CONSUMER PROTECTION FRAMEWORKS FOR NEW ENERGY PRODUCTS AND SERVICES AND THE TRADITIONAL SALE OF ENERGY IN AUSTRALIA

FINAL REPORT FOR THE AUSTRALIAN ENERGY MARKET COMMISSION

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Summary

Digital, market and behavioural changes are transforming how Australian consumers buy, manage, share and sell electricity. These changes raise important questions about the consumer protections frameworks for energy markets, including about the protections that should apply to consumers of new energy products and services, and the consumer protections that should continue to apply to the traditional sale of energy. The purpose of this report is to step back from the specific detail of current arrangements and focus on foundational questions around the rationales for consumer protection frameworks in the energy sector. It does so by drawing on general principles, but also on comparative insights and experience from other sectors and jurisdictions.

Why do we have sector specific consumer protection regulations?

Current consumer protections for energy products exist under three main regulatory frameworks: Australian Consumer Law (ACL), the National Energy Customer Framework (NECF) and voluntary regulation initiatives. Additional protections are also provided under fair trading legislation at state and territory level. Each of these frameworks differ in terms of: scope of application, protections afforded to consumers, degree of prescription, and enforcement and redress mechanisms.

Energy sector specific consumer protections are often premised on:

- energy being considered essential for 'health, safety and wellbeing';
- a need to protect specific groups of consumers, such as those who are vulnerable or experiencing financial hardship, and to protect all consumers where markets are evolving and unfamiliar; and
- a need to counterbalance certain market characteristics, such as suppliers having weak incentives to maintain reputation, or substantial power imbalances between suppliers and consumers, enabling suppliers to exploit information asymmetries and consumers' behavioural biases.

Suppliers that face additional consumer protection obligations will often have to incur additional costs, and these will ordinarily be reflected in consumer prices. In addition, such obligations can potentially impact incentives for entry and innovation. The choice of who should face additional consumer protection obligations is therefore important, and is conditioned by the characteristics of the particular market and industry setting. Relevant factors include:

- the functional attributes of products/services and whether, from the consumers perspective, they could fulfil an essential service function;

- the similarity of suppliers in terms of size, scale and operations;

- the scope for innovation or new entry; and

- where 'gaps' in the coverage of consumer protection could create significant and disproportionate burdens on some consumers.

How can consumer protection regulations be implemented?

Principles-based (outcomes-focussed) or prescriptive (rules-based) approaches

Where additional sector specific consumer protections are necessary, a separate consideration is how best to implement such protections to achieve a particular set of policy objectives. Two important implementation aspects are: the level of prescription and detail that should be contained in the consumer protection regulations, and the role that industry should play in designing and implementing the protections. On these points:

- Prescriptive or 'rules-based' frameworks involve detailed ex ante rules that are highly particularistic and prescriptive.

- Principles-based (or outcomes-focussed) frameworks, typically involve the government/regulator specifying outcomes or principles, cast at a high level, which allows suppliers some discretion as to how best comply with these principles/outcomes.

In practice, 'hybrid' approaches are typically adopted which combine elements of each approach to regulation. A number of contextual factors can impact on the appropriateness, and potential effectiveness, of each approach including: the complexity of the setting; the nature of risk and potential harm; information conditions; degree of innovation; the attitudes of suppliers; and the degree of trust between suppliers and the regulator.

A separate dimension to whether consumer protection frameworks are principles/outcomes-based or prescriptive/rules-based is whether they are created voluntarily by industry ('self-regulation') or mandated by law and implemented by regulators ('state/public regulation'). Again, hybrid arrangements have emerged, where frameworks are shaped by statute, and subject to regulatory oversight, but are given substantive content by industry ('co-regulation').

Industry self-regulation

Industry self-regulation may emerge where suppliers perceive benefits in regulating the behaviour of those who provide services in an industry. Among the potential benefits of self-regulation are that suppliers can use access to superior information to fashion rules that are more appropriate to the issues that arise, and that it can be more flexible and adaptive, including in response to market changes.

However, a key risk of self-regulation is that rules may be shaped and implemented in ways which serve the interests of the industry (or certain segments of the industry – e.g.: incumbents) to the detriment of consumers. Self-regulatory arrangements are likely to be most effective where there are substantial competitive pressures on suppliers, and consumers understand a service, its required quality, and their rights, and are likely to act in accordance with this understanding.

Co-regulation

Co-regulation is sometimes argued to provide a 'middle way' between public/statutory regulation and pure industry self-regulation by establishing, in some cases, a framework for an ongoing and structured 'dialogue' between the state, suppliers and other stakeholders (including consumers and consumer associations). Co-regulation can take a variety of forms, for example, legislation may require:

- consumer protection arrangements to be developed by industry and certified/approved by a regulator;
- suppliers to establish specific consumer dispute-resolution arrangements;
- regulators to monitor industries' enforcement of its own rules, or to enforce such rules itself; or
- that the terms of industry codes are incorporated into consumer contracts (giving consumers civil rights of address against breaches).

Among the advantages of co-regulation is that it: can encourage a joint problem solving/solution-focused orientation; allows for broad participation by affected and interested parties at different stages of rule development and implementation; has a plasticity and a focus on solutions that can adapt and be revised over time; improves industry accountability relative to self-regulation; and combines the flexibility of industry self-regulation with support and guidance from government and regulatory institutions. Potential disadvantages of co-regulation is that it may have significant time and cost implications for industry, and that it may operate without adequate accountability, which could lead to consumer harm, if the arrangements are not underpinned by adequate monitoring and relevant state powers including in relation to enforcement.

Co-regulation in likely to be most effective where an industry is fast-moving technologically, and the understanding of suppliers of developments in the industry is likely to outpace that of state regulators; the industry is of a sufficient scale to absorb the time and costs of participation in joint regulatory initiatives, and also where there are a number of service segments in a sector (with different market/consumer attributes) that demand separate regulatory arrangements in relation to their respective customers.

State/public regulation

State/public regulation involves consumer protection frameworks and rules being developed wholly by the state and its regulators. Although in many countries, stakeholders may feed into consultations in legislative and regulatory decision making, this approach generally gives industry a less active role in shaping consumer protection frameworks than in co-regulatory approaches.

Such an approach may be most suited where: suppliers have substantial market power and low incentives to develop arrangements that protect consumers, where there is a need for consistency across services or jurisdictions, or where an industry is at a scale that it does not have the capacity or sophistication to engage more fully in regulatory processes. It may also be appropriate where services within an industry share similar market/consumer attributes, requiring less service-by-service distinction in consumer protection arrangements. Among the limitations of state/public consumer protection regulation are that it can: be overly static (and therefore harmful to innovation and alternative business models); adopt a one-size-fits all approach; be limited by information asymmetries and involve a significant compliance burden.

Consumer protection frameworks for other essential services supplied in competitive market settings

Technological and market changes have raised questions about the scope and adequacy of consumer protection frameworks for other essential services in Australia, particularly those provided in competitive settings where there are multiple suppliers such as telecommunications and retail banking. A review of consumer protection frameworks of these sectors offers a number of relevant insights.

Telecommunications

Many of the sector specific consumer protections in telecommunications are similar to those in the NECF. While the main consumer protection code applies to multiple products (mobile, landline and internet) many other consumer protections only apply to certain fixed line products, or to specific suppliers.

The telecommunications consumer protection framework combines statutory protections, developed by the state and enforced by a regulator, with substantial use of codes that are developed in a co-regulatory way. Recent reviews have highlighted some issues with the consumer protection framework in telecommunications. Notably, some consumer bodies have argued the current self-regulatory approach has failed to protect consumers, and that there is a need for a 'stronger regulatory posture' from the regulator (the ACMA). Notwithstanding these concerns about application of the co-regulatory approach, the reviews have not recommended a move away from co-regulation in the sector.

Retail banking

While not a traditional utility service, access to retail banking services is often characterized as an essential service. Sector specific consumer protections have typically been premised on the characteristics of certain consumers of such services, and on how consumers make decisions. There are also longstanding concerns about market power in the retail banking sector, which is seen to be reinforced by consumer inertia and limited switching. Most of the detailed provisions regarding consumer protection for retail banking are contained in codes developed by representative industry bodies, and approved by the regulator (ASIC). Many of the broad categories of protection under the codes are similar to those in telecommunications and in the NECF.

Recent reviews have highlighted a range of issues around the adequacy of the consumer protection framework for retail banking. A particular complaint has been poor enforcement of the rules contained in the industry codes. The Financial Services Royal Commission made various recommendations to address this including that: ASIC's power to approve codes of conduct be extended; provisions in the industry codes might become 'enforceable code provisions' and that industry codes might, in some circumstances, become mandatory; and that ASIC's role must go beyond 'being the passive recipient of industry proposals'. The Royal Commission also acknowledged the importance of the banking industry being able to continue to develop their industry codes over time.

Other sectors

Postal sector consumer protection obligations are intertwined with Australia Post's statutory Community Service Obligations, and other operators or courier companies are not generally subject to similar obligations. No sector specific consumer protections exist for airline passengers. However, major Australian airlines have introduced customer charters. Regulated water companies in some states are subject to mandatory Customer Service Codes, and Customer Contracts or Charters produced by the regulator.

Energy consumer protection frameworks in other jurisdictions

A survey of energy consumer protection frameworks in the European Union, USA and Britain suggests that all of these jurisdictions are grappling with questions about how to best adapt to changing market and technological changes, and the emergence of new products and services in regulated energy markets.

European Union

Many EU energy specific consumer protections are similar in nature to those contained in the NECF. However, EU policy distinguishes between different types of 'customers' of electricity, and, the protections can vary according to the customer type (including customer; final

customer; household customer; active customer and vulnerable customer). A distinction is also made for supply to final customers via so-called 'Citizen Energy Communities'.

Consumer protection provisions contained in EU Directives combine elements of principle and prescriptive rules and are ultimately implemented by domestic legislation in EU member states. The Council of European Energy Regulators (which represents energy regulators in EU Member States) recently set out a number of principles which it suggests should be reflected in Member State arrangements, including that:

- consumer rights should be safeguarded, even if customers engage in sharing;
- consumers need to be adequately informed of the conditions of their supply, regardless of its source;
- consumers need to be able to choose their supplier freely; and
- consumers that participate in an energy community, or engage in energy sharing, should not lose access to vulnerable consumer protection measures.

United States of America

In US states where retail choice and competition exists, many of the sector specific consumer protections are determined at the state level. In many states, the Public Utility Commission only regulates the (private) investor owned utilities (IOUs), and many of the consumer protection obligations only apply to these suppliers. Some consumer protections are provided for under state law and apply directly to the consumer (e.g.: various affordability initiatives). Rationales for regulation based on encouraging consumers to be more engaged, or to address specific behavioural biases, do not appear to be as common in many US states.

The degree of prescription in the frameworks on core consumer protection issues can differ significantly across states. Protections in some states are contained in a Consumer Bill of Rights, which can include a right to be treated fairly with regard to application for service, customer billing, and complaint procedures.

Many US states are grappling with questions of how to deal with consumer protection issues associated with residential solar power, the ability of consumers to be 'active' customers and the classification of microgrids. Different approaches are being taken ranging from mandating rules which apply to these new products and services to relying on voluntary industry codes.

Britain

In Britain, sector specific consumer protections are contained in supplier licences, and there are several alternatives to becoming a fully licensed supplier (e.g.: Licence Lite, White Label

supply or Sleeving) which has implications for which suppliers are subject to the consumer protection obligations.

Licensed electricity suppliers are subject to broad Standards of Conduct that contain enforceable overarching principles aimed at ensuring licensees (and their representatives in the case of domestic supply) treat each customer fairly. These requirements cover three areas relating to: behaviour, information and process, and apply to electricity suppliers as well as any parties that represent suppliers.

On some issues, a co-regulatory approach has been adopted, and there are various Consumer Protection Codes in place that protect customers in relation to various renewable and heating products. This includes the Renewable energy consumer code (RECC) which sets out consumer protections in marketing, pre-contractual information, quotations, deposits, contracts, guarantees and after-sales service for domestic consumers. Other voluntary codes of practice include the: Energy Switch Guarantee; the Code of Practice for accurate bills; and the Safety net for Vulnerable Customers.

Evolution of energy consumer protection frameworks for <u>new</u> products and services

Building on the principles and surveys of cross-sectoral and international experience, the report considers whether, and how, the Australian energy consumer protection frameworks could evolve in response to the introduction of new products and services.

<u>Guiding principles</u>

In developing guiding principles that might inform the transition of the consumer protection framework in the face of new energy products and services, one approach is to orient away from 'supplier obligations' and towards 'consumer outcomes'. Five core principles that might be used to guide the transition are:

(i) consumers should have access to at least one source of reliable energy supply;

(ii) consumers should have choice, and ability to choose another supplier/ source of energy and to switch supplier without undue impediments;

(iii) consumers should have access to sufficient, accurate and timely information;

(iv) vulnerable consumer circumstances should be adequately taken into account in supply arrangements; and

(v) consumers should have access to low cost and accessible dispute resolution mechanisms.

In considering the appropriate scope of consumer protections for new products and services it is useful to identify the key areas of consumer risk. Among the risks are:

- consumers cannot access at least one reliable energy source/supplier which jeopardises their 'health, safety and wellbeing';
- consumers cannot, or do not, effectively exercise choice among competing sources/suppliers which dampens competition among suppliers;
- consumers do not fully understand the terms and conditions for unfamiliar products and services, and risk agreeing to adverse contract terms and conditions;
- vulnerable customers do not have appropriate protections; and
- consumers do not have access to low cost and accessible avenues for resolving disputes.

Regulatory tools and approaches to protect consumers and support innovation

Policymakers and regulators have experimented with, or adopted, a range of different tools and approaches to achieve the dual aims of ensuring consumer protection while supporting innovation in relation to new products/services. Among the broad types of tools/approaches adopted include:

- a shift towards a more principles-based approach;
- use of an exemption regime;
- a forbearance strategy with reliance on *ex post* measures;
- regulatory sandboxes;
- the use of impact assessments; and
- the introduction of flexible governance arrangements.

What are the essential service elements?

In developing a regulatory framework, the elements of energy supply that might be considered to be of an essential nature include: the ability of consumers to connect to at least one (reliable) energy source; protection from disconnection for consumers who rely on only one source of electricity; and the ability of those on life support equipment to access a reliable source of energy. Whether default products, fair and reasonable terms, access to dispute resolution and data rights are considered essential elements of supply for new products and services depends,

among other factors, on: whether consumers multi-source energy; the reasons why different types of consumers access such products; whether consumers face more or less risk in the new environment of choice; and the extent and intensity of competition.

