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ARENA response to the AER Review of Consumer protections for Future Energy Services (formerly the Retailer Authorisations and Exemptions Review)

This submission provides information and insights relevant to the *Review of Consumer Protections for Future Energy Services Options Paper*¹.

Recent studies commissioned by ARENA indicate that there is considerable uncertainty as to how new energy services and products are captured within the existing regulatory framework, particularly regarding the responsibilities and obligations surrounding consumer protections. Without the appropriate consideration of non-traditional providers, consumers may face limited competition between providers and difficulties switching providers, as well as limited access to information and a poor awareness and understanding of available services and products.

To support innovation and protecting consumers, ARENA

- supports the appropriate expansion of the consumer protections framework to include new energy products and services such as Energy-as-a-Service (EaaS) in an augmented retailer licence.
- supports balance between the design and implementation of new regulatory obligations to ensure adequate consumer protections and actively promoting innovation in new energy service offerings.

Insufficient customer protections

Ambiguous regulatory framework

Stakeholders consulted during several studies commissioned by ARENA have highlighted the high level of uncertainty surrounding how current electricity regulations and consumer protections laws apply to new energy products and services like Energy-as-a-Service (EaaS) models, homes energy management systems (HEMS), and dynamic operating envelopes (DOEs).

¹ <https://www.aer.gov.au/retail-markets/guidelines-reviews/review-of-consumer-protections-for-future-energy-services>

Preliminary findings from the ARENA-commissioned *Energy as a Service Report*² developed by Accenture revealed industry stakeholder confusion around the relevant protections available to consumers in instances where EaaS services failed to deliver on consumer expectations. There is considerable risk to consumers when multiple parties across sectors are involved in the provision of EaaS services (e.g. utilities, technology and communications providers, etc.). Models in which rely on consumers reducing their connection capacity, or disconnecting from the grid through EaaS offerings are at risk of lost or curtailed energy supply, as the current regulatory framework does not oblige non-traditional supplies to maintain a customer's access to at least one source of energy³. This could occur in situations where the EaaS service fails or if the supplier disconnects a customer, such as for non-payment⁴. Similarly, non-traditional suppliers are not currently obliged to maintain a supply of energy to vulnerable customers or those experiencing financial hardship⁵.

As part of the ARENA-commissioned *Smarter Homes for Distributed Energy Report*⁶ produced by Enea Consulting, legal advisors Allens reviewed how existing electricity and consumer protection regulations might apply to HEMS. Allens found that the consumer protections associated with HEMS fall under the Australian Consumer Law (ACL) and are in addition to the protections consumers receive for the retail supply of electricity. Voluntary consumer protection frameworks may also apply, typically when the new energy products and services are associated with government schemes (e.g. rooftop PV suppliers are required to be signatories to the Clean Energy Council's Retailer Code of Conduct to participate in Victoria's Solar Homes Program)⁷.

The lack of clarity relating to the responsibility and liability of compliance, enforcement and penalties associated with new energy services meeting technical standards also poses a risk to consumers. For example, a consumer could be penalised for unintentionally breaching a dynamic connection agreement despite their not having any ability to manage for compliance and their obligations not being clearly communicated with them⁸. ARENA understands this issue may be considered under the AEMC's *Review into DER Technical Standards*, however it is important that this is also considered with a consumer protection lens.

Dispute resolution

The Distributed Energy Integration Program (DEIP) *DOE Outcomes Report*⁹ identified a situation in which consumers' attempts to resolve an issue is frustrated by ambiguity of responsibility between parties. This could occur with multi-party EaaS services, in cases where the responsible party has ceased trading, or if the relationships between providers is obscure and difficult for the consumer to easily navigate.

² <https://arena.gov.au/knowledge-bank/accenture-energy-as-a-service-report/>

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ <https://arena.gov.au/knowledge-bank/smarter-homes-for-distributed-energy/>

⁷ Ibid.

⁸ Ibid.

⁹ <https://arena.gov.au/knowledge-bank/deip-dynamic-operating-envelopes-workstream-outcomes-report/>

The lack of low-cost and accessible dispute resolution options available to consumers is a significant risk as new energy services and products are offered to consumers. In situations where the current regulatory and consumer protections frameworks do not cover non-traditional suppliers, consumers may be forced to pursue dispute resolution through the court system, which can be costly and take time¹⁰.

The DEIP DOE Working Group recommended that changes be made to the dispute resolution processes applicable to new energy products, including extending the capacity and powers of state-based energy ombudsmen schemes¹¹. The Working Group further suggested the creation of a national public register for all complaints, disputes, and outcomes to support transparency and accountability.

Competition and ease of switching

Consumer engagement with new energy services is often iterative, with purchasing occurring overtime in line with consumer needs and/or their financial capacity to procure them. The futureproofing of technology and services is therefore an important consumer protection consideration. Weak regulatory frameworks for DER products and services impact consumer outcomes by limiting competition and choice for consumers, either through technical or contractual lock-in. This has the potential to materially reduce the uptake of new energy products and services over time. It is important that a consumer's selection of a new product or service at a point in time does not unduly limit their future choices.

