the regulation of energy retailers, lessons about the harm in the transition to solar technology in that report can inform decision makers as to how to approach policy reform that ensures consumer can access safe, secure and reliable energy at the lowest possible costs as the traditional market transitions. Protections like regulated information provision, Explicit Informed Consent (**EIC**) and cooling off periods are still needed to avoid harm but some consideration should be given to redefining some aspects of these concepts to both provide more robust protection for consumers and allow non-conventional services for better consumer outcomes.

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

¹ Consumer Action, 2019. *Sunny Side Up; Strengthening the Consumer Protection Regime for Solar Panels in Victoria*.

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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.

Responses to questions for consultation

Information provision

1. Information provision in the contents of bills: Are the current requirements for the information and delivery of information that is required to be included on restricting innovation and digitalisation? If so, what changes would allow innovation to occur?

2. Forms of regulation (bills): Does the current form of regulation of information provision restrict innovation and digitalisation? If so, what form of regulation—the mechanism employed—could be introduced? For example, could industry self-regulation or principle-based regulation better facilitate innovation and digitalisation?

Requirements for information on bills are important elements of consumer protections. We recognise that the presentation of bills could be redesigned through comprehensive consumer testing to ensure the information portrayed is effective. However, we strongly oppose eroding protections in relation to the information that is required on billing or moving requirements around bills away from mandatory regulation.

The requirements in the NERR for the minimum standards around information on bills are likely to assist consumers to better understand the advantages of new offers or even need additional requirements to facilitate such understanding. For instance, information about the Consumer Data Right and how to access data once this is implemented may greatly assist engaged consumers.

It is important that bills continue to provide clear information about the amount owing and how it is calculated, how to access assistance, how to obtain a more suitable deal, and how to resolve disputes.

We strongly oppose industry self-regulation of the minimum requirements for information on bills. Such self-regulation would likely be:

- difficult for regulators to monitor and enforce across millions of bills;
- difficult for ombudsman schemes to interpret when disputes arise; and
- difficult for consumer groups to engage with, both in the development of an industry code and in subsequent engagement with all businesses around interpretation of the code for their billing design and any issues that arise.

We consider that it could be possible to for principles-based regulation to produce good consumer outcomes, given regulators have clear consultation requirements and have objectives to benefit consumers. However, we are apprehensive about such a direction given the value of current minimum requirements. This includes that clarity that prescription brings to dispute resolution and monitoring and enforcement activities. Principles based regulation designed by regulators may be more appropriate for any additional information on bills relating to emerging energy technology products and services.

RECOMMENDATION 1. The AEMC should not alter the current minimum requirements for information on bills without comprehensive consumer testing.

RECOMMENDATION 2. The AEMC should not pursue industry self-regulation for the minimum requirements for information on bills.

RECOMMENDATION 3. The AEMC only allow principles-based regulation for additional requirements about information on bills to better facilitate emerging energy technology products and services.

3. Notifications: Do the current requirements on delivery of information of notifications to consumers restrict innovation and digitalisation? If so, what changes would allow these to occur?

The AEMC should consider introducing other protections that mean consumers get what they expect from energy providers and do not need to be notified. This is because notifications may only be effective for protecting some cohorts of consumers.²

We support taking the approach of the Essential Services Commission's (ESC), such as its proposal that will require benefit periods to match the length of a retail market offer.³ This simplification is an opportunity to remove the need for 20 to 40 day notice period for benefit changes while better protecting consumers who are unlikely to act when notified. The ESC proposals also include some other regulatory options that would enable new energy offers to enter the market where the benefits to consumers are established. These options may present an option for robust regulation for consumer protections and the ability for consumers to benefit from non-conventional retail services that better suit their needs.

RECOMMENDATION 4. The AEMC should introduce rules to prohibit benefit periods to simplify offers and remove the need for notifications of benefit changes.

4. Forms of regulation (innovation): Does the current form of regulation of information provision restrict innovation and digitalisation? If so, what form of regulation—the mechanism employed—could be introduced? For example, are industry self-regulation or principle-based regulation appropriate methods of regulation?

The AEMC should consider a robust exemption system to some notification requirements that is operated by the energy regulator. A recent ESC draft decision proposed an exemption system for offers that would not meet the proposed requirements for fixed periods for retail pricing in Victoria where these offers will benefit consumers. We support such an approach as this will allow benefits for consumer cohorts who could experience better outcomes, while ensuring some rigour in oversight. A similar exemption scheme for offers where consumers give EIC to not receive notification of price changes for clearly defined and understood time periods may offer a way forward. For such an exemption scheme should be robust by incorporating safeguards including:

- Stringent requirements around EIC for entering exempt contracts which require providers to give clear information about other products available with less risk;
- Regular reporting to the regulator about the number of consumers contracted on these offers and the proportion of those consumers receiving or entitled to assistance for hardship or payment difficulty with corresponding public reporting;
- A robust regulator approval process for exempt products that includes requirements to prove the benefits for consumers and to define the appropriate intended distribution to consumers with certain characteristics, similar to the incoming Australian Securities and Investments Commission's Design and Distribution Obligation requirements for financial services firms;⁴ and,

² 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*

³ Essential Services Commission, 2019. *Ensuring energy contracts are clear and fair draft decision*

⁴ See: Australian Securities and Investments Commission, 2019. *Consultation Paper 325, Product design and distribution obligations*. Available at: <https://download.asic.gov.au/media/5423121/cp325-published-19-december-2019.pdf>

- Entitlement to be offered a tariff review for all consumers on exempt tariffs who are entitled to any form of hardship or payment difficulty assistance.