Adapting consumer protection frameworks for the traditional sale of energy

The survey of other sectors and jurisdictions suggests a number of possibilities for how the consumer protection regulatory frameworks for the traditional sale of energy could evolve in Australia. Two general ways in which the frameworks could be adapted are:

- a shift towards a greater reliance on a co-regulatory arrangements, where the regulator remains responsible for some tasks (such as approving and overseeing codes) and the industry is responsible for developing and implementing codes; and

- a shift towards a more principles/outcomes-based approach which could combine high-level principles with prescriptive rules in specific areas.

Incentives to shift toward a co-regulatory approach based around industry codes

Governments/ regulators might have incentives to sponsor a self or co-regulation initiative if this improves the problem of asymmetric market information; increases flexibility in regulatory tools to deliver policy objectives faster; and reduces costs relative to statutory regulation. For traditional suppliers of energy, a potential motivation for adopting self/ co-regulation approaches may be to enhance flexibility relative to the current statutory, one-size fits all, framework. Other reasons firms can have positive incentives to participate in self/ co-regulation measures; include an ability to input and shape regulation, and an ability to elaborate the content of high-level principles in a manner that is coherent with their specific product or service.

Assessments of co-regulation approaches and the use of industry codes in other sectors (e.g.: telecommunications and retail banking) highlight a number of aspects of the design and implementation associated with better (or worse) performance. These include:

- whether the codes are tailored to different products/services and business models;

- extent of participation in the codes;

- the ability of the code to adapt over time; and

- critically, how active the regulator is in overseeing the codes, and ensuring that consumers are, ultimately, adequately protected (i.e.: the 'regulatory posture' adopted).

Changes to NECF in specific areas

Specific areas where the NECF could change or adapt to market and technological changes are:

- making information provisions less prescriptive to reflect the fact that consumers increasingly communicate through digital means and in real-time. For example, suppliers might be placed under a general obligation to communicate in a way most suited to the customers' needs and requirements, but be required to offer a default bill format if the consumer does not choose to be contacted in another way.

- making informed consent process less prescriptive and more 'outcomes focussed', particularly where such prescriptive requirements might be limiting the take-up of new products or switching supplier. However, any such change would need to recognise that some technological developments and business models may raise the potential for new areas of consumer harm insofar as consumers do not fully understand the products and services they are being switched to, or what they are committing to via a third party/representative.

- allowing consumers on *solicited* retail market contracts to be able to opt-out, or waive, their right to a cooling-off period. For example, they may elect to do so where they wish to expedite the transfer of supplier.

1. Introduction

1.1 Purpose of this research

1. Under the existing consumer protection framework in Australia, all electricity consumers benefit from certain protections under general consumer law (the Australian Consumer Law (ACL) at the national level, and fair trading legislation at state and territory level), while additional protections are provided to residential and small business customers under the National Energy Customer Framework (NECF). In addition, there are voluntary or industry-led consumer protection initiatives for certain energy related products and services.
2. In its 2019 Retail Energy Competition Review the AEMC undertook an extensive mapping of the consumer protections in the National Electricity Market (NEM). The AEMC concluded that while the ACL and the NECF are, in general, complementary, and provide sufficient consumer protections, there are two areas of potential weakness in the current arrangements:
    - First, the AEMC identified a need to assess if (and what) consumer protections should apply to new, non-traditional energy-related products and services, particularly as the protections afforded under the NECF only apply to the (retail) sale of energy.
    - Second, there was concern that certain information provisions of the NECF may be too prescriptive, and be inadvertently preventing innovation, particularly in relation to digital technologies. There was also concern that there have been a number of progressive one-off additions to the information provisions over time.
3. Against this background, the principal purpose of the analysis in this report is to step back from the specific detail of current arrangements and focus on fundamental questions around the rationales for consumer protection frameworks in the energy sector. It will do so by drawing on general principles, but also on comparative insights and experience from other sectors and jurisdictions. The overarching aim of the analysis is to assist the AEMC in its work on: (i) what consumer protections should apply to new energy products and services? and (ii) what consumer protections should apply to the traditional sale of energy, and what form should such protections take?
4. In considering the energy consumer protection framework, the report will apply a common analytical frame which incorporates the following foundational questions:
    - Why are some energy products subject to sector specific consumer protection regulations? What is an essential service? Which types of consumers need to be protected? What harms/risks are consumers being protected from?
    - Who and what should be subject to consumer protection regulations? Should it be all providers of a product, or a selection (e.g. those above a certain size or with a large market share)? What are the merits of exemption frameworks? What could be relevant 'triggers' for the introduction of sector specific regulations?

- How might any additional consumer protection regulations best be applied? What level of prescription is needed to protect consumers? What are the merits and likely appropriateness of public/statutory regulation versus self and co-regulatory approaches to regulation?

5. These foundational questions form the basis for the analytical framework used to discuss the principles and comparative experience of consumer protection regulation in other sectors and in other jurisdictions.

1.2 Approach and scope of analysis

6. This report approaches the analysis of consumer protection frameworks in the energy sector in four stages.

   - First it seeks to identify and articulate the general principles which underlie the rationale for consumer protection of essential services (including energy supply products) that are provided in competitive markets, over and above those which are contained in generic consumer protection laws (such as the ACL).
   - Second, it surveys the rationale for, nature of, and scope of, consumer protection frameworks that apply to other essential services in Australia. At the request of the AEMC, it focusses particularly on telecommunications and retail banking, but also briefly consider the frameworks that apply to transport, post, and water.
   - Third, the report considers how consumer protection frameworks for electricity markets are applied in selected other jurisdictions, and in particular how such frameworks are adapting to the emergence of new products and services in regulated electricity supply markets.
   - Finally, building on the first three stages, the report considers whether, and how, the Australian energy consumer protection frameworks could evolve in response to the introduction of new products. In addition, it considers whether, and how, some elements of the consumer protection framework for the sale of traditional energy products under the NECF need to change or could be improved. The report also addresses a set of specific questions identified by the AEMC.

7. It is useful to clarify the scope of the analysis in this report. First, the discussion is principally focussed on electricity products, and not gas or other energy retail products. Second, the analysis does not directly consider how consumer protection frameworks in non-energy sectors might overlap now, or in the future, with the energy consumer protection frameworks.[1] Third, the analysis does not consider consumer protections associated with personal data collection and privacy, which, while important, are assumed to be principally addressed under general data protection and privacy laws. Fourth, the

[1] For example, whether protections under the communications consumer framework might interact with the energy frameworks when it comes to the failure of 'smart' energy devices; or how sector specific transport regulations related to electric vehicles might interact with energy consumer protection frameworks.

analysis of consumer protection does not focus on protections of consumers from high retail prices, which are assumed to be addressed through relevant retail price regulations or Australian Competition law. Finally, the analysis is focussed on what protections should apply to consumers who *buy energy*, and does not therefore directly address the questions about whether there is a need for additional protections for those consumers who also *sell energy,* including through aggregator services, peer-to-peer platforms or Virtual Power Plant arrangements.

8. A few explanatory words about the terminology used in this report. The term 'consumer' is principally used to refer to small consumers, such as households and small businesses. The term 'regulation' is used in a broad sense to capture not just public/statutory regulation, but also industry regulation and co-regulation initiatives. Finally, the term 'supplier' is used in a general way to refer to retailers, or others who provide a product or service to a final consumer.

9. The analysis in this paper draws on a wide range of materials including: policy-documents; regulatory consultations; reports and decisions; academic papers and other documents.

1.3 Structure of the report

10. The report comprises six additional sections. Section 2 sets the scene for the analysis and discussion in the report, by providing an overview of new and traditional energy products/services, and of those who consume and supply such services. It also briefly sets out what consumer protections currently exist under the ACL, the NECF and voluntary regulations. Section 3 identifies and describes the general principles that underlie consumer protection frameworks for electricity products/services. It draws on general principles to consider foundational questions such as: why do sector specific consumer protection regulations exist in the energy sector?; who and what should be subject to consumer protection regulation?; and, how might any additional consumer protection regulations best be applied? Section 4 presents key insights from a comparative survey of the consumer protection frameworks for other essential services in Australia, particularly the telecommunications and retail banking sectors. Section 5 introduces the findings from a comparative review of key aspects of the energy consumer protection frameworks in selected jurisdictions, including the US, the UK and at the European Union level. Sections 6 and 7 build on the discussions in previous sections to consider a range of questions about how energy consumer protection frameworks might evolve in response to new and emerging products, and to consider whether some elements of the consumer protection framework for the sale of traditional energy products need to change or could be improved.

2. Background and context

Chapter summary

There is not a single, homogenous type of consumer of energy products. Consumers can be impacted differently by emerging technological and market changes according to their: digital competence, confidence in engaging in energy markets; physical and geographic location; access to reliable internet and communications services; financial resources; and risk profile.

As the breadth and type of new energy products offered to consumers has expanded, there has been changes in the types of suppliers providing these products (ranging from community owned and operated bodies, such as cooperatives; not-for profit companies; municipal bodies to large private enterprises from other sectors, such as the telecommunications and the IT sector). These providers work through a range of different business models, and sometimes offer consumers products which are 'bundled' with other non-energy products or under new types of supply arrangements.

Current consumer protections exist under three main regulatory frameworks for energy products: Australian Consumer Law (ACL), the National Energy Customer Framework (NECF) and voluntary regulation initiatives. Additional protections are also provided under fair trading legislation at state and territory level. Each of these frameworks differ in terms of scope of application, what protections they offer consumers, degree of prescription and enforcement and redress mechanisms.

11. This section provides context for the discussion that follows. It presents an overview of the characteristics of energy products, including 'new' and more 'traditional' products and services. It then provides an overview of the characteristics of (and differences between) those who consume these products as well as those who the supply them. Finally, it summarises briefly what consumer protections currently exist under the ACL, the NECF and voluntary regulations.

2.1 Characteristics of energy products

12. It is useful to consider the characteristics of specific energy products as this can illuminate the potential risks or detriments consumers might need protection from in relation to those products.

13. In very general terms, it is possible to think of two broad categories of retail electricity products:

    - 'Traditional' products and services, that involve the sale of energy from a retailer supplier to a consumer; and

- ‘New’ products and services, some of which may involve the sale of electricity, but others of which may allow consumers to better manage, control, share and store electricity.

14. In general terms, traditional energy products involve the sale and delivery of electricity using the centralised, unidirectional electricity supply network (i.e.: the electricity grid) to a connection at a consumers’ premises. The term products is used here to denote the fact that although the physical characteristic of electricity is the same irrespective of when it is consumed (i.e.: it involves the transmission of electrons), there can be important temporal and spatial factors which can differentiate the energy products supplied in economic terms. Consumers of traditional energy products typically enter into a single supply arrangement with an electricity retailer to provide all of their electricity needs. In other words, while a consumer often has a choice among several competitive electricity retailers, they will only choose one provider (i.e.: consumers do not enter into multiple supply arrangements with different retail suppliers for electricity, like they do for other services provided in competitive markets). It is these type of supply arrangements for which the energy-specific consumer protection regulatory arrangements were originally developed.

15. ‘New’ energy products/services is a broad term which captures a suite of products which share the common characteristics that: (a) they do not just involve the sale of grid-sourced electricity to a consumer by an electricity retailer under a standard supply arrangement (i.e.: they are not a traditional energy product); and (b) the product or service has emerged relatively recently. Among other things, new products/services provide consumers with new ways of sourcing electricity and managing demand, as well as new way for consumers to engage with the market and manage their consumption and costs.

16. Among the general categories of products which are currently on offer, or under development, are those which:

- **Change the way electricity is produced and supplied to, and by, consumers**. This includes products such as small-scale onsite distributed generation facilities (e.g.: solar PV facilities and small-scale wind turbines), products which allow consumers to source energy from microgrids or community owned generation facilities (i.e.: not from the national grid); as well as products which given consumers the ability to source or share electricity through peer-to-peer platforms.

- **Change how electricity is consumed.** This includes products which make energy consumption more efficient, or reduce the overall demand for electricity, such as by installing insulation or energy efficient appliances. They also include products such as smart pool pumps or air conditioners.

- **Allow customers to actively respond to market signals by adjusting and managing their consumption patterns in real time.** These products can include remote and automated home management systems and smart thermostats. Some products allow consumers to manage appliances manually through apps on mobile phones, while

others involve the automated management of appliances (such as air conditioners or pool pumps) which automatically switch on and off in response to market signals.

- **Allow consumers to enter into supply arrangements with demand response facilitators which give third parties some control over their electricity**. This includes products supplied by non-traditional suppliers (such as 'white label suppliers') which involves grid sourced electricity being provided through a third-party (known In Australia as a demand response facilitator), who has the direct relationship with consumers**.**

- **Allow consumers to store electricity in batteries or electric vehicles**. While the cost associated with on-site electricity storage facilities have meant that to date they have not yet had mass-market appeal, recent developments and innovations – including in terms of electric vehicles – suggest that these products may become viable for a larger number of consumers in the future.

- **Affect how consumers assess, and make choices, regarding different electricity products and suppliers**. This includes products such as price comparison sites, energy brokers and other intermediaries, as well as products which offer energy efficiency advice or bill forecasting or checking services. In addition, it can include products that involve the automated switching of accounts among different suppliers (so-called 'autoswitchers').

- **Provide consumers with better data and information about their electricity consumption and costs.** This includes products which provide breakdowns of specific timing and amounts of energy consumption and the associated estimated costs. It can also include products which allow customers to monitor and record data on their consumption over time.

17. A non-exhaustive list of the types of products that are available to consumers is presented in table 1 below:

Table 1: Examples of traditional and new energy products and services

Broad product category	Nature of product and supply arrangement
Grid sourced electricity supplied under a traditional retailer supply arrangement	Provides electricity sourced through the NEM
Grid sourced electricity supplied under an alternative retailer supply arrangement	Provides grid sourced electricity under different packages or subscription models. For example, fixed fee arrangements, bundled packages, subscription model etc.
Grid sourced electricity from a demand response facilitator under a 'white label' retailer agreement	Provides grid sourced electricity through a third-party (known as a demand response facilitator), which has the direct relationship with consumers.
Electricity sourced from a standalone network	Electricity is sourced from a standalone network, that is not part of the national grid.
Electricity sourced from an embedded network provider	Provides electricity from a private network which can be connected to the NEM
Electricity sourced from solar panels	Allow for electricity to be provided from onsite solar panels. This is sometimes provided under a power purchase agreement or lease arrangement.
Electricity sourced by a battery	Allows electricity to be stored and provided from batteries.
Electricity sourced from vehicles	Allows electricity to be stored and provided from electric vehicles
Automated home management of electricity	Automatically manages internal household consumption.
Non-automated home management of electricity	Allows the consumer to manually manage internal energy consumption, through Apps etc.
Data and information services	Provides real-time information services about consumption, and the costs of electricity
Switching services	Switches a consumers account automatically to the best tariff

2.2 Characteristics of consumers of energy products

18. Much has been written on the profound impacts digital and market transformation is having on the electricity consumers in many parts of the world. These changes are seen to 'empower' consumers by allowing them to buy, manage, share and sell electricity in different ways. Technological changes, and digitialisation, are allowing consumers to control their purchase, and manage their consumption, of electricity through automated means. This includes automatic control of appliances and devices, but also automated engagement with suppliers through, for example, enrolling in auto-switching programmes which allows consumers to minimise the costs of electricity, Moreover, as noted above,

some consumers have additional choice in terms of when and how they 'source' energy: whether it comes from the grid, or from sources not connected to the grid (such as standalone networks, behind the meter generation, or battery storage).