Limited behind-the-meter (BTM) interoperability resulting from proprietary devices and communications protocols that preference one provider over others can limit consumers' choices and their access to different value streams and could be taken to constitute a form of anti-competitive behaviour. For example, a HEMS provider may preferentially allow access to certain devices that could result in suboptimal outcomes for the customer¹². Allens' review of the current consumer protections found that certain prohibitions in the *Competition and Consumer Act 2010 (Cth)* (i.e. Section 47 exclusive dealing and Section 46 misuse of market power) may prevent a single vertically integrated HEMS or device provider (e.g. a gateway or platform provider) from impeding competition through the supply of proprietary devices¹³. However, it doesn't prevent the granting of preferential access to devices, as this is subject to a lessening of competition test which considers the likely future state of the market and whether a dominant provider can materially impact competition in the market. This may include the circumstance, for example, where a technology provider grants access to facilitate third party control of a device but with more limited functionality compared to that they would grant themselves.

Similarly, without the proper protections in place, new energy providers may seek to curb competition and customer switching through financial or contractual lock-in. For example, certain EaaS models require the long-term repayment of assets, which can result in

¹⁰ <https://arena.gov.au/knowledge-bank/accenture-energy-as-a-service-report/>

¹¹ <https://arena.gov.au/knowledge-bank/deip-dynamic-operating-envelopes-workstream-outcomes-report/>

¹² <https://arena.gov.au/knowledge-bank/smarter-homes-for-distributed-energy/>

¹³ Ibid.

consumer lock-in if the contractual terms and obligations are unclear¹⁴. In the case of EaaS offers, it may be beneficial to decouple asset payback from ongoing services to ensure that suppliers can recoup the asset cost without locking consumers into ongoing services¹⁵. For example, once a consumer has repaid the cost of the asset, they should be free to change providers if they wish. If the consumer hasn't repaid the asset, then they would only be liable for the agreed asset cost and not any additional EaaS services.

Access to information

There is often an asymmetry of information that prevents consumers from being able to make informed decisions about new energy products and services. For example, there are currently no standardised rules on information requirements and disclosures, including pre-contractual information on terms and conditions¹⁶. Understandably, this heightens perceived risk and dampens consumer appetite for new offerings if there no trusted party to oversee the formulation of rights, responsibilities and protections¹⁷. Smaller consumers will often lack the experience to engage in new contractual terms with confidence.

As highlighted in the *DEIP DOE Outcomes Report*¹⁸, consumers do not experience the numerous non-traditional offerings and policy interventions in isolation, but rather in combination, and any changes to consumer protections must consider the whole consumer journey and how protections work to ensure the best outcomes are achieved. The DEIP DOE Working Group recommended the consideration of new consumer protections, potentially under the as the New Energy Tech Consumer Code (NETCC) and further consideration of the role of the Clean Energy Regulator with regard to solar retailers and installers¹⁹.

International lessons on best practice

The *Energy-as-a-Service Report*²⁰ studied four comparable international jurisdictions to help identify how other markets have faced and overcome similar barriers to EaaS uptake and integration. The EaaS report highlights the following international activities that may provide valuable insights into the design of more comprehensive and energy-specific customer protection regulations:

- The European Union Energy Efficiency Directive (2021) introduced basic contractual rights, provision for vulnerable customers and out-of-court dispute settlement procedure.
- The Council of European Energy Regulators (2021) published regulatory framework recommendations such as simple presentation of information for bundled products and regulations to limit customer captivity.

¹⁴ <https://arena.gov.au/knowledge-bank/accenture-energy-as-a-service-report/>

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ <https://arena.gov.au/knowledge-bank/deip-dynamic-operating-envelopes-workstream-outcomes-report/>

¹⁹ *Ibid.*

²⁰ <https://arena.gov.au/knowledge-bank/accenture-energy-as-a-service-report/>

- The United Kingdom introduced new customer protection codes and is defining the role of new market intermediaries. In order to clarify the regulatory obligations, the Office of Gas and Electricity Markets (OFGEM) recognised supply to EV charging point as “supply” and selling electricity from these points as “not supply”. New customer protection codes, such as the Renewable Energy Consumer Code (2016) are in place for customers to set up contracts, guarantees and after-sale services. A voluntary code of conduct applies to the suppliers for accurate bills, energy switch guarantee and safety net for vulnerable customers.
- Different states in the United States are at different stages of adapting current frameworks. California’s Solar Consumer Protection guide has been made mandatory for all solar lease offerings, while Colorado is reviewing how customers and suppliers are classified in their framework.

Intersection of new energy offerings and consumer protections

Due to the emerging nature of new energy offerings, it is not yet clear which offerings will meet the essentiality criteria that would require a full retail licence²¹. Accenture have summarised two scenarios:

1. *New energy offerings do not impact the supply of an essential energy service:* In circumstances where services are offered on top of the essential service, it is expected there would be both a traditional energy retailer and parallel non-traditional service provider that operates only BTM.
2. *New energy offerings do impact the supply of an essential energy service:* A non-retail service provider can mediate the provision of the essential service of energy when the outcome of the service itself is essential, such as heating and lighting. The non-retail service provider may also mediate the energy supply arrangement where they become the Financially Responsible Market Participant (FRMP) for the consumer’s load. In this instance, the non-retail provider acts as a gatekeeper between the consumer and the supply of energy.