The AEMC would also need to define how the regulator would intervene where these safeguards indicate that consumers are not getting good outcomes from exempt retail offers. The regulatory exemption framework should have a clear process for protecting consumers if necessary.

We do not consider that industry self-regulation would be appropriate in relation to requirements around the notification of price changes. Industry self-regulation is unlikely to be robust and this could cause significant consumer harm in terms of inconsistent practices and difficulty for ombudsman and regulators to act in consumer's interests where systemic issues arise.

RECOMMENDATION 5. The AEMC consider implementing a robust regulator operated exemption scheme to allow offers that cannot meet notification requirements only if these will benefit consumers.

Explicit Informed Consent

5. Explicit informed consent in a digitalised market: Is the current method prescribed in the NECF for retailers to record EIC restricting innovation and digitalisation? If so, how could it be changed to allow these to occur?

EIC is a cornerstone protection for consumer's access to their essential energy services and we strongly oppose winding back aspects of this protection that could expose consumers to harm. The current requirements to obtain EIC facilitate verification by regulators and assist resolution of disputes. We would not support new products or services that are unable to provide this. Even if these products or services offered greater efficiency this benefit would not outweigh the detriment of exposing consumers to much greater risk of harm when accessing essential services.

The AEMC's discussion in the Issues Paper about changes in consumer conceptions since the introduction of EIC is focused on cohorts of consumers with understanding of retail competition and access to AMI metering. Protections should be designed to be universal for all consumers no matter their engagement or access to technology. Instead of altering EIC protections for a specific cohort, the AEMC should consider whether regulators can operate robust exceptions with safeguards where benefits to a cohort of consumers can be demonstrated.

RECOMMENDATION 6. The AEMC maintain EIC protections.

6. Temporary explicit informed consent waiver: Should energy consumers be able to waive EIC for certain services for a given time period?

There may be a case for such waivers in relation to the appropriate use of energy data through the Consumer Data Right or other services offering tailored solutions to consumers or allowing consumers who have the expertise to accept more exposure to wholesale pricing for their benefit. Where this is the case, we consider that a robust exemption scheme operated by the regulator as discussed in our response to question four is essential.

RECOMMENDATION 7. The AEMC only consider allowing a temporary EIC waiver within a robust regulator operated exemption scheme that ensures consumer benefits.

7. Explicit informed consent, innovation and digitalisation: Are the current provisions that require retailers to have a record of EIC restricting innovation and digitalisation? If so, how could these be changed to allow these to occur?

It would be unacceptable to remove the requirement of a record of EIC. This would completely undermine the protection.

RECOMMENDATION 8. The AEMC should not remove the requirement for retailers to have a record of EIC.

8. Explicit informed consent delegation on a third party: Should energy consumers be able to provide EIC to a third party to interact with the retail market on their behalf? If so, what arrangements should be in place?

These services may be appropriate for some cohorts of consumers, however there is potential for harm to arise where consumers become confused as to arrangements made on their behalf. In practice this delegation of EIC for a defined purpose should be time limited and subject to mandatory regulation and ombudsman coverage for all businesses involved.

If the waived EIC relates to a third-party provider not subject to current energy regulation, then there should be a requirement for these providers to be members of an energy ombudsman scheme. A mandatory regulatory code for third party energy services that gives clear guidance on what is expected of third parties would also be needed to ensure that ombudsman services can reach fair resolution for consumers who have disputes and regulators can intervene where systemic issues or breaches arise.

RECOMMENDATION 9. The AEMC should only pursue allowing EIC delegation to a third party where providers are members of energy ombudsman schemes and subject to mandatory regulatory codes at a minimum.

Cooling-off periods

9. Cooling-off period under the NECF: Are cooling-off period protections for solicited retail market contracts still beneficial? If so, why? If not, what improvements could be made?

Cooling off protections are still beneficial to consumers in solicited retail market contracts, but different regulatory approaches may improve consumer outcomes. As above, the AEMC should be cautious in asserting that consumers have a greater understanding of energy retail competition when assessing the best approach to consumer protections as all cohorts of consumers with different abilities to engage should be protected. The AEMC must also not redesign protections to suit AMI metering when the roll out is not universal. Removing a protection period altogether is not acceptable given this will allow harm for people trying to reverse switching on accumulation meters where significant extra costs to consumers may be generated for meter reads. It may also mean people are more likely to be pressured into an energy offer they do not understand or that is not in their interests.

Behavioural economics insights should also be taken into consideration. Many people may experience information overload and agree to a retail market offer as a polite way to end a high-pressure sales pitch but may experience barriers in cooling-off. Offers from retailers are numerous and already hard to compare let alone when emerging new technology and services further complicate comparison and decision making.

RECOMMENDATION 10. The AEMC explore an 'opt in' period protection for both solicited and unsolicited sales of energy offers.

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

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RECOMMENDATION 4. The AEMC should introduce rules to prohibit benefit periods to simplify offers and remove the need for notifications of benefit changes.

RECOMMENDATION 5. The AEMC consider implementing a robust regulator operated exemption scheme to allow offers that cannot meet notification requirements only if these will benefit consumers.

RECOMMENDATION 6. The AEMC maintain EIC protections.

RECOMMENDATION 7. The AEMC only consider allowing a temporary EIC waiver within a robust regulator operated exemption scheme that ensures consumer benefits.

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