19. At a general level, consideration of the *consumer impact* of digitalisation, and the accompanying market transformation is important for at least two reasons. First, as is widely recognised, changes associated with digitalisation (as well as other changes such increased competition and development of distributed energy resources) are giving consumers' greater agency and choice in determining how they source electricity; when it is delivered and consumed; how devices that use electricity are controlled: and who provides them with electricity and at what rate. Second, these changes can raise questions about some of the historical rationales for, and approaches to, the protection of consumers in energy markets. Re-assessment may be required to ensure traditional protections remain appropriate/relevant but also whether new areas of coverage and protection are required.

20. As the analysis in this paper is focussed squarely on the energy consumer, it is important to acknowledge the distinction between two broad categories of electricity consumer:

    - consumers who are willing and able to engage with the new products and services being offered in the market, some of which are, to different degrees, substitutes or complements to the traditional sale of electricity from the national grid.
    - consumers, who for various reasons discussed below, may not currently be able to access or utilise some new products and services, and have a 'traditional' supply relationship with a retailer for electricity from the national grid.

21. Within these broad, and crude, categorisations there are obviously wide differences in the characteristics, and preferences, of consumers. For example, consumers in both categories may be more or less 'savvy' or, alternatively, more or less 'vulnerable'. Consumers can also have different risk profiles and contexts which can impact on how they engage with energy products. For example, consumers located in a specific geographic or locational context – such an apartment block or, alternatively, a remote rural area with poor digital access or reliability – may have different access to products in the market or engage with products differently. Recognising this diversity in consumers is important when thinking about consumer protection requirements, particularly as the perceptions of the characteristics of such consumers is often a rationale for specific protections.

22. Consumers might also be impacted differently by the technological and market changes. There are several dimensions to consider:

    - **The digital competence of the consumer:** Digitally competent consumers, who have access to good digital services, may be better able to utilise products that allow them to actively, and more effectively, manage their supply arrangements and consumption than those less comfortable or competent with digital products.
    - **The confidence of the consumer in engaging in the market:** Consumers who are more confident in engaging with the market might choose to outsource some decisions about their energy provider and consumption to third parties (e.g.

automated 'switching' decisions; decisions about when electricity is supplied and at what price and when certain appliances are operated etc). In contrast, some consumers may be less confident with engaging with new suppliers and products because they do not feel competent to properly/safely assess options or offerings.

- **A consumers' location:** The physical and geographic location of a consumer can impact the ability to access and consume some energy products. For example, consumers located in their own standalone dwellings might have greater access to alternative non-grid sources of energy (such as from rooftop PV facilities, on site batteries and or access to electric vehicles), than consumers who live in multiple dwellings such as apartment blocks. Some consumers might be in locations where they can source electricity through a standalone power network, or from an embedded network.
- **A consumers' ability to access reliable internet and communications services:** Many new energy products are provided through communications networks and require access to high speed, and reliable internet and data services. Therefore inadequate network coverage will impact product access.
- **A consumers' financial resources**: Patently, consumers can have widely varying financial resources, which can impact access to some products. Costs to install batteries or other behind the meter products such as solar panels may be prohibitive for some consumers. Similar financial issues may exist in relation to demand side products such as home management systems.
- **A consumer's risk profile**. Consumers have different risk profiles, which can impact on their willingness to enter into supply agreements for new products or non-traditional tariff arrangements (e.g. 'dynamic' tariffs can expose consumers to price volatility and financial risk). Such risk profiles may be inter-related with a consumer's financial resources discussed above (i.e. the ability to absorb a bill 'shock').

23. In summary, there is not a single, homogenous type of consumer of energy products. Consumers can vary in their ability to engage with, and access, products across a number of dimensions. This diversity is arguably highly relevant to the design of any consumer protection framework.

2.3 Characteristics of the suppliers of energy products

24. The characteristics of those who supply energy products is also relevant to the need for, and nature of, consumer protections. Historically, suppliers of traditional grid-sourced electricity were large energy companies who emerged through the separation of the electricity supply industry. Over time a new set of retail entrants came into the market, and differentiated themselves in various ways (e.g.: in terms of tariff structures and offerings, quality of service and as to where electricity is sourced (such as green suppliers)).

25. As the breadth and type of new energy products offered to consumers has expanded, there has been changes in the types of suppliers providing these products. These providers work

through a range of different business models, and sometimes offer consumers products which are 'bundled' with other non-energy products or under different types of supply arrangements (e.g.: long-term power purchase or leasing agreements). Among the examples of 'new' suppliers are: community owned and operated bodies, such as cooperatives; not-for profit companies; municipal bodies; third party for-profit financing companies; and operators of peer-to-peer sharing platforms. In addition, large private enterprises from other sectors, such as the telecommunications and the IT sector, are increasingly involved in the supply of energy products. In response to this entry, a number of traditional energy companies have changed their activities and structures to become 'multiservice' operators, who combine energy supply with other services.

26. Variety in the providers of energy products is important when thinking about consumer protections for at least two reasons. First, some consumers no longer interact with a traditional retailer energy service provider, but rather have arrangements with an alternative type of supplier (such as a standalone network operator or an apartment block owner). Second, consumers may utilise energy products from a range of providers, and some products/services within the market may be (to varying degrees) substitutable for one another. Third, some new providers come from outside the energy sector, and may be pursuing additional non-energy related objectives. They may therefore seek to 'bundle' product offerings to consumers, or to gain other value from the supply arrangement (i.e.: access to consumer data)

27. A non-exhaustive list of the types of suppliers of energy products is presented in table 2.

Table 2: Examples of suppliers of traditional and new energy products

Broad category of service	Description of provider
Grid sourced electricity supplied under a traditional retailer supply arrangement	Traditional energy retailer which supplies grid-sourced electricity to a consumer.
Grid sourced electricity supplied under an alternative retailer supply arrangement	New energy retailers, including non-traditional energy providers, who differentiate themselves from traditional energy retailers through pricing offers, contractual terms or how energy is sourced (e.g.: green energy).
Grid sourced electricity under a 'white label' retailer agreement such as from a demand response facilitator	'White label' retailers offer their licence and a subset of retail functions to the demand response facilitator. In turn, demand response facilitators have the direct relationship with consumers
Electricity sourced from a standalone network	Standalone service providers are not physically connected to the national grid. This includes microgrids which supply electricity to multiple customers, and individual power systems, which relate only to single customers.
Electricity sourced from an embedded network provider	Embedded network providers are privately owned networks exempted from AEMO requirements but that are connected to the NEM. A typical supply arrangement would involve the embedded network provider on-selling electricity to consumers at specific connection points within the embedded network.
Electricity sourced from solar panels under a power purchase agreement	Solar panel power providers install and maintain a solar panel system to a consumer. The consumer is then required to buys the energy provided by the solar panels for an agreed price for a set period. The supply arrangements can be short-term or long-term in nature.
Electricity sourced by a battery under a service agreement	Battery service providers which sell, install and, in some cases, operate a battery. This can also involve a battery service provider offering joint product offering with a retailer, where a customer is offered a specific retail market offer(s) contingent on them also being contracted with a battery service provider.
Electricity sourced from storage in vehicles	Car manufacturers. This provides the potential for home consumption but also vehicle-to -grid flexibility services in the future.
Automated home management of electricity	Smart Home Service Providers which install and automatically operate certain devices, such as air conditioners or pool pumps
Non-automated home management of electricity	Energy Management Service providers which allow consumers to manually control electricity consumption.
Data and information services	Data providers. These providers provide consumers with information about actual and historical consumption levels and in some cases estimated costs.
Switching services	Automated switching services providers which use an algorithm to automatically switch subscribing consumers on to the cheapest tariff.

2.4 Current consumer protection frameworks for energy products

28. This section presents a brief overview of the consumer protections that currently exist under three main regulatory frameworks for energy products: Australian Consumer Law (ACL), the National Energy Customer Framework (NECF) and voluntary regulation initiatives.[2] The purpose of this discussion is to bring out key aspects of these frameworks, such as scope of application, such as whether they are they mandatory or voluntary in nature and what is the trigger for application for such provision; whether they are prescriptive or not etc.

(a) Australian Consumer Law (ACL)

29. The ACL provides consumer protections applicable to all products (not just energy products) relating to conduct by providers, unfair contracts terms, marketing practices, and product safety. The key attributes of the ACL relevant to the discussion in this paper are presented in table 3 below.[3]

(b) National Energy Consumer Framework (NECF)

30. The NECF is a sector-specific consumer protection framework which provides additional protections to energy consumers. In general terms, the NECF provides consumers with protections against not being connected to energy network (including requirements to provide connections, restrictions on disconnections and interruptions); as well as a range of other protections relating to fairness of contractual terms, marketing and redress, which supplement the general protections under the ACL outlined in table 2. It should be noted that the NECF was introduced at a time when the retail market was being opened to competition, and where almost all consumers contracted with an electricity retailer to provide grid-sourced electricity. The key attributes of the NECF relevant to the discussion in this paper are presented in table 4 below.[4]

(c) Voluntary consumer protection frameworks

31. Some consumers are not specifically protected by the NECF provisions, because the product being sold is not classified as involving the sale of energy. This can include consumers who purchase 'new' energy products and services such as those which involve sourcing energy from behind the meter facilities (e.g.: solar panels or batteries) or who purchase demand energy response products.

32. Although the NECF does not apply to these products, consumers still have some degree of sector-specific consumer protection beyond the ACL through a voluntary consumer protection framework. This framework covers products such as solar panels and batteries which are sold to residential and small business consumers and comprises voluntary codes,

[2] We do not specifically consider protections provided under fair trading legislation at state and territory level

[3] This table builds on the summary presented in section 9 of the AEMC's 2019 Retail Energy Competition Review. See AEMC (2019a).

[4] This table builds on the summary presented in section 9 of the AEMC's 2019 Retail Energy Competition Review. See AEMC (2019a).

are managed by the Clean Energy Council (CEC), a not-for-profit, membership-based organisation. The three voluntary codes that the CEC administers are shown in table 5 below.

(d) Electricity Retail Code

33. In July 2019, a new Electricity Retail Code of conduct was introduced by the ACCC which provides for additional consumer protections over and above those contained in the ACL and the NECF and voluntary initiatives. The code is mandatory and covers issues related to pricing and marketing of energy products to consumers. Table 6 below sets out the main attributes of the Electricity Retail Code.

(e) New Energy Tech Consumer Code

34. In April 2019, the Clean Energy Council (CEC), the Australian Energy Council (AEC), the Smart Energy Council (SEC) and Energy Consumers Australia (ECA) lodged an application with the ACCC for a New Energy Tech Consumer Code. The code covers solar generation systems, energy storage systems, electrical vehicle charging and other emerging energy products and services. Signatories to the proposed code commit to establishing minimum standards of good practice and consumer protection from initial marketing and promotion through to, as appropriate, the offering, quoting, contracts, finance and payments, installation, operation, customer service, warranties and complaints handling processes. The Applicants must report to the ACCC on the operation of the Consumer Code, to allow it assess whether the Consumer Code is operating as envisioned, including whether there are sufficient protections against harms that arise from unsuitable financial arrangements. The ACCC granted conditional authorisation New Energy Tech Code for 5 years in December 2019.[5] However, this authorisation decision has been appealed and is currently before the Australian Competition Tribunal.

[5] The conditions relate to requirements for "buy now pay later" (BNPL) finance providers, and the prohibition on BNPL finance being offered in unsolicited sales of New Energy Tech products). See ACCC (2019a).

Table 3: Key attributes of the Australian Consumer Law protection framework

Scope	• **Broad application to all businesses and individuals that deal 'in trade or commerce'**. Therefore, applies to a consumer buying products or services, as well as a business that sells products or services to individuals or other businesses.
Broad types of consumers protections	• **Unfair contract terms.** Applies to consumer contracts and for the purposes of the ACL, electricity and gas are 'goods' and the unfair contract term provisions are applicable to retail energy contracts (although see below) • **Unfair contract practices:** This includes against unfair practices such as offering rebates, gifts or prices, false, misleading representations, bait advertising and referral selling. • **Misleading, deceptive and unconscionable conduct.** This includes protections against misleading and deceptive conduct (general protection) and misleading conduct as to the nature of goods or services (specific protection); unsolicited supply of goods and services; unsolicited consumer agreements; and unconscionable conduct. • **Certain marketing practices.** This includes protections against marketing practices when suppliers or sales persons approach or call a consumer without requesting it or being invited (unsolicited consumer agreements). • **Consumer guarantees:** general protections related to consumer guarantees for the supply of goods and services, and liability of manufacturers for goods with safety defects. 'Goods' include, among other things, gas and electricity, but excludes the application of consumer guarantees *to the supply* of electricity and gas (e.g. solar panels or batteries may be covered). • **Product safety**: Provides consumers with an ability to seek compensation for the amount of loss or damages caused by a safety defect in goods supplied by a manufacturer (e.g.: batteries or solar panels).
Triggers	The ACL has broad application to products and services sold in trade or commerce and bought by an energy consumer so no real trigger. However, certain provisions will not apply to some products, including the following: • **Application of unfair contract terms provisions to the price terms of an energy retail contract will depend on how these terms are structured.** If the retail contract term related to payment is not disclosed at or before the time the contract is formed, or includes any other payment that is contingent on the occurrence or non-occurrence of a particular event, it would not be an upfront price and therefore, the ACL's unfair contract term provisions would apply. • **Consumer guarantees do not apply to the *supply* of electricity and gas,** however it may apply to other energy services and products acquired by consumers, such as solar panels or batteries.
Degree of prescription	A principles-based approach to promote competition and fair trading, and for providing consumer protection • **A set of principles that businesses must have in mind** when designing and entering into consumer contracts, including energy contracts • **Does not specify particular types of contractual arrangements or specific terms** applicable to the sale of goods and services • **Interpretation of some provisions such as if a term is unfair adopts a principles based approach**. The term must be considered in the context of the contract as a whole and it may take into account the extent to which the term is transparent.
Enforcement and redress	• **Jointly administered and enforced jointly by the ACCC (national), the jurisdictional regulators and the state and territory consumer protection agencies.** ACL regulators exercise discretion as to which matters to pursue, and have a range of civil, administrative and criminal enforcement remedies at their disposal