The *Smarter Homes for Distributed Energy Report*²² acknowledges the relative infancy of many new energy offerings and the need to apply tailored consumer protections without adding restrictive regulatory obligations on an evolving market. The report suggests non-regulatory measures such as best practice guidelines, codes of practice, and consumer education materials may be of value while a better understanding of consumer experiences (and the need for additional regulatory controls) is developed. However, there may already be a case for basic consumer protections in the form of BTM interoperability standards, as discussed above, where current consumer protection and competition laws are considered insufficient.

Augmented retailer licence for EaaS services that do not intersect with the essential service of energy

²¹ <https://arena.gov.au/knowledge-bank/accenture-energy-as-a-service-report/>

²² <https://arena.gov.au/knowledge-bank/smarter-homes-for-distributed-energy/>

As part of the *Energy-as-a-Service Report*²³, and in consultation with the DEIP Markets Working Group, Accenture have recommended that the objective of an augmented retailer licence should be “to ensure a minimum standard of quality for EaaS, extend customer protections from energy retail law to EaaS, lower the barriers to entry for new entrants (in comparison to a full retailer license), and provide EaaS suppliers access to market participant-only data”. Accenture have further recommended that financial hardship provisions and life support obligations should not be included in the augmented licence applied to these EaaS providers as they relate to ensuring the provision of the essential service of energy.

Accenture recommends that these EaaS providers should be required to provide a standard offer that meets a set of minimum criteria similar to that which is currently required under the retailer licence, albeit less prescriptive²⁴. Accenture have recommended that consumer protection frameworks:

- Ensure that any government incentive such as solar rebates or instant asset write-offs can still be received by the consumer or assigned to the service provider for a benefit
- Provide clarity and transparency around the payout requirements if the consumer were to move houses or sites, this should also consider
- Place reasonable limits on contract length, such as the term not being longer than the EaaS supplier’s amortisation schedule for the equipment (unless prices are reduced at this point)
- Contain service levels, agreed to by both parties, with avenues for rectification, or compensation for any services with a demand management component.
- Ensure that in all instances, the energy service guaranteed through the service has been provided before attempting to make revenue through market participation.
- Provide clarity around profit-sharing of revenue achieved through demand flexibility markets
- Ensure that suppliers are compensated in the event of ‘gaming’ behaviour of consumers in outcome-based models.

Accenture does not recommend that the standard offer be mandatory, just that an accredited and standardised contract may help consumers’ access to clear and reliable information.

Augmented retailer licence for EaaS services that do intersect with the essential service of energy

Accenture recommend that the same objective-based standard offer should also be applied to EaaS services that could impact of the supply of energy to for essential purposes, regardless of whether the AER considers them suitable for the augment retailer licence. This is intended to support consumer trust and procurement processes.

²³ <https://arena.gov.au/knowledge-bank/accenture-energy-as-a-service-report/>

²⁴ Ibid.

In instances where an EaaS provider is the on-seller of essential energy, Accenture recommends that the following provisions should be included in the augmented retailer licence (where they are not themselves the FRMP):

- Ensure that the EaaS provider records life support information and passes this on to the FRMP.
- Ensure that claims of financial hardship are promptly passed onto the FRMP and,
- In the instance that the EaaS providers chooses to cancel a service due to non-payment, they are required to ensure that the customer's account is transferred to the FRMP at no cost to the customer.

Other considerations

Further information on Accenture's recommendations in relation to EaaS providers, as well as the potential implications for the two instances where EaaS intersects the essential service of energy, can be found in the *Energy-as-a-Service Report*²⁵.

It is worth noting that as the retailer licence currently only applies to the residential sector, the consideration of whether the licence should be extended to cover other consumer segments like commercial-industrial should be based on the potential risks to consumers. Similarly, the *Energy-as-a-Service Report* only considers EaaS models, and each new energy service should be judged on their specific risks and merits to determine whether a similar augmented retailer licence should be applied.

About ARENA

The Australian Renewable Energy Agency (ARENA) was established in 2012 by the Australian Government. ARENA's function and objectives are set out in the *Australian Renewable Energy Agency Act 2011*.

ARENA provides financial assistance to support innovation and the commercialisation of renewable energy and enabling technologies by helping to overcome technical and commercial barriers. A key part of ARENA's role is to collect, store and disseminate knowledge gained from the projects and activities it supports for use by the wider industry and Australia's energy market institutions.

Please contact Caitlin Sears, Knowledge Sharing Manager, via caitlin.sears@arena.gov.au if you would like to discuss any aspect of ARENA's response.

Sincerely,

Rachele Williams

Rachele Williams

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²⁵ <https://arena.gov.au/knowledge-bank/accenture-energy-as-a-service-report/>