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Retailer authorisation and exemption review: Issues paper

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to the Australian Energy Regulator's ('AER') issues paper on its Retailer authorisation and exemption review *(the **Issues paper**).*

The Australian Energy Council is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation. The AEC supports reaching net-zero by 2050 as well as a 55 per cent emissions reduction target by 2035 and is committed to delivering the energy transition for the benefit of consumers.

As the energy market continues to evolve, the outcome of this review is critical not only to the ongoing ability of new energy providers to innovate and develop solutions that benefit consumers, but also for traditional energy retailers currently held to a different standard when offering similar services. As a broad principle, the AEC encourages the AER to undertake this review by considering each issue by first seeking to answer one key question: what is the appropriate level of protection for this service, and is this level of protection provided by all parties who are able to offer it?

Competitive neutrality and consumer protections

In the issues paper, the AER outlines three objectives in undertaking this review. These objectives set out to identify gaps in the National Energy Customer Framework (NECF), to recommend reforms that seek to mitigate specific consumer harms, and to consider whether these harms are appropriately subject to ongoing monitoring by the AER.

Of concern to the AEC is the framing of these objectives, and the lack of direct reference to competitive neutrality. Simplistically, these objectives aim to ensure that non-retailers are able to offer services in the market, and that consumers are entitled to be protected when these services are offered. This simplistic objective is a positive one, but it assumes that the existing protections placed on authorised retailers are appropriate and do not need to be scrutinised.

As the AER points out in the issues paper, the architecture of the current regulatory framework prioritises the sale of energy, with any organisation who seeks to sell energy required to be an authorised retailer (or exempted from this obligation). The consumer protections within the NECF are then focused on retailers, who in selling energy are required to comply with the broad NECF obligations. For retailers it is black and white. If they are selling energy they must comply with the NECF – there are no exceptions.

Exempt providers on the other hand are allowed by the AER to sell energy without a retail authorisation due predominantly to practicality. Traditionally, exempt providers were considered to be small or niche, with the higher risks to customers (of lower protections) outweighed by the reduction in largely unnecessary regulatory oversight. As the market evolved, exempt providers began offering retailer-like services, most commonly in large, multi-site embedded networks. Other categories of providers, such as solar power purchase agreement (SPPA) providers were exempted after the sale of energy in this manner became prominent, with the AER reacting to this innovation by creating a new exempt category rather

than requiring these providers to provide customers with the same level of protections that the retailers they were competing against had to provide. It seems a plausible outcome of this review that the AER develops other exemption categories for new energy products and services when the full suite of protections under the NECF might be impractical (or present as a barrier to the provision of that service).

This final point is illustrative of the AEC's concern in the framing of this review. While it could be reasonably argued that the sale of energy from an SPPA provider does not place the same risk on customers that might come from the sale of energy from the grid, if a retailer was to offer this service it would be considered the sale of energy by a retailer, and the full suite of NECF protections would apply. These circumstances result in two regulatory challenges for the AER – firstly, retailers cannot offer the same innovative services with a light touch regulatory regime that their competitors can, likely reducing innovation in the market and slowing its transition, and secondly, that it creates incentives for retailers to take steps to *avoid* being a retailer. In 2014 when a market for SPPA's quickly emerged, retailers took steps to create subsidiary entities to enable them to compete without the regulatory barriers of the NECF. This a useful example of unintended consequence and one that the AER should consider when undertaking this review.

In light of the above, the AEC considers that the current regulatory structure is no longer fit for purpose, and requires some amendment to enable it to continue to deliver positive outcomes for consumers in a transitioning energy market. While the AEC agrees with section 4.2.4 of the issues paper that highlights the need to consider the impost on traditional energy retailers who might incur a disproportionate regulatory burden, the AEC considers this statement should go further. In our view, the key issue isn't just the need to avoid developing a construct in which retailers are left to hold all regulatory protections while their customers take up offers with new energy service providers, but rather to create a construct that enables retailers to genuinely compete with new energy providers where it is in both theirs and their customers interests to do so.