Table 4: Key attributes of the National Energy Consumer Framework

Scope	• **Applies in relation to the sale of energy whose premises are connected, or to be connected, to the interconnected national electricity system.**
Broad types of consumers protections	• **Established minimum contract terms:** relating to billing; payment obligations; pricing; customer complaints and dispute resolution. Requirements differ depending if consumer is on a standard retail contract (which are more prescriptive) or a market retail contract. • **Pre-contractual information and marketing rules:** this includes requirements to disclose certain information prior to a contract being struck and certain restriction on marketing, canvassing and advertising. A designated retailer cannot decline to enter into a standard contract. • **Disclosure and information requirements:** this includes historical billing data; bill review; end of fixed term contract notice; and other information provisions (including interruptions, new meter provision etc). • **Connection services:** This includes a requirement to provide connection services if requested. • **Disconnection and reconnections:** this includes a general obligation to maintain a customer connection, limitations on interruptions and requirements before disconnections/de-energisation (including not being able to deenergise certain types of customers) • **Financial difficulty**: requirements to provide support and assistance to those experiencing financial difficulty. • **Life support**: protections for customers on life support equipment
Triggers	• **Trigger for the application of the NECF is the 'sale of energy'.** However, the NECF does not provide a definition for 'sale of energy' or if it is limited to the supply of electricity and gas. • **Sellers that are deemed to sell energy must either obtain a current retailer authorisation or be an exempt seller** • **The AER can exempt a seller** from a retailer authorisation, **but can also impose conditions** on that seller. • **When exempting sellers the AER must ensure that**: (a) **regulatory arrangements do not unnecessarily diverge** from those applying to retailers; (b) ensure that **exempt customers are, as far as practicable, afforded** the right to **a choice of retailer and not denied the customer protections afforded retail customers under the NECF.**
Degree of prescription	• **A prescriptive approach where detailed and specific rules are set out**. In particular the rules for consumers on standard retail contracts are highly prescriptive setting out model terms and conditions.
Enforcement and redress	• **The AER enforces the NECF** in participating jurisdictions. • **The AER can invoke administrative responses (such as seeking voluntary commitments) or exercise its statutory enforcement powers**. This can include infringement notices, civil court proceedings or revocation of a retailer's authorisation. • **There is also the possibility under the NECF for private enforcement**. • **Small customer complaints can be managed by jurisdictional energy ombudsman.**

Table 5: Voluntary codes administered by the CEC

Approved Solar Retailer program	
Scope	• **Relates to the marketing and sale of PV systems.** • Self-regulated scheme authorised by the ACCC. • To participate, solar retailer businesses must to meet the requirements of the Solar Retailer Code of Conduct.
Specific protections	• **Pre-sale activities**: protects against dishonest or misleading advertising and sales tactics, and ensure consumers have necessary written information to ensure 'full' understanding and awareness of their purchase. • **Post sales activities**: ensures rights relating to cooling-off periods, deposits and refunds are respected; consumer has the opportunity to cancel a contract where changes are made after point of contract that are not approved in writing; correct and safe installation; and a standard minimum warranty period. • **Documentation:** consumer is provided with the required documentation after the PV system is installed, and that the retailer and the consumer are fully aware of who is responsible for the provision of the relevant documentation. • **General business conduct**: retailer must adhere to all existing legislation and regulations, and maintains consistent business practices including, but not limited to, effective complaint handling procedures and cancellation procedures.
Trigger	• **A voluntary code so any participant must be a signatory, but can opt-out at any time.** • However, federal and state incentive and rebate programs for solar require that a CEC accredited solar installer and designer, and use CEC approved products, are used.
Enforcement	• **CEC actively monitors compliance of retailers** and investigates all reported breaches of the Code. • **Serious non-compliance** which is detrimental to consumers may give cause to **remove a retailer from the program with immediate effect**
Accreditation for Solar PV Designers/Installers	
Scope	• **Accredits the designers and installers of solar systems.** • **Only individuals are able to attain accreditation**.
Specific protections	**CEC-accredited solar designer/installer**: • has completed the necessary solar specific training courses; • is bound by the CEC Accreditation Code of Conduct and the CEC Accreditation Terms and Conditions; • complies with the CEC Design and Install Guidelines, relevant Australian Standards and all other relevant regulations when designing/ installing PV systems.
Enforcement	• **If the CEC is made aware of a solar design or installation that does not meet relevant Australian Standards**, CEC Guidelines or other regulations, it can take appropriate action to ensure standards are upheld. • This can vary from requests to rectify non-compliant work, the allocation of demerit points, suspension or even cancellation.

Product assurance program for solar and storage products	
Scope	• **Verifies and tests solar and storage products** that are eligible to be installed in Australia, based on their compliance with Australian and International Standards.
Specific protections	• The CEC works in collaboration with government, electrical safety regulators, certifiers, network providers and product manufacturers to **ensure that only approved products are installed in the Australian market.** • Only systems with products from the approved lists are eligible to receive small-scale technology certificates (STCs) under the Small-Scale Renewable Energy Scheme (SRES).
Enforcement	• **If the CEC identifies non-conformance** with the device's certification, CEC may suspend or remove the listing until compliance can be verified. • CEC may also suspend or remove all device model numbers listed for that manufacturer.

Table 6: Key attributes of the Electricity Retail Code

Scope	• **Code is mandatory and binding on all electricity retailers that supply electricity to small customers** in the applicable distribution regions (New South Wales, South Australia and south-east Queensland)
Broad types of consumers protections	**The Code sets out requirements for advertisements, publications or offers by electricity retailers.** • **The following must be clearly and conspicuously stated**: o the difference between the unconditional price and the reference price, stated as a percentage of the reference price (unconditional percentage) o for each conditional discount, the difference between the conditional price and unconditional price, stated as a percentage of the relevant reference price o the lowest possible price of the offer (inclusive of all conditional discounts mentioned in the advertisement, publication or offer) o conditions for all conditional discounts o the distribution region and type of small customer. • A conditional discount should not be stated as the main element of the advertisement, publication or offer.
Triggers	• All retailer supplying particular small customers in certain distribution regions must comply with the requirements under the Code • The Code does not apply to small distribution regions with less than 100 000 consumers. • Other types of supply arrangements for households and small businesses are <u>not</u> covered by the Code. These are: o embedded networks o prepayment meters o where a price for the supply varies (wholly or partly) with network-wide demand, at a time or during a period, for the supply of electricity o solar photovoltaic (PV) units with feed-in tariffs.
Degree of prescription	• **A broadly prescriptive approach where detailed and specific rules are set out**.
Enforcement and redress	• **The ACCC enforces the code.** • **The ACCC can impose civil penalty provision for contraventions.** • **The ACCC can also pursue other remedies including:** issue a public warning notice; accept administrative or statutory undertakings; commence court proceedings to seek redress orders to compensate consumers for loss or damage suffered, or to seek injunctions to prevent the non-compliant conduct, non-punitive orders (such as community service orders) and other compensatory orders

3. Foundational principles for consumer protection regulation

Chapter summary:

- Energy sector specific consumer protections are often premised on the fact that energy is considered essential for 'health, safety and wellbeing'; to protect specific groups of consumers such as those who are vulnerable or experiencing financial hardship; to protect all consumers particularly in developing or evolving markets; and where suppliers have weak incentives to maintain reputation and/or may seek to collectively exploit information asymmetries which create consumer confusion.
- Suppliers that face additional consumer protection obligations will often have to incur additional costs, and these will ordinarily be reflected in consumer prices. The choice of whether or not to apply additional consumer protection obligations on all suppliers, or only selected suppliers, is therefore critical and can be conditioned by the characteristics of the particular market and industry setting.
- Prescriptive or 'rules-based' approaches involve the development of detailed *ex ante* rules that are highly particularistic and prescriptive, while principles-based (or outcomes-focussed) regulatory approach, typically involves the regulator specifying outcomes or principles, cast at a high level, which allows suppliers some discretion as to how best comply with these principles/outcomes. In practice various forms of 'hybrid' frameworks are typically adopted, which combine elements of each approach to regulation.
- There are well-recognised benefits associated with industry self-regulation: suppliers can use access to superior information to fashion rules that are more appropriate to the issues that arise and it can be more flexible and adaptive, including in response to market. The principal limitation of self-regulation is that rules may be shaped and implemented in ways which operate in the interests of the industry (or certain segments of the industry – e.g.: incumbents) to the detriment of consumers.
- Co-regulation can provide a 'middle way' between state regulation and pure industry self-regulation by establishing a framework for an ongoing and structured 'dialogue' between the state, suppliers and other stakeholders (including consumers and consumer associations). Other advantages of co-regulation is that it can encourage: a joint problem solving/solution-focused orientation; allows for broad participation by affected and interested parties at different stages of rule development and implementation; has a plasticity and a focus on solutions that can adapt and be revised over time; improves industry accountability relative to self-regulation; and combines the flexibility of industry self-regulation with support and guidance from government and regulatory institutions.

35. This section identifies, and describes, some general, foundational principles relating to the rationale for specific consumer protections in certain sectors, and in the electricity industry in particular. The topics covered align with the analytical framework set out in section 1, and will draw on general principles to address the following: Why do we have sector specific consumer protection regulations?; Who and what should be subject to consumer protection regulations?; and how might any consumer protection regulations best be applied?

3.1 Why do we have sector specific consumer protection regulations?

36. This section considers foundational rationales for providing consumers with sector-specific protections and how these might inform how, and, when such protections are applied. The discussion is organised under three broad headings:

    - Rationales based on the essential nature of a product;
    - Rationales based on the characteristics of the consumers;
    - Rationales relating to an industry structure, including the nature and intensity of competition between suppliers.

(a) Rationales based on the essential nature of the product/service

37. One rationale for the existence of sector-specific consumer protection regulation relates to the nature of the product/service. Some services are argued to be of such importance to either economic or social welfare that consumers require protections over and above those provided by the market or general consumer laws. Utility services, such as electricity supply, are often classified as 'essential' in nature.

38. While the phrase 'essential service' is commonly used in policy and regulatory discourse there is no fixed definition of the phrase, nor standard methodology, for determining what products are essential. Notions of 'essentiality' differ across societies and groups within society. For example, access to banking services, such as a basic bank account, is considered essential to financial inclusion in some countries and not in others. What services are essential can also change over time. In many countries, the ability to access broadband at a minimum speed is now considered essential to the ability of individuals to participate in society, and to social and economic welfare.

39. There are different ways to approach the question of whether or not a particular service, or activity contributing to a service, is essential to a community. Among the approaches that are used explicitly (or implicitly) to determine whether a service is essential:

    - the degree to which the service is taken up or consumed by members of the public i.e.: ubiquity can be a proxy for essentiality.
    - whether interruption to, or absence of, the service would endanger life, health or personal safety for the whole or part of a population. Some international organisations define 'essential service' along these lines.

- whether a service has a 'general interest dimension', such that these services cannot be entirely left to market forces (i.e.: without regulation) because of a need to protect certain values or deliver outcomes in the overall public good.[6]
- whether there are effective substitutes for the product or service. Products which are widely used, and for which there are no effective substitutes, have sometimes been classified as 'essential' on this basis.
- whether the cost of the product/service constitutes a relatively large proportion of an average consumer or household budget. In some countries, for example, products as milk or petrol are subject to special treatment (including pricing restrictions) on this basis.
- public opinion as to the importance of the service.[7] This is usually determined by surveys, although these have shown opinions differing on the question across countries and across demographics within a country (such as between younger and older respondents).[8]

40. Common to all of the above concepts, is an assumption that failure to have access to reliable supply of an essential product would create substantial, and widespread, consumer detriment.

41. Three points should be kept in mind when thinking about what is, and is not an essential product/service:

    - First, an 'essential service' is not the same as a 'universal service'; the latter are typically services which are made available to all end-users irrespective of their geographic location, at an affordable price. Access to some services – which may be classified as 'essential' in some contexts such as access to mains water and wastewater facilities or gas pipeline networks – will not always be universally available. For example, consumers who are situated 'off-grid' will need to obtain supplies through other means, often without the same degree of consumer protection which apply to on-grid consumers.
    - Second, not all services which may be considered very important, or even indispensable, for specific groups of consumers will be classified as 'essential'. For example, bus services may be indispensable for some consumers, particularly those located in rural locations (i.e.: where there are limited alternatives), however, access to bus services is often not classified as an essential service, and subject to special

[6] In the EU, for example, Services of General Economic Interest (SGEI) are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. European Commission (2011).

[7] One European study, using 1997 data, found that electricity was considered an essential service by around 80% of respondents, second only to water (88%). Interestingly, the collection of household rubbish was seen as the third most important service (63%) above that of gas supply (56%), telephone services (24%), and rail transport services (10%). Postal services did not feature as an essential service. See Van De Walle (2009).

[8] For example, in the UK older people did not see water as a service which should be guaranteed to everyone, presumably on the basis that they are more familiar with shortages from their youth, while younger, less educated males tended to see access to TV channels as an essential services. See Van De Walle (2009: 532).

consumer protections or oversight in its provision. In short, a product or service that is not classified as essential can nevertheless cause consumer detriment to particular groups of consumers in relation to problems with accessibility or conditions of supply.

- Third, even within broad categories of services that are commonly categorised as essential – such as energy or telecommunications – there can be some products or supply mechanisms that are not subject to sector specific consumer regulations. For example, those whose use a landline phone to make telephone calls often have additional and specific consumer protections compared with consumers who make OTT calls using applications such as Skype or Facetime.

42. In many industrialised countries electricity supply is classified an essential service, and consumers of the service subject to specific sectoral protections for consumers. This is often on the basis that such protections are required for health, economic and social reasons. For example, in Australia the position adopted is that electricity is important for the '*health, safety and wellbeing'* of Australians.[9] Similarly, the European Commission and European energy regulators have spoken of the risk of consumers who are unduly denied access to energy becoming *'economically, socially and culturally isolated*'.[10] A United Nations resolution on consumer protection has adopted the principle that Member States should consumers be given access to essential goods and services.[11]

43. Even when a service such as access to energy is characterised as essential, there can be important differences in how any such essential service obligation is conceived and perceived. For example, as noted above the United Nations emphasise 'access to' an essential services as important, while some jurisdictions go further and consider 'access to energy which is affordable, reliable and on fair terms' as being the essential service that should be provided to consumers. This has obvious implications for the scope of consumer protections needed and is discussed in section 6.

(b) Rationales based on the characteristics of the consumer

44. A second rationale for the existence of sector specific consumer protection regulations relates to the characteristics of those who purchase and consume the product. Within this general rationale there are three broad sub-rationales that inform the need for consumer protections:

- First, that <u>all consumers</u> have access to poor or limited information or suffer from decision making biases, or otherwise prone to making irrational or imperfect decisions.
- Second, that <u>specific groups of consumers</u> require additional protections because they are vulnerable.

[9] Ministerial Council on Energy Standing Committee of Officials (2008:18).
[10] ACER/CEER (2013: 202).
[11] United Nations (2016).

- Third, that while a market is developing or evolving, consumers need protections until they become familiar with new offers and arrangements and can make informed decisions.

45. Much has been written about how various cognitive limitations and decision-making biases can lead consumers to sometimes act in ways, and take decisions, which are not 'rational' insofar as they inconsistent with their own welfare, and also inconsistent with the assumptions which underpin our understandings of how competitive markets work.[12] This research suggests that effective decision-making by all or a large proportion of consumers may be hampered by cognitive limitations associated with processing the information, or by other behavioural and decision-making biases (such as 'the status quo bias', 'anchoring', 'the over-optimism bias' or 'the endowment effect', to name a few). Moreover, the research suggests that suppliers who recognize these cognitive limitations, can have incentives to exploit them, including through the way they present information, the timing of offers, and other tactics.[13] In these circumstances, additional consumer protection regulations for all consumers are sometimes justified by the need to address such limitations/biases and prevent such exploitation.[14]

46. Consumer protections can also be based on the proposition that specific groups of consumers require additional protections, because they are vulnerable.[15] While this rationale is often motivated by fairness or social welfare considerations, there is also a substantial economic dimension to it: if a significant proportion of consumers are, for various reasons, inactive (i.e.: they lack access or information, or are otherwise not sufficiently equipped to make choices in their own best interests) then active consumers need to work harder to ensure that competition is effective.[16] However, concepts such as vulnerability are multifaceted, and many consumers can potentially be vulnerable on some measures but not on others.[17] For example, a wealthy, older urban consumer may not be

[12] See Decker (2017) for an overview of this work.
[13] For example, if suppliers recognise an over-optimism bias in certain categories of consumer, such as in relation to the ability to pay bills on time, or expected levels of future consumption of the service, this can create an incentive for firms to exploit such biases (such as through high penalties for late payment of bills; tariff plans which allow for a set amount of consumption at a fixed rate but apply a significantly higher tariffs once that set amount of consumption is exceeded (i.e.: leading to bill-shock); unduly onerous notice periods which lack a clear rationale; or early contract termination payments which are excessive).
[14] See, for example, Ofgem (2011). However, not all supplier responses to such biases and limitations will be obviously detrimental to consumers – for example, firms in effectively competitive markets may have incentives to simplify decision-making in recognition of biases, such as the status quo bias, making it easier for consumers to overcome their biases.
[15] This will include consumers that are generally collectively labelled as 'vulnerable' consumers, such as those on low incomes, or with special needs. This general principle is also reflected in the United Nations resolution on consumer protection which states that Member States should ensure *"the protection of vulnerable and disadvantaged consumers".* See United Nations (2016).
[16] Specifically, if a significant proportion of a market are not actively engaging in that market – because, for example, they lack access or information, or are otherwise not sufficiently equipped to make choices in their own best interests – this will reduce the competitive pressure that is placed on suppliers by consumers. Put differently, As Armstrong (2014:1) puts it: "*An old intuition in economics suggests that savvy consumers help to protect other consumers, and that consumer policies which protect vulnerable consumers are only needed when there are insufficient numbers of savvy types present in the market."*
[17] To take an example, consumers may be more or less computer literate. Ofgem (2019a: 59) lists a range of other vulnerable characteristics.

digitally savvy, while in contrast, a young digitally savvy consumer might have limited financial resources. Difficulties in drawing bright line boundaries or quantifying the size of different groups which need protection can make it challenging to assess and design consumer protection policies that target a specific group of consumers (considered vulnerable along some dimension) while not unduly restricting the choices of other consumers, who may represent a significant minority. There is also a longstanding debate about whether sector specific consumer protection policies are the most appropriate mechanism to assist vulnerable consumers, or whether other more targeted policies are more appropriate.[18] This topic also engages wider political questions, such as whether certain groups in a society should be afforded *special* rights under law in recognition of their relatively weak bargaining position.[19]

47. Consumer protection regulation can also be premised on the needs of consumers in developing or evolving markets, where product/service offers are unprecedented or unfamiliar. In these circumstances, consumers may find it difficult to assess options and make informed choices. The proposition that trust and confidence in liberalising markets must be fostered and developed may underlie specific consumer protection regulation in markets newly opened to competition, such as retail energy markets in Australia and elsewhere.[20] In this context, additional consumer protection regulations have frequently been seen as necessary to: inform consumers of the risks and their rights in the new context;[21] address the new incentives of suppliers in the changed context; [22] address non-scrupulous business and marketing practices that may emerge among operators (including incumbents and entrants alike) in the initial stages of market opening;[23] and address any differential impacts on different categories of consumers that can be created by the opening of a market to competition.[24] Certain consumer-related regulations may also be introduced in newly-opened markets to help achieve the policy objective of promoting competition, for example to encourage active searching and switching by consumers to facilitate the development of a competitive market.[25]

48. An obvious question in relation to this rationale for enhanced consumer protection is: at what point will the additional protections no longer be warranted? Arguably, as markets become more liquid and established, and suppliers become more concerned with

[18] See OECD (2008:24).
[19] Other examples of contexts where groups can be afforded special rights are tenants vis-à-vis landlords, and employees vis-à-vis employers. The special protections are premised on recognition of the imbalance in power, and the need to prevent possible exploitation.
[20] See Armstrong (2008:131) on this 'infant consumer' point.
[21] Including through: informed consent policies; minimum or standardised contractual terms; and access to inexpensive dispute resolution mechanisms (such as ombudsman schemes).
[22] For example, regulations may be needed to prevent incumbent or traditional suppliers from developing working practices and contractual terms that seek to 'lock-in' consumers for specific periods (for example, through the use of automatic roll-over contracts, or contract termination penalties) or by making it unduly onerous for customers to switch supplier by having an extended notification period. Lock-in of this type can also be framed as a competition concern.
[23] For example, aggressive doorstop and telephone marketing and selling practices.
[24] Specifically, in some settings, it has been shown that the average price paid by uninformed consumers actually increases as the number of suppliers in the market increases. See Armstrong (2008:130).
[25] These can include measures to improve price transparency and comparability, as well as consumer education measures.

reputation, and consumers more familiar with the new products, and with exercising choice in these markets, some of the rationales for additional consumer protections will be less compelling. For example, protection measures which may be appropriate in the early days of market opening to encourage search and switching (such as requirements for minimum standardised contractual terms, standardised tariff and billing procedures, or limitations on abilities of suppliers to enter into certain types of supply contracts) could, as the market develops, limit differentiation among suppliers and innovation more generally, and frustrate consumers prepared to bear more risk through bespoke arrangements. However, it may not always be easy to determine which protections become unnecessary as competition develops, and which need to endure irrespective of the intensity of competition in the market. As the telecommunications discussion in section 4 illustrates, even where consumers have become familiar with a new market context, the continued emergence of new products and product offerings (e.g. bundled products) can renew consumer confusion and the need for protections.

(c) Rationales based on the industry structure, including the nature and intensity of competition between suppliers.

49. Sector-specific consumer protections are sometimes premised on the nature of the supply structure for a product, in particular whether there is a single monopoly supplier or multiple competing suppliers. In circumstances where there is a monopoly provider of an essential product and there is no real prospect for retail competition – such as for the supply of water and wastewater services to households in many jurisdictions – consumer protections are seen as needed because consumers do not have choice, and are effectively 'locked-in' to a supply arrangement with a single supplier which can obviously dampen the incentive to provide high quality services to consumers. In these monopoly-like settings, the types of additional consumer protections introduced tend to focus on addressing the asymmetrical bargaining position between the supplier and consumers (e.g.: through establishing minimum service standards) and aiding transparency (e.g. how bills have been calculated).

50. In industry structures where there are multiple suppliers which compete intensively it is often argued that additional consumer protections are not necessary. On this argument, robust competition is the best form of protection for consumers because firms will have a natural incentive to foster a reputation for being reliable and good quality suppliers of services,[26] and to overcome information asymmetries where they exist.[27] In these circumstances, general consumer protection laws – such as against fraud and deception, faulty goods, mis-selling and unfair contact terms – will suffice.

[26] As a former head of the US Federal Trade Commission puts it: *"The consumers' ability to shift expenditures imposes a rigorous discipline on each seller to satisfy consumer preferences. It often motivates sellers to provide truthful, useful information about their products and drives them to fulfill promises concerning price, quality, and other terms of sale. Consumers can punish a seller's deceit or its reneging on promises made by voting with their feet – and their pocketbooks."* See Muris (2002:4)

[27] For example, in order to build market share firms may seek to reduce the search and switching costs of consumers by reducing some of the costs of switching (i.e.: carrying the burden of any one-off costs of switching) or providing targeted information which allows consumers to better understand the offer available.

51. However, industry structures may fall between the extremes of monopoly and being highly competitive. These market contexts might be categorized as those where there is: a lack of incentive for suppliers to maintain a good reputation; there are pronounced information asymmetries between suppliers and consumers; or there is a 'poor' equilibrium, where all suppliers may to different degrees seek to exploit consumers.[28] In these settings, some consumers may require additional consumer protections to provide them with better and more accurate information (e.g.: contracts which use plain language); limit the scope for opaque or unclear marketing practices which create consumer confusion; and to create stronger incentives for suppliers to take account of their consumer's circumstances when providing them with a service.

3.2 Who and what should be subject to sector specific consumer protection regulations?

52. The previous section considered why additional consumer protections may be warranted in a sector. This section considers the required *scope* of such protections, and in particular who (i.e.: which suppliers) and what (i.e.: which products and services) should be subject to the regulations that afford such consumers protections.

(a) Which suppliers should be required to provide additional consumer protections?

53. If consumer protection regulations are required for certain products over above protections available under general consumer law, a key question concerns whether such requirements should be placed on all suppliers in a market or only selected suppliers.

54. The scope of application or regulations requires consideration of two initial points:

- First, suppliers that face additional consumer protection obligations will often have to incur additional costs, and these will ordinarily be reflected in consumer prices.[29]
- Second, suppliers may operate different business models or service different groups of consumers. This diversity will be relevant to question of scope and design of regulation, and there may be unintended consequences if scope or design reflects only one business model, supply method or technology.

55. Tables 7 and 8 below set out the high-level, in principle benefits/advantages and risks/disadvantages of imposing additional consumer protection obligations on all suppliers vis-à-vis selected suppliers. These benefits and risks are set out across three dimensions: consumer impact, competition and innovation.

[28] See Akerlof and Shiller (2015).

[29] These costs manifest in various ways but might include costs associated with requirements to: provide minimum levels of service; service particular consumer groups; incur various liability risks; and establish and participate in consumer dispute resolution schemes (such as ombudsmen).

Table 7: 'In-principle' advantages and disadvantages of applying additional consumer protection obligations on ALL suppliers

	Benefits/advantages	Risks/disadvantages
Consumer impact	• Covers the entire market as applies to all suppliers, so should limit scope for 'gaps' in protection coverage to occur.	• May result in consumers of some suppliers facing too high a level of consumer protection. • This could limit their ability to exercise choice, as suppliers are more restricted in how they can differentiate themselves in certain dimensions. • Could increase prices for all consumers. • Could limit innovation and different business models from emerging which could impact on future consumers.
Competition	• Ensures a level playing field such that all suppliers of a particular product face the same regulatory obligations.	• May limit the scope for suppliers to differentiate themselves from one another, and therefore result in one less dimension of rivalry (e.g.: in terms of service quality). • Costs of compliance may not be proportionate to size, such that smaller suppliers are disproportionately affected.
Innovation	• Ensures that all innovations satisfy a common level of consumer protection. In other words, suppliers must ensure that any innovations maintain minimum standards of consumer protection.	• Can create disincentives to innovate or adopt new business models or supply methods (e.g.: ways of communicating with new and existing consumers). This can have adverse effects on current consumers and future consumers

Table 8: 'In-principle' advantages and disadvantages of applying additional consumer protection obligations on SELECTED suppliers

	Benefits/Advantages	Risks/disadvantages
Consumer impact	• Targeted only on those suppliers who are likely to have consumers which need additional protections, and therefore consistent with a risk-based approach. • Could lower costs for consumers. • Increases differentiation among suppliers, which provides consumers with greater choice.	• Not full coverage of the market means that consumers will face different levels of protection depending on their supplier. This could also lead to 'gaps' in protection emerging. • Could be difficult for consumers to understand which suppliers offer full protection and which suppliers do not.
Competition	• Can ensure that the obligations are imposed in a proportionate manner, and does not unduly burden suppliers who provide high levels of consumer service or for whom the rationales for consumer protection do not arise. • Can lower overall industry costs, and therefore intensify competition. • Can create incentives for suppliers to differentiate themselves in terms of quality of service and responsiveness to consumers, in order to gain market share.	• Can provide exempt suppliers with a competitive advantage, by lowering their regulatory obligations and costs. This could distort competition. • Could result in 'threshold effects' which can distort incentives for some firms to grow or service certain consumers so as to avoid obligations being imposed.
Innovation	• Can create strong incentives to innovate, particularly for those who wish to adopt new business models or ways of interacting with consumers. • Can promote incentives for entry by new suppliers from outside the sector who can bring new and innovative ways of engaging with consumers.	• Consumers who purchase products from new, innovative suppliers may be exposed to new risks. • Some consumers of innovative suppliers may not be aware that they are not protected by the same consumer protections as more traditional suppliers.

56. The analysis presented above suggests that the choice of whether or not to apply additional consumer protection obligations on all suppliers, or only selected suppliers, can be conditioned by the characteristics of the particular market and industry setting. In very general terms, it suggests that:

    - Applying the obligations on all suppliers may be most appropriate where: the suppliers of a product are largely homogenous in terms of size, scale and operations, pursue similar business models and service the same types of consumers; there is

limited scope for innovation or new entry; and where 'gaps' in the coverage of consumer protection could create significant and disproportionate burdens on some consumers.

- Applying the obligations selectively on suppliers may be most appropriate where: there is significant diversity in suppliers in the market in terms of size, scale of operations, and business models; suppliers service markedly different consumer groups or segments; there is scope for innovation in service delivery, including by new entrants; and the magnitude of any potential detriment suffered by consumers of suppliers which do not face obligations is assessed as relatively modest.

57. An additional consideration is a practical one. What are the appropriate metrics for determining which suppliers should be subject to additional consumer protection obligations. Potential metrics might include:

    - **Market size and scale:** e.g. only the largest suppliers (in terms of customer numbers) or those with the highest market shares are required to satisfy additional obligations.
    - **Geographical area of operations and coverage:** e.g. additional obligations may only be imposed on those suppliers who have a wide geographic coverage of the market.
    - **Number of competitors and intensity of competition:** e.g. if there are five suppliers in a particular urban area, this may be seen as sufficient to protect consumers, whereas if there is only one or two suppliers this may not be assessed as sufficient and those suppliers would face additional obligations to consumers.
    - **The business model of the supplier:** e.g. additional obligations may only be imposed on suppliers with 'riskier' business models, or who have a poor track record in terms of providing high levels of consumer protection.
    - **The technology or delivery method used to supply the product:** additional obligations may only be imposed on suppliers of particular technologies or delivery methods.[30]
    - **The consumer segments served:** e.g. additional obligations may only be imposed on suppliers of particular types of consumers. such as vulnerable or low income consumers.