The final point that the AEC considers relevant here is the breadth of the NECF protections retailers are currently subject to. If the protections in the NECF were solely about maintaining supply to an essential service, it is unlikely that the issue as to how to regulate new energy services would be material. The issue here arises due to the broad nature of the NECF protections and their application to any energy sold, irrespective of whether it is a small volume used for heating and cooking, or, whether it is a vast amount of energy used to run a swimming pool heater. Irrespective of use, retailers are required to provide protections which include supply, service quality, notification, consent, billing, hardship, dispute resolution and a vast array of other protections. It is this breadth that creates the need for the AER to now consider whether all of these protections are relevant to new energy sellers. In this sense, if the protections were more limited, or limited to a particular volume or use of energy, this issue might be easier to resolve.

Use cases and business models

The AEC is comfortable with the approach of using use cases to identify the harms and risks of new energy services and products, but questions the framing of use-cases as business models given its potential to impact competitive neutrality. In practice, the AEC considers that only the use case is directly relevant to harm and risk. Who the provider of the service is, or under which business model they provide that service, does not seem relevant to the harms and risks that might come from it. The AEC agrees with the AER's framing of potential use-cases in Table 1, despite them being referred to as business models. These four examples are clear, and appear to be at a level of maturity that the risks and rewards might be reasonably able to be predicted. While more use cases might enable this review to be more future-proofed, on the other hand it would require more guesswork as to how a service might operate, and how it might interact with both the customer and the rest of the market.

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Essentiality

The characterisation of energy as essential is in effect the cornerstone of its regulatory framework. Energy is considered different to the provision of other services because of its essentiality – often illustrated by suggestions that customers have no ability to opt out of the supply of energy, with stakeholders broadly agreeing and that the asymmetry in power and sophistication between the customer and their retailer cannot be simply left to the broader consumer laws and contractual agreements. With that framing in mind, to date it has been assumed that *all* energy sold by an energy retailer to a customer is equally essential. This point is important.

In this consultation, the AER is seeking to identify whether energy sold by other parties (assumed in the issues paper to not be retailers) remains essential in a future energy market. Interestingly, it is the ability to opt out of the supply of energy from a retailer that has led to the need to ask this question, yet this ability to opt out is not presented in the paper as affecting the essentiality of energy sold by a retailer. This in itself is illustrative of the competitive neutrality challenges described above.

With that in mind, the AEC considers that rather than assessing whether energy provided under a particular use case is essential or not, the AER should identify the ability of a customer to reasonably protect themselves from loss of supply when purchasing that particular energy service. This will require a level of judgement, as if the standard placed on suppliers to maintain supply is set too high, there will be lost benefits – both in the ability of suppliers to offer services to customers that meet individual risk appetites, but also in higher costs caused by duplication and increased regulatory burden.

As a matter of principle, the AEC believes that consumer protections should fall on the party best able to manage them. Where a customer is only purchasing energy from a single retailer, then that retailer should provide all appropriate consumer protections. But when a customer opts into multiple energy supply arrangements, these protections should be common so as not to unreasonably impact the ability of particular providers to compete. If a customer contracts 90% of its energy load to a third party, is it still reasonable that the only provider required to provide hardship support and maintain connection is the retailer that only sells 10% of the energy at the premises? In considering the use cases presented in the issues paper, the AEC urges the AER to not simply rely upon the presence of an authorised retailer to carry all of the consumer protections so the market for new energy services can develop. It is critical at this early juncture in the market that protections are appropriate for all services, irrespective of who provides them.

Given these factors, the AEC considers that in some circumstances, the use cases presented in the issues paper may intersect with essentiality. The clearest example is with regard to embedded networks, where customers effectively purchase all of their energy from a single provider, in much the same way as if they were to purchase energy from a retailer. Given the limited ability of embedded network customers to switch to other providers, it could be said that for these customers there is a greater level of essentiality than a customer of a traditional retailer might experience.

At the other end of the spectrum, it seems clear that aggregation and energy management services (EMS) are not essential in the same manner as embedded network services. In the aggregation and EMS scenario noted in the issues paper, a customer is impacted by entering into a contract that allows their supply to be affected by wholesale price impacts. Presumably in return for this risk, the customer obtains a financial benefit over and above a standard retail offering. The practical consequence of this use case might see a customer who entered into this arrangement having their supply affected – for example, a service that managed air conditioning load might see a customer unable to turn on their air conditioner when the spot price was above a certain amount. If a customer didn't enter into an arrangement such as this, they would not experience such a service limitation, but similarly, they would not receive the financial incentive they opted to receive. Provided the customer is reasonably able to understand this

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choice in entering this arrangement, the AEC does not consider it would meet the threshold of 'unreasonably affecting a customer's supply'. In this scenario, if the provider was exempted from holding a retail authorisation the AER could place appropriate protections for a customer purchasing this service, which might for example simply require a notification prior to the event.

While the AEC considers that the impact on supply should not in itself make a service essential, it is interesting to consider how a retailer might offer a similar service. The current regulatory framework does not allow a retailer to withhold supply to any customer at any time without appropriate notice. If a retailer was offering an EMS and it had been determined that the appropriate standard of protection was for the customer to merely be notified in advance of an event, that retailer should similarly be able to avoid the NECF obligations and provide the same notice as their competitor.

The impacts of regulating new energy services

The AEC acknowledges the challenges with regulating new energy services, and the potential impacts that arise from unnecessary regulation on developing sectors. That said, in a market as heavily regulated as energy, it is important to consider the impacts on the existing market should competitors be allowed to operate relatively unfettered, and the resulting impacts this might have on consumer outcomes.

As a general principle, the AEC considers that competition provides an effective consumer protection with respect to price and service quality. It is in the interests of new competitors, and the market broadly for customers to be able to make choices that benefit them, at a price they are willing to pay. But today's energy market has not been allowed to operate in this manner. While the need to regulate the supply of energy is clear, there is less evidence that customers are benefiting from broader regulations regarding prescriptive pricing presentation, notification, and engagement.

Given the presence of significant regulation on retailers, the AEC is challenged by the notion that new entrants should see lower regulation as a means of encouraging the uptake of DER based energy services. If the regulation prescribed on energy retailers (other than that relating to supply) is unreasonably burdensome for new entrants, it suggests that these regulations are also unreasonably burdensome for energy retailers. Inversely, if the AER considers this regulation to be 'optional' in the context of different energy services, the AEC would welcome a discussion about reducing the level of regulation placed on retail energy services.

If retailers are left to carry the burden of regulation that their competitors do not, it is likely that customers will be incentivised (potentially inefficiently) to move away from traditional retailers to smaller new energy sellers. This does not in itself lead to better outcomes for energy consumers. Retailers will be required to cover the costs of providing the 'safety net' for the market, and combined with the loss of energy sales, will likely lead to higher fixed costs, and greater costs for consumers unable to participate in the future DER market.

That said, the AEC acknowledges that certain obligations do not make sense to be moved from energy retailers to third parties. As the use cases develop, the AEC encourages the AER to undertake an assessment of the impact of new energy services on obligations such as those relating to life support. Unless the new energy service expressly relates to the delivery or operation of life support machinery, the AEC considers obligations of this nature are best placed on a single participant at each site to limit confusion and supply risk.

Capturing new energy products and services

The AEC is comfortable with retaining the sale of energy as the predominant driver for regulation under the NECF. As a starting proposition, the AEC considers that businesses that sell energy and interact with

the energy market or the grid should be authorised as energy retailers. Regulators do not differentiate between energy sold by retailers today, so there does not seem any justification to now suggest that some energy is not essential if it is sold by a party other than an energy retailer.

Once you determine that a party selling energy must be an energy retailer, the AEC considers that exemptions from this rule should be as limited as possible. If some energy is considered non-essential, then this suggests that the existing regulatory framework is no longer fit for purpose broadly, not just for new energy services.

Where it becomes less clear is energy sold behind the meter (BTM), with practically no interaction with the energy market and grid. The AEC considers that there may be merits to a party selling BTM energy only getting an exemption from becoming a retailer, given the service does not affect the energy market any more than rooftop solar does today. In these circumstances, the AEC would be comfortable if a reasonable minimum standard was required as a term of an exemption, which might for example require the seller to be a signatory to the New Energy Tech Consumer Code.