58. As is evident from the above list, setting thresholds for the application of additional obligations could affect the incentives of suppliers. For example, suppliers who serve large numbers of vulnerable or low-income consumers, may have incentives to 'shed' or no longer seek to attract such consumers, to avoid the enhanced obligations.

[30] For example, in telecommunications there is a debate about whether Over-the-Top (OTT) voice providers – such as Skype and WhatsApp – should be subject to the same consumer protection obligations as traditional telecommunications providers. Some argue that this is appropriate because they essentially provide the same product to the consumer (i.e.: the ability to make a voice call), while others have argued against such policies, noting that OTT is nothing more than a software application and that the technology is different.

59. In addition, where there are a large number of differentiated suppliers, the challenges, and associated costs and risks, of determining which suppliers should, and should not, face additional obligations may be so great that a 'wholesale', market-wide approach is more efficient. Alternatively, all suppliers might be *a priori* subject to the regulation subject to an exemptions regime that a supplier would need to establish they came within.

(b) Which products should be subject to additional consumer protections?

60. A further key consideration around the scope of sector specific consumer protection regulations is: which products should be subject to such obligations? For example, if the ability to make a voice call is considered an essential service, should suppliers of any products which provides this service (i.e.: landline, OTT voice providers (such as Skype or WhatsApp) or mobile service providers) have the same obligations, and their consumers the same protection? Similarly, should suppliers of all products which provide electricity to a household consumer be subject to the same regulation and consumers of such products the same protections? (e.g.: grid-sourced electricity, battery sourced electricity or solar PV sourced electricity?). These questions are considered in more detail in the sections that follow, but for current purposes it is useful to consider some of the dimensions that could be relevant when addressing the question of whether or not there should be regulatory alignment *across products* that could fulfil an essential service function.

61. There are two ways to approach this question. One way is to focus on the characteristics and functionality of the *products* which are consumed, and the extent to which these are related to an essential service. If from a consumers' perspective, the functions and attributes of two products are such that they can both fulfil an essential service, then protections for consumers should, under this approach, be broadly aligned (e.g.: mobile voice calls and landline voice calls). The second way of approaching this question is to focus on the *protections* that are needed for a product which could perform an essential service function. Here the focus is on the broad characteristics of the market and different consumer protections, and to map these to the different concepts of essential service described in section 3.1 above.

62. If an analysis of consumer protection requirements is to be based on product attributes or functionality, the following dimensions need to be considered:

    - **Are products that can ostensibly perform the same essential service function, considered close substitutes for one another from the consumer's perspective?** Even if products could in some circumstances fulfil the same essential service function, if consumers perceive the products not to be full substitutes then this may support different consumer protections being placed on the products. Historically, we have seen different protections for products with some level of functional similarity because they have been considered complements rather than substitutes for one another by consumers. For example, in the early days of mobile phones, some jurisdictions treated these as complements to fixed line network services, rather than substitutes. More recently, there has been debate about whether certain Over The Top (OTT) services in telecommunications (such as Skype or WhatsApp) are substitutes for traditional services. A 2018 Market Study the ACCC noted that

while consumers are increasingly using OTT services for communications, such use can often be complementary to use of traditional services. [31]

- **Do all products provide the same degree of reliability and functionality?** For example, if one product provides more reliable service, and can be accessed at all times by consumers, this may be subject to additional consumer protection obligations on the basis that it more fully performs the 'essential' service functions (e.g.: this type of argument has been used by some VoIP providers to argue against being required to fulfil various lifeline functions in some jurisdictions).
- **Are the contractual and supply terms, and the consumer related investments, similar across the products?** Products can be sold under different trading terms and arrangements and involve different degrees of up-front investment by consumers. This can give risk to different risks for the consumer and can shape the nature and magnitude of potential exposure to consumer harm. For example, the nature of protection that a consumer needs if it makes a large up-front investment and is locked into a multi-year contract, will likely differ from the protections needed if the consumer makes no (or limited) up-front investments and can switch suppliers rapidly.
- **Would the consumer detriment associated with poor supply or customer performance be the same across all products?** For example, is the detriment associated with consumers not having access to electricity stored in an electric vehicle for 48 hours, comparable to not having access to grid-sourced electricity for that same period? If so, the nature of the consumer protections for the two products might need to reflect these differences.

63. A second way to approach the question of which products should be subject to sector specific regulations is to focus on the specific nature of various consumer *protections*, and to map these to the different concepts of essential service discussed in section 3.1. In effect, this involves examining the purpose of different categories of consumer protection, and assessing which of these protections may need to apply to all products, and which protections are only need to apply to products being sold to certain consumers or in particular settings. Table 9 sets out a broad categorisation of consumer protections and links them to the underling consumer detriment that could arise, and then offers suggestions as to the types of products and settings where such protections may be needed.

64. A number of general observations can be made about table 9:

- There are different types of 'consumer detriment' which consumer protections aim to avoid or mitigate, and the likelihood of these different types of detriment arising

[31] Notably, the 2018 ACCC Communications Sector Market Study noted that while consumers are increasingly using OTT services to replace traditional services, particularly for content and communications, their use can often be complementary as well. Moreover, at that time, they did not consider wireless broadband to be a complete substitute for fixed broadband services, and that the degree of future substitution to wireless technologies will in part depend on the consumer experience on the NBN, in addition to technical factors such as wireless capacity. See ACCC (2018:149 and 151).

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can vary across products and settings. For example, the detriment experienced by consumers might depend on the terms of a sale for a product, and the amount of upfront investment they need to make in any assets, or the extent to which they are locked into a specific supply arrangement. Similarly, there may be a need for additional protections for products sold in settings where there is low intensity of competition and suppliers adopt similar terms (on connection or disconnection)

- Second, some potential consumer detriments might be seen as 'core' or direct, while others might be seen as secondary/indirect insofar as the potential harm experienced by a consumer can be of a different magnitude. For example, the disconnection of a consumer for an extended period could directly give rise to potential health, safety and social harm. In contrast, the inability of a consumer to withdraw from a contract because there is no cooling-off period will also cause a consumer harm, but of a different nature (e.g.: economic harm).
- Third, some 'detriments' are related to specific policy objectives not being fulfilled. For example, consumers might be assessed as suffering harm if they do not have access to good information and/or are not able to actively search and switch supplier. The nature of the harm here relates to the potential lack of competitive pressure being placed on supplier(s) which can result in higher prices and poor service quality.
- Finally, some detriments are likely only to arise for certain types of consumers. Most clearly, detriments associated with financial difficulty or failure of life support equipment will only apply to particular consumer groups in society.

Table 9: Broad types of consumer protection and link to consumer detriment

	Specific examples of protections under the NECF	What consumer detriment does it aim to protect consumers from?	For which products and settings will the protection be most needed?
Consumer Access	• **Connection services**: requirement to provide connection services if requested • **Disconnection and reconnection:** general obligation to maintain a customer connection, limitations on interruptions and requirements before disconnections/de-energisation • **Life support**: specific protections for customers on life support equipment	• Potential detriment to health, safety or wellbeing arise from having access to reliable energy (e.g. not being able to heat or cool home, cook, access hot water etc)	• Arguably should apply (within reason) to all products which fulfil this essential service function for a consumer and where there is no default supplier • Relevant in settings with low levels of competition, or where all suppliers offer similar connection/ disconnection terms.
Competition	• **Pre-contractual information and marketing rules:** this includes requirements to disclose certain information prior to a contract being struck and certain restriction on marketing, canvassing and advertising.	• Because consumers do not fully understand the terms and conditions they are purchasing they could get 'locked-in' to bad contract terms and conditions. This could result in 'bill-shock' in the future. • Aggressive marketing practices that lead consumers to contract for products that are not suitable for them or harassment via sales tactics	• Relevant to products where there is a risk of consumers not being fully informed of product attributes and/or being 'locked-in' to poor quality contracts. • Relevant in settings with low intensity of competition, where all suppliers sell products on similar terms, and where large numbers of non-savvy consumers.
	• **Disclosure and information requirements:** this includes historical billing data; bill review; end of fixed term contract notice; and other information provisions	• Being unable to assess current service in order to assess /take advantage of alterative offerings in the market • Being unable to understand own usage to utilise demand-side services. Aims to make consumers more active, by making it easier to search and switch, and seeks to promote fair and affordable access.	• Relevant for products where consumers have imperfect information or inactive. • Relevant to settings where consumers can switch suppliers in the short-term relatively easily.(e.g. where they haven't made a large up-front investment or long-term commitment).

Contract terms and dispute resolution	• **Established minimum contract terms:** relating to billing; payment obligations; pricing; customer complaints and dispute resolution	• Having rights which are not enforceable in practice because there is no complaints mechanisms or dispute resolution is, in practice, inaccessible (e.g. prohibitively expensive or time-consuming). • Protects consumers from poor quality of service, and to provide them with various accessible rights of redress to make their rights meaningful/enforceable.	• Relevant for products with complex pricing arrangements. • Relevant to settings where there is likely to be a large number of disputes and where costs can be socialised.
Financial difficulty	• **Financial difficulty**: requirements to provide support and assistance to those experiencing financial difficulty.	• Inability to heat or cool home etc in case of chronic or sudden financial difficulty. • Protects consumers from disconnection who experience financial difficulties.	• Relevant for products which are purchased by those on low-incomes, or who could potentially experience sudden financial difficulties.

3.3 How can consumer protection regulations be implemented?

65. The preceding discussion in this section has focussed on why sector-specific consumer protection obligations may be needed, and which products and suppliers should be subject to these. A separate relevant framing consideration is how best to apply and implement such protections to achieve a particular set of policy objectives. This section focuses on two general questions: first, what level of prescription and detail should be contained in the consumer protection regulations, and more generally what are the merits of principles-based versus rules-based approaches to regulation? Second, when should the regulations be statutory/public in nature, and imposed and enforced by a government regulator, and when should regulations be led and implemented by industry such as through a voluntary or co-regulatory approach?

(a) Principles-based and rules-based approaches

66. Regulators can deploy different regulatory strategies to achieve policy objectives. One general strategy, often referred to as a 'rules-based' regulatory approach, typically involves the development of detailed *ex ante* rules that are highly particularistic and prescriptive and give suppliers advance notice as to what their obligations are, and which actions/behaviour they can and cannot engage in. Such an approach typically provides limited flexibility in any specific factual context. Another regulatory strategy, often referred to as a principles-based (or outcomes-focussed) regulatory approach, typically involves the regulator specifying outcomes or principles, cast at a high level, which allows suppliers some discretion as to how best comply with these principles/outcomes. In this regard, suppliers are required to exercise judgement to predict what actions will achieve the regulatory objective and which might conflict with it.[32] Table 10 below sets out some of the general differences between the two approaches.

[32] On the different approaches more generally, see Decker (2018).

Table 10: Comparison of rules-based and principles-based approaches to regulation

	Principles based	Rules based
Degree of particularity or precision	• Directions are generally imprecise and open-textured, leaving scope for interpretation	• Specific and precise prescriptions for behaviour
Who decides on content of provision	• Suppliers interpret the goal and make judgments as to how best to comply with the goal	• Those drafting the rule, such as a regulator
When is content determined	• At the time the supplier interprets the goal and takes action	• At the time of the drafting of the rule
Congruence with a regulatory objective	• Requires suppliers to continually engage with the question, across activities and across time, as to whether actions are consistent or inconsistent with the regulatory objective, and exercise judgement on this.	• Assumed that the rule is congruent with the objective, and so if supplier complies with the rule the objective will be achieved
Enforcement approach	• Investigate whether the supplier's actions are consistent with the goal	• Investigate whether the supplier has complied with the rule
Degree of particularity or precision	• Directions are generally imprecise and open-textured, leaving scope for interpretation	• Specific and precise prescriptions for behaviour

67. Table 11 below sets out, in very general terms, the key advantages and disadvantages of each approach across a number of dimensions. The key messages to emerge from this table are:

    - Generally speaking, principles-based approaches are seen to: be flexible; encourage experimentation and alternative approaches to compliance; encourage suppliers to take more responsibility and think through consequences of actions; be more adaptive to changes in the environment and market; and to allow a regulator to tailor its approach to enforcement. By shifting the focus away from the detail of individual prescriptive rules (which seek, in combination, to achieve a regulatory outcome) to a policy goal or outcome itself, the approach is seen as more durable than detailed prescription because high level principles and open-textured provisions can capture a wide range of behaviours, and avoid large enforcement or compliance gaps emerging where market conditions change and new risks emerge. This is seen as particularly important in innovative sectors where significant market change is occurring (such as through the emergence of new supply methods or rapid technological change).

    - The main risk with principles-based approaches can stem from the potential for imprecision and vagueness which can lead to multiple interpretations, and which can create coverage gaps and leave suppliers uncertain as to how to comply with a

required regulatory outcome. In some contexts, this could have a chilling effect on behaviour and foster a degree of conservatism among suppliers, and stifle what may be desirable behaviour. This risk can potentially be mitigated through the publication of non-binding guidance or indicative actions and behaviours that illustrate or exemplify compliance with a goal. However, if this mechanism is over-used such that suppliers are confronted with a proliferation of guidance, or if regulates treat such guidance as prescriptive rather than exemplary, this will create similar issues to those that arise under a prescriptive, detailed rules- based approach

- The main perceived advantages of more prescriptive 'rules-based' approaches are: they can lead to more certainty for suppliers; they are more effective at constraining regulatory discretion; and better at ensuring that a regulator is ultimately accountable for the outcomes of the regulatory system. A rules-based approach can potentially make enforcement easier (as it involves less judgement on the part of the regulator) and can be more cost efficient in some settings as it eliminates the need for the regulatory enforcer to make investigations and exercise judgment, in each and every application of the rule (i.e.: it can exploit any economies in enforcement costs by not requiring the regulator to undertake time-consuming and repetitive investigations of how principles might apply to specific facts for each and every regulated party). Finally, it is sometimes argued that the lines of accountability are clearer under a rules-based approach as the regulator remains ultimately accountable for ensuring that the rules are congruent with the regulatory objective, and is not delegating this to suppliers.

- The principal weakness of more prescriptive 'rules-based' approaches are perceived to be: is its inflexibility, which, in some settings, may unnecessarily increase compliance costs or stifle innovation. In contexts subject to significant change, prescriptive rules can also tend towards obsolescence, and require constant adaptation or supplementation. If rules are too static they may misfire in changed circumstances and hinder innovation or technological development. In addition, the need to develop rules to cover every possible action or contingency can result in an over-abundance of prescriptive rules resulting in lengthy and unwieldy regulatory codes, where rules that address the most significant risks are obscured/swamped by the extent of coverage/detail. There can also be considerable challenges associated with drafting precise ex ante rules particularly where the knowledge and information of the regulator is limited relative to that the industry.

Table 11: Relative 'in-principle' advantages and disadvantages of rules-based and principles-based approaches

	Principles based	Rules based
Flexibility	Seen as more flexible	Less flexible
Predictability and certainty	More imprecise, and potentially less certain	More precise and therefore potentially more certain
Promotion of innovation	Seen to encourage experimentation and alternative approaches to compliance	Limited incentives to innovate in compliance
Impact on approach and mindset of supplier	Requires suppliers to be forward-looking and think through consequences of actions	Can result in a tick-box mentality developing
Uniform or differential treatment of supplier	Can allow for differential treatment of supplier based on compliance history or other characteristics	Formally treats all suppliers the same
Ability to adapt to changes in environment/ market	More open-textured and therefore can be more adaptive to changes in the environment	Less adaptive to changes, rules can tend towards obsolescence, and require more rules to be introduced
Scope for exercise of regulatory discretion	Potentially significant scope for the exercise of regulatory discretion	Typically constrains the discretion of the regulator
Accountability	Devolves some responsibility to suppliers, and can create an accountability gap	Regulator is ultimately accountable for failures
Incentives for compliance	Can lead to over- or under-compliance depending on level of precision of regulation, and the risk profile and resources of supplier	Can create incentives to 'game the rules' and engage in creative compliance

68. While table 11 sets out some of the 'in-principle' advantages and disadvantages of rules-based and principles-based approaches, in practice, a large number of contextual factors can impact on the appropriateness, and potential effectiveness, of each approach. Some of the most relevant contextual considerations are shown in table 12 below.

Table 12: Relevant contextual factors which condition the choice of principles-based or rules-based approaches

Contextual factor	Consideration
Simplicity or complexity of setting	• Rules-based approaches are seen to be more appropriate in relatively simple setting with homogenous actors. • Conversely, principles-based approaches may be more appropriate in more complex settings with more heterogeneous suppliers and where a wide variety of activities are subject to regulation.
Nature of risks and potential harm	• There can be often challenges associated with capturing a wide range of potentially risky behaviour and outcomes in prescriptive, uniform rules. However, some prescriptive rules may be the only option to avoid certain behaviours which would cause significant consumer detriment.
Information conditions	• Principles-based approaches are seen as more appropriate in settings where the regulator does not have good access to information. However, as most regulators face imperfect information conditions the question is obviously one of degree.
Degree of innovation	• Principles based approaches are perceived to be more appropriate in innovative sectors as they are potentially more adaptive to changes in the market.
Attitude of suppliers and degree of trust	• Rules-based approaches can potentially give rise to creative compliance, and a principles-based approach may therefore be able to capture a wider range of actions inconsistent with a regulatory objective. However, this advantage of a principles based approach is seen as being affected by the degree of trust between a regulator and the community it regulates.
Shared understandings and predictability	• Principles-based approaches are generally seen as less predictable than more prescriptive rules based approaches as they can be open to multiple interpretations. • However, if a rules-based approach involves too many, or conflicting, rules this can reduce predictability.
Ability of the regulator to adapt	• To apply the principles-based approach a regulator must be willing to devolve some responsibility, and to accept and assess judgement-based outcomes.
Ability to draft rules to capture the actions or activities of interest	• In some settings a principles-based approach may be inevitable by virtue of the fact that it is not possible to formulate and develop a precise set of prescriptive rules to cover all the actions of interest.

69. While sharp distinctions are often made in policy discourse between prescriptive, rules-based approaches and principles-based approaches, in practice, the distinctions are not as clear cut, and various forms of 'hybrid' approaches are typically adopted, which combine elements of each approach to regulation. For example, a regulatory framework might comprise binding high-level principles accompanied by non-binding guidelines and 'safe-harbours'. Alternatively, a framework might be based around binding prescriptive rules, which are subject to qualifications and exceptions. In short, in practice, the gap between approaches can be narrower than the conceptual paradigms, and therefore the advantages and limitations of each approach will also be attenuated in such blended frameworks.

(b) Industry self-regulation

70. In many sectors subject to regulation, a frequent question is the appropriate balance between industry self-regulation and public/statutory regulation, i.e. *who* is responsible for the development, implementation and enforcement of the 'rules'.

71. There are a number of well-recognised benefits associated with self-regulatory forms of regulation:

- First, suppliers should be intimately familiar with the sector. This can have advantages in terms of an ability to recognise issues, and fashion rules that are appropriate to such issues, and should also reduce the information costs associated with regulation by non-specialists. As the rules are made by those who will be subject to them, there may also be benefits for compliance relative to externally-imposed prescriptions.

- Second, self-regulation may reduce the costs of monitoring and enforcement. This is because those who enforce the regulations should have sector-expertise that may assist them distinguish between compliant and non-compliant behaviour. It is also sometimes argued that a collective desire to maintain the reputation of an industry, (and prevent unfair advantage of competitors) leads self-regulating bodies to be more rigorous and thorough in the monitoring and identification of non-compliance with obligations than a public authority might be.

- Third, self-regulatory bodies may be more flexible, and adaptive regulators as they are not required to work through the formal machinery of government or statutory bodies when developing or changing regulations.

- Fourth, there may be stronger incentives for industry to adapt regulation in response to market changes. In particular, in contexts where consumer trust and confidence are important, maintaining effective regulation should expand the size of the market.

- Finally, self-regulation can empower the industry to 'own' specific problems related to the product they supply, and to take steps to mitigate those problems, rather than relying on the state to address concerns about the supply of a product.

72. Of course such general propositions about the perceived motivations for, and benefits of, rules promulgated by self-regulatory bodies need to be assessed against the possibility that rules may be shaped and implemented in ways which operate in the interests of the industry (or certain segments of the industry – e.g.: incumbents) to the detriment of consumers. In other words, alongside the 'in-principle' benefits of self-regulation there is one well-recognised potential disadvantage of self-regulatory arrangements: a self-regulating industry can have an incentive to act like a cartel/monopoly by enacting rules which operate

in the interests of the industry (or certain segments of the industry – e.g.: incumbents), to the detriment of competitive processes and consumers. In other words, one of the central roles of a self-regulatory body association is to establish various forms of *control* over industry suppliers, and this can create a natural incentive to promulgate rules that serve to improve their own positions, at the expense of consumers (in effect, a form (perhaps the most obvious form) of 'regulatory capture').

73. However, for current purposes, the key question is whether allowing an industry to have greater involvement in the development and monitoring of consumer protection regulations is more or less likely to protect consumers, than other forms of regulation, such as where the protections are solely designed and implemented by government-appointed or statutory regulatory bodies. In this respect, there is a large body of economic research in the area of public or collective choice theory, which suggests that regulators and regulatory agencies may not themselves always act in the 'public interest', and are liable to be unduly influenced by various sectional interest groups or ideologies. The net result, it is posited in some of this work, is that the regulatory framework that emerges is the result of a contest between various competing interest groups (existing suppliers, new entrants, sectors of society etc), rather than necessarily reflecting what is in the best interest of consumers or the public.[33]

(c) Co-regulatory approaches

74. A third general approach to regulation is sometimes labelled 'co-regulation'. At its most general level, co-regulation refers to a regulatory framework where the state and industry co-operate or collaborate, and where governance is made up of both public and private 'governors'. Some commentators have described co-regulatory – or collaborative governance – frameworks as a 'middle way' between state regulation and pure industry self-regulation. Such an approach is seen as focusing attention away from the command and control approach of traditional regulation towards joint problem solving and the use of controlled discretion by a regulator.

75. A key strength of a co-regulatory framework is that it can be more flexible and adaptable than standard uni-directional regulation. It achieves this is by establishing a framework for an ongoing and structured 'dialogue' between the state, suppliers and other stakeholders (including consumers and consumer associations) in pursuit of shared fundamental goals. Another important attribute of co-regulatory arrangements is that they often involve multiple stakeholders, and this inclusiveness is argued to lead to greater legitimacy. Further, co-regulatory frameworks can allow for greater experimentation: allowing the regulator and suppliers to develop mechanisms that are well suited to, and effective, in the specific context in which they are being applied.

76. Given the nature of co-regulation, which is based on establishing a framework for a

[33] The classic references here are Becker (1985) and Posner (1971).

structured and ongoing dialogue between a regulator, suppliers and other stakeholders, including consumer associations, it is unsurprising that, in practice, it can take various forms. Specifically, co-regulatory frameworks can be seen to lie along a spectrum. Some co-regulatory arrangements (such as where the regulator reviews certain rules of an industry association and may have 'veto' powers) lie closer to traditional forms of oversight, while other co-regulatory arrangements (such as where the regulator does not have an automatic right to review or approve rules of an industry) lie closer to the pure self-regulatory end of the spectrum.

77. Variety in co-regulatory arrangements can be seen in the extent to which the state regulator becomes involved in the development and enforcement of rules in a sector. Some co-regulatory frameworks delegate the responsibility for developing and implementing rules (or a code) to the industry in the first instance but provide for a backstop 'veto' by a state regulator over specific rules in prescribed circumstances. Other co-regulatory arrangements delegate the full responsibility for rule change requests to the industry, and the regulator is only empowered to intervene on complaint from a participant or consumer.

78. Notwithstanding the diversity of co-regulatory approaches adopted in practice, a number of potential advantages of the general approach have been identified. Among the most important of these articulated in the wider literature is that it can encourage:

- **A joint problem solving/solution-focused orientation**: a focus by the regulator and the industry on a positive approach to problem solving rather than conflict and contestability. This encompasses factors such as voluntary information sharing and communication between the regulator and industry.

- **Broad participation by affected and interested parties at different stages of rule development and implementation**: the approach involves wide participation in the development and shaping of rules with a common goal among all parties for effective problem solving.

- **Plasticity and a focus on solutions that can adapt and be revised over time**: co-regulation can be an evolutionary approach where decisions about rules to cover on immediate problems do not unduly foreclose future options.

- **Adequate accountability:** the regulator and the industry recognise their interdependence and accountability to one another, and therefore jointly 'own' a problem and the rules introduced to mitigate the problem.

- **Flexible industry self-regulation but with support and guidance from government and regulatory institutions***:* the regulator, or other government body, can act as an engaged actor and facilitator that guides and monitors the industry in coming up and implementing relevant regulations, while not necessarily mandating or dictating action.

79. A good example of a co-regulatory structure that has emerged in many liberalised energy markets is industry codes, which set out many of the rules regarding participation in the electricity and gas markets. The codes are typically modifiable, multiparty agreements which set out the contractual framework for connection to, and use of, the networks and allow for the execution of bilateral agreements, entered into pursuant to the code, which contain the site-specific terms for connection to, and/or use of, the system. In many jurisdictions, a co-regulatory structure has been developed both in relation to the management of the code, and for assessing proposed changes to the code. A party that believes that certain aspects of the rules are not working well can propose a modification to the code. An amendments/modifications panel comprising industry members, representatives from a consumer representation body and the regulator then consider the change. Code modifications can be proposed by the individual parties, but can sometimes require the approval of the regulator.

80. These arrangements provide protection against an industry developing rules/regulations in ways that are favourable to their own interests, and contrary to, say, the interests of consumers. Moreover, because they have the power to propose amendments, disaffected parties can ensure that issues are addressed by pro-actively proposing code modifications: they do not have to wait upon the initiatives of the regulator. Alternatively, dissenters can oppose modifications they consider undesirable (by making submissions to the panel), safe in the knowledge that their views will be brought to the regulators attention in the panel's report on the modification. In short, the co-regulatory structure may serve to mitigate market power deriving from any undue influence of particular parties over rule-books.

81. The experience of network codes in the energy sector suggests that such arrangements have tended to have a number of beneficial effects, including:

- promoting active participation in code governance by a range of parties;
- discouraging incumbents from seeking to use the rule-books to advance their own interests at the expense of others, including consumers (because such attempts will likely be defeated via the requirement for a regulator's approval); and
- serving to reduce regulatory burdens by virtue of the fact that the regulator's role is largely one of adjudication.

82. Generally speaking, co-regulatory arrangements for code governance are often perceived as one of the successes of liberalisation of energy markets. Having said that, the co-regulatory arrangements surrounding code governance have adapted over time. An early weakness of some of co-regulatory arrangements was the piecemeal way in which code modifications were proposed and developed. Such a weakness is particularly significant when major changes are taking place in the markets being served, and there are a large number of proposed changes to the code. In response, the code arrangements in some jurisdictions have been adapted to allow the regulator to conduct periodic Significant Code Reviews, which enable it to consider how the rules are operating in a more holistic way, and to identify broader sets of modifications that the regulator considers to be warranted.

4. Consumer protection frameworks for other essential services

Chapter summary:

- Many of the sector specific consumer protections in telecommunications are similar to those in the NECF. While the main consumer protection code applies to mobile, landline and internet consumers many of the other protections only apply to consumers of certain fixed line products, or to certain suppliers.
- The telecommunications consumer protection framework combines statutory protections, developed by the state and enforced by a regulator, with substantial use of codes that are developed in a co-regulatory way. Recent reviews have highlighted some issues with the consumer protection framework in telecommunications. Notably, some consumer bodies have argued the current self-regulatory approach has failed to protect consumers, and that there is a need for a 'stronger regulatory posture' from the regulator (the ACMA). Notwithstanding these concerns about application of the co-regulatory approach, the reviews have not recommended a move away from co-regulation in the sector.
- While not a traditional utility service, access to retail banking services is often characterized as an essential service. Sector specific consumer protection regulations in relation to such service has typically been premised on the characteristics of certain consumers of such services, and on how consumers make decisions. There are also longstanding concerns about market power in the sector, which is seen to be reinforced by consumer inertia and limited switching. Most of the detailed provisions regarding consumer protection for retail banking are contained in codes developed by representative industry bodies, and approved by the regulator (ASIC). Many of the broad categories of protection under the codes are similar to those in telecommunications and in the NECF.
- Recent reviews of the banking sector have highlighted a range of issues around the adequacy of the consumer protection framework for banking. A particular complaint has been poor enforcement of the rules. The Financial Services Royal Commission made various recommendations to address this including that: ASIC's power to approve codes of conduct be extended; provisions in the industry codes might become 'enforceable code provisions' and that industry codes might, in some circumstances, become mandatory; and that ASIC's role must go beyond 'being the passive recipient of industry proposals'.
- Postal sector consumer protection obligations are intertwined with Australia Post's statutory Community Service Obligations, and other operators or courier companies are not generally subject to similar obligations. No sector specific consumer protections exist for airline passengers. However, major Australian airlines have introduced customer charters. Regulated water companies in some states are subject to mandatory Customer Service Codes and Customer Contracts or Charters produced by the regulator.

83. This section presents key insights from a survey of the consumer protection frameworks for other comparative essential services in Australia provided by multiple suppliers in competitive market settings. Given the competitive market structure in electricity there is a particular focus on the frameworks for telecommunications and financial services, while there is also a brief discussion of the frameworks for other sectors such as post, water and transport.

84. The survey aligns with the analytical framework set out in section 1, and focusses on:

- Why are sector specific consumer protection regulations introduced in these other sectors? What services (if any) are considered to be essential? How is the sector responding to change?
- Who and what is subject to consumer protection regulations in these sectors? Is it all providers of a service, or only the largest operators? What are the 'triggers' for the introduction/application of sector specific regulations?
- How are the consumer protection regulations applied? Are they mandatory or voluntary in nature? Is a co-regulation approach adopted? What level of prescription vis-à-vis flexibility is contained in the regulations? What is the experience of enforcement of the consumer protections in the sector?

4.1 Telecommunications

85. The telecommunications industry in Australia (and elsewhere in the world) has transformed over the past three decades, from an industry where consumers principally made voice calls using a fixed line network, to one where consumers now have wide choice in voice communications. This includes choice around the technologies, networks, equipment and applications used for fixed line calls, mobile phone calls, and over-the-top Services (OTT). In addition, there has been substantial growth in other modes of communication (i.e.: growth in data communications such as email, text and social media applications). Alongside these changes, there has been profound changes in the telecommunications network architecture in Australia. This includes how the traditional fixed-line PSTN is utilised (with some consumers choosing to 'cut the cord' and no longer utilise a fixed line network), the development and rollout of the National Broadband Network (NBN), and successive improvements in the coverage, speed and service offerings of mobile communications networks.

86. Certain changes in the telecommunications industry have been seen to have direct implications for consumers, and the consumer protections required. Among these:

- **Emergence of new products and service offerings:** while consumers were traditionally offered a single product (a landline phone connection with per call charges) with fixed prices, they now face a range of product offers including bundled packages which may combine landline or mobile services with other

products (such as broadband access and access to Pay TV or other entertainment packages, or in some cases energy products),[34] and involve different usage 'allowances' (e.g.: call packages or unlimited data allowances).

- **Greater consumer choice about performance and standards of service:** consumers face greater choice across several performance and reliability dimensions, including ways of accessing a service (mobile, fixed line, satellite), as well as service coverage and speed across the different networks, technologies and providers.[35]

- **New providers and new business models**: a range of new providers of communication services have entered the market in the past two decades. This includes full-scale competitors to traditional fixed-line incumbents, mobile phone operators, re-sellers of specific retail services, virtual mobile network operators, cable companies, and internet-based businesses such as voice and messaging providers like Apple's Facetime, Skype and WhatsApp.[36] Such providers operate on different business models, and generate revenues in different ways, to the traditional telecommunications companies.

- **New supply and trading arrangements**: a variety of new contractual arrangements have emerged with the new providers and product offerings. This includes contracts with different degrees of investment in customer equipment (e.g.: handsets) and monthly charges, as well as contracts which are differentiated in terms of call charges, extent of access to services and data, and contract period (12 month, 24 month or even 36 months). For example, consumers can opt for contracts which offer unlimited voice and data services, or for pre-paid contracts where access can be restricted or limited once a particular usage threshold is reached.[37]

- **Changing consumer expectations and reliance on services:** as consumers have started to utilise new products and services their reliance on these products, and

[34] The ACCC Market Study identified the following examples of additional services being combined with telecommunications products: exclusive content deals for major sporting events such as AFL, NRL and English Premier League, as well as offering (typically for a limited period) free access to music services (including Apple Music and Spotify Premium), video streaming services (such as Netflix, Stan or Foxtel) or their own entertainment channels (such as Yes TV by Fetch (Optus) or Telstra TV). In addition, some service providers, such as Amaysim and Dodo, also offer consumers the opportunity to purchase other services (such as energy services) in addition to telecommunications services, in selected areas. See ACCC (2018:36).

[35] The ACCC (2018:36) observes: *"[t]he ability to offer different speed options on fibre networks affords these service providers another opportunity on which to differentiate and compete. At present, the most common speed tiers offered to consumers are 12, 25, 50 and 100 Mbps".*

[36] Alongside Telstra and the three main mobile operators, some estimates suggest that there are 780 fixed line, mobile service resellers and MVNOs, 550 ISPs operating. See PWC (2018).

[37] The ACCC Market Study noted that customers can sometimes select their own mix of speed, data quota and contract length for broadband services, with additional options for home phone and calls, and modem inclusions. See ACCC (2018: 35).

expectations about performance and service quality have also changed.[38] Many consumers now expect communications products to be accessible and reliable wherever they are and across all their needs/ activities.

87. Taken as a whole, these changes are seen as having been highly beneficial for consumers insofar as they have enhanced competition and choice, brought new and innovative services to the market, and have successively improved service quality and performance.[39] However, as with changes in the electricity sector, changes in the telecommunications sector have raised questions about the rationale, nature and scope of protections that consumers need in this new environment.

(a) Why are there telecommunications sector specific consumer protection regulations?

88. A review of the broad rationales for sector-specific consumer protections in the telecommunications sector shows a high degree of similarity with those in the energy sector. Specifically, these rationales can be organised under the three headings identified in section 3.1: telecommunications can be considered an essential service; certain consumer characteristics create a need for specific protections; and the industry structure, including the nature and intensity of competition between suppliers, contributes to the need for certain consumer protections.

89. The Australian Communications and Media Authority (ACMA) has made clear that it considered telecommunications an essential service, and that it was the responsibility of the "entire industry" to keep consumers connected.[40] The ACMA noted that consumers rely on telecommunications services for social, commercial and safety reasons. In its view, access to reliable telecommunications services, particularly for vulnerable consumers, was more important at this point in time than ever before. Communication services were also considered essential for most Australian consumers and businesses.[41]

90. The question of which specific communication services are essential has also arisen in the telecommunications sector; some jurisdictions now classifying access to broadband services as essential. In its 2018 Communications Market Study, the ACCC supported the view that broadband services constitute essential services on the basis that *consumers rely heavily on the internet to carry out every day activities and access basic service, and because broadband supports a range of other services such as…. OTT communications and content services, the IoT, and cloud services"*.[42] In December 2018, the Australian Government announced its intention to replace the Universal Service Obligation for fixed voice and payphone services with a Universal Service Guarantee that will provide universal access to voice and broadband services.

[38] The ACCC found that for 2015–16 and 2016–17, there was an increasing number of complaints about broadband services supplied over the NBN. See ACCC (2018:38).
[39] Examples include services such as Skype and WhatsApp which allow consumers to call and text over an Internet connection using a range of devices (PCs, tablets and mobile phones), while services such as Netflix and Amazon Prime allow customers to watch films and TV programmes on various Internet connected devices.
[40] See ACMA (2019;12).
[41] ACMA (2019;13).
[42] ACCC (2018: 20).

91. Certain consumer characteristics have also justified sector-specific consumer protection regulations in the telecommunications sector. Historically, this has involved a focus on the protection of 'vulnerable' consumers, or consumers who require priority assistance (i.e.: customers whose life might be at risk without access to a phone). In addition, low income consumers, such as pensioners and some others on Centrelink benefits, can receive a telephone allowance to assist them in paying their phone bills, and can receive a higher rate of allowance to assist with the cost of home internet service.

92. However, as the telecommunications market has evolved, and consumers have faced wider choice, and increased complexity in offerings and pricing practices, there has been a perceived need to extend a degree of consumer protection to consumers generally to assist in the making of informed choices.[43] The increased importance of telecommunication products in daily consumer activities, and therefore the increased reliance on such products and services, has been perceived to increase the risks and potential detriments associated with poor or ill-informed decisions.[44]

93. Industry aspects have also influenced consumer protection regulation. As noted above, there are multiple suppliers of telecommunications services in Australia who sell products across a range of technologies, networks and applications. Nevertheless, the number of suppliers for some products is limited and the markets are relatively concentrated across both fixed line and mobile networks.[45] This concentration can be even starker in specific geographical areas, or for specific types of consumers, where not all retailers may be active or offer full coverage. Accordingly, additional consumer protections have been considered important to protect consumers in areas where there may be limited incentives for suppliers to offer connections or maintain a high level of reliability. The ACCC recently found that Australian households are not active switchers when it comes to home phone and fixed broadband services, and that consumers generally tend to be very loyal to their telecommunication provider.[46] When consumers did decide to switch, their movement was predominantly between the large service providers, which may explain the limited change in overall market shares.[47] The ACCC speculated that a contributing factor to the strong market positions of incumbents – particularly Telstra – across all services (despite the more

[43] In its submission to the ACCC Market Study, the Australian Communications Consumer Action Network (ACCAN), noted that: *"communications services are inherently technical and complex for consumers to understand. Further, service providers may structure their products in a complicated manner or provide consumers with large amounts of information to make it difficult for consumers to compare offerings with those of other providers"*. See ACCC (2018: 123).

[44] The ACMA recently observed that the potential offering of telecommunications services based on different service levels may make *it "more confusing and challenging for consumers to choose between the different providers and plans offered. Further, increased diversity in service offerings in terms of performance benchmarks may create a more complex compliance landscape*". On this basis, the ACMA advocated that information be made available to consumers at time of purchase so they can easily compare service offerings. ACMA (2019: 17).

[45] ACCC (2018:42) notes: *"the market remains highly concentrated with large vertically and horizontally integrated service providers continuing to capture most of the market on both fixed line and mobile networks*"

[46] According to a survey quoted in ACCC (2018:120), in 2016 only 3% of Australian households switched home phone service provider, while 7% switched for fixed broadband, and 10% of Australian consumers said they had switched mobile phone service provider.

[47] Of those Australian households that have been with the same fixed broadband service provider for ten years or more, 65 per cent are with Telstra compared to 16 per cent with Optus. See ACCC (2018:40).

competitive offerings available from other service providers) was that consumers were unaware of their options, and, given the concentrated supply structure, and lack of demand side pressure, it was important to ensure all suppliers have strong incentives to: provide appropriate information to consumers and high levels of customer service; not engage in confusing or complex marketing and selling practices; and provide timely responses to faults.

94. Finally, it should be noted that the roll-out of the NBN has introduced additional interactions between wholesalers and retailers in the supply of end-to-end telecommunications services. The greater separation of wholesale and retail activities can give rise to new questions about who is ultimately responsible for maintaining service quality and reliability for the end product supplied to consumers. This change in the industry structure for the telecommunications sector might give rise to new challenges for consumers in understanding who is accountable for different aspect of the service they receive, and what are their avenues of redress should something go wrong.

(b) What additional consumer protections exist?

95. Internationally, among the specific consumer protection requirements that are imposed on *traditional* (incumbent) telecommunications service providers are requirements related to: access to emergency services; privacy and data protection; network reliability; minimum quality standards; provision of Universal Services; wiretapping for law enforcement services, and lifeline and other services for 'vulnerable' people.[48] A number of these requirements are also imposed on '*competitive* telecommunications providers',[49] and, although such providers are not required to provide a universal service they may be required to contribute to a universal service fund. Table 13 below sets out the general types of additional consumer protections that exist for telecommunications consumers in Australia, while table 14 describes the main regulatory instruments and codes in which these protections are contained.

96. Two general observations can be made when looking at these tables:

- First, in contrast to the energy sector, where many of the additional consumer protections are contained in the NECF, in the telecommunications sector the additional protections are contained in a combination of legislation, regulations and co-regulatory codes and documents.
- Second, the additional protections contained in the legislation, regulation and industry codes are broadly similar to those which apply in the energy sector. Indeed, the consumer protections in telecommunications are at least, and if not, more comprehensive than those contained in the NECF.

[48] See ITU (2013:2).
[49] This is typically a defined category of entrant, who competes in the supply of traditional products and services. An example would be Optus in Australia and the Competitive Local Exchange Carriers (CLECs) in the USA.

Table 13: Telecommunications sector specific consumer protections

Broad category of protection	Examples of specific protections
Consumer access	• **Connection Services:** a universal service obligation provides reasonable access, on request, to a standard telephone service for all people in Australia. • **Reconnections:** requirements relating to in-place service by a new Customer where the previous customer has vacated the premises and the existing service has not been cancelled. Sets out processes for the disconnection of the previous service, the connection of a new service and a process for reversals for invalid connections. • **Restrictions on disconnections:** there are restrictions on the ability to limit access to Telecommunications Services for credit-related reasons. Customers must be given adequate notice regarding a decision by the Supplier to Restrict, Suspend or Disconnect their Telecommunications Service for Credit and/or debt Management reasons.
Competition	• **Pre-contractual information and marketing rules**: rules relating to advertising, the provision of information, selling practices, contracting, customer service, and dealing with consumers with different needs to allow Consumers to make informed choices. • **Responsible approach to selling:** sales representatives must sell products in a fair, transparent, responsible and accurate manner to assist consumers in making informed purchasing decisions; and clearly explain the key terms, conditions, and costs of the telecommunications products consumers are purchasing. • **Switching and changing suppliers:** suppliers have certain obligation when consumers seek to change their current supplier to an alternative supplier • **Disclosure and information requirements** current offers must be disclosed in "Critical Information Summary" (CIS), which contains specific information to allow consumers to easily compare product offers of different service providers to determine which best suits their needs.
Contract terms and dispute resolution	• **Plain language:** Suppliers must communicate with consumers in plain language • **Minimum contract terms:** customer contracts must include details of the entity providing the service and of any associated goods; various pricing, billing and payment terms; • **Dispute resolution** residential and small business consumers of telephone and internet services must have access to a complaints handling and industry ombudsman scheme to provide a dispute resolution service. •

Service levels and reliability	• **Minimum standard for connection times**: suppliers face obligations regarding remediation and appointment keeping standards (including maximum timeframes and compensation) for eligible standard telephone services. • **Network Reliability Framework:** a reporting and repair framework • **Customer and network fault management**: process and procedures for recording, managing and resolving customer faults
Protection of certain consumer groups	• **Disadvantaged and vulnerable consumers:** suppliers are required to adopt best practice when dealing with these consumers • **Financial assistance**: suppliers must have a financial hardship policy and ensure that it is easy for consumers to find and access. • **Priority Assistance:** requires Telstra to take steps to prioritise connection and fault repair for telephone services of people with a diagnosed life-threatening medical condition.

Table 14: Regulatory basis of telecommunications specific consumer protections

Regulatory basis	Form	Consideration
Telecommunications (Consumer Protection and Service Standards) Act 1999 (the TCPSS Act)	Legislation	• Introduces a Customer service guarantee (CSG) provides for minimum performance standards in the supply of telephone services and the payment of compensation if these standards are not met. • Establishes an industry-funded independent Telecommunications Industry Ombudsman (TIO) Scheme to provide a dispute resolution service for residential and small business consumers of telephone and internet services.
Telecommunications Act 1997	Legislation	• Requires that telecommunications be regulated in a manner that: (a) promotes the greatest practicable use of industry self-regulation; and (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry; but does not compromise the effectiveness of regulation in achieving the objects.
Regulatory licence conditions and other directives	Licences; regulatory directives; standards	• Universal service standard • Telecommunications