Other services that do not involve the sale of energy should be outside the scope of this framework, irrespective of who provides the service. In that sense, energy management software solutions that seek to optimise a household's consumption would not require a retail authorisation or exemption if it did not interact with the grid. Products and services that relate to energy - but do not constitute the sale of energy – are appropriately covered by the Australian Consumer Law. The AEC does not consider that simply because a product is energy related that it requires a higher standard of protection – every appliance in the home affects energy consumption, and there is little evidence to suggest consumers are willing to pay for a regulatory framework to protect themselves for the impact of their whitegoods on their energy costs.

Point in time assessments

The AEC acknowledges that point in time assessments creates a potential challenge to the regulatory framework, and this would be exacerbated if the AER created multiple classes of energy sellers, with some required to provide consumer protections and some not.

However, the AEC considers that if its above recommendations are enacted, the risks to consumers are minimal. As a general rule, if obligations are fit for purpose for the service offered, and onerous protections are placed on the sale of energy equally, there is little risk of consumers seeing negative outcomes from a service provider changing their product offering after their initial engagement with the AER. Where this becomes a problem is if the AER determines that some businesses who sell energy need to provide consumer protections and other businesses who also sell energy don't. This creates an environment where businesses are incentivised to commence selling the regulation with the lightest regulation, before changing their offering at some future time. Businesses that aren't required to comply with the existing regulatory framework as a means of encouraging the development of the market are not likely to be sophisticated enough to monitor the highly changeable regulatory environment that retailers operate under, and it is likely that consumers will be unprotected when they otherwise should have been.

The AEC considers that businesses should have robust compliance systems and processes in place before being allowed to sell energy, and that these are updated frequently to ensure they meet changing regulatory frameworks. The AER similarly should have processes in place to ensure that all businesses that sell energy are meeting their obligations to the market and their customers. There is no additional need to have periodical 'authorisation reviews' or other onerous mechanisms.

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Changing the regulatory framework to better manage a transitioning energy market

The AEC does however strongly support changes to the existing framework to ensure that retailers and other energy sellers are not required to provide protections that are not relevant to their customers. The most pertinent example of this is the need for retailers that only sell energy to large energy users to have to have systems and processes in place to comply with small customer protections just in case they should accidentally win a small customer site.

There are likely other scenarios where retailers might only seek to sell energy to certain classes of customer that mean other retailer obligations are not relevant. In these circumstances the AEC strongly supports the AER rationalise their obligations, potentially through developing a more limited retail authorisation.

However, it is important that any limited retail obligation is not able to be used in a manner that creates a competitive neutrality issue (noting that in some instances, the existing framework is already creating an imbalance). In the scenario above, a retailer who sells energy to small customers needs to develop processes and procedures to comply with small customer specific obligations. Even if that retailer also sold to large customers, there is no competitive issue as compared to a large customer specific retailer as the protections are not relevant for the service being sold. In today's market though, there is somewhat of a competitive neutrality issue by requiring the large customer retailer develop small customer protections when they only sell to large customers. This retailer incurs a higher compliance cost to deliver the same service as a retailer who sells energy to all customers.

Where it becomes an issue, as has been mentioned throughout this submission, is if a limited retailer is able to compete with full retailers for the same service. In the scenario described in the previous paragraph (for comparison only – the AEC acknowledges this is not in question), if the large customer retailer was able to sell energy to small customers in some circumstances without consumer protections, they would be at a competitive advantage to the full retailer who is required to provide the protections. The AER should be cautious in developing any sub-categories of authorisation, and maintain a strong focus on competitive neutrality in considering their benefit.

The AEC welcomes the opportunity to engage on this challenging topic. As the market progresses there is a need for the regulatory framework to evolve, but it should not be at the expense of existing market participants who are incurring significant cost and effort to ensure customers are appropriately protected.

Any questions about this submission should be addressed to me by email to ben.barnes@energy.council.com.au or by telephone on (03) 9205 3115.

Yours sincerely,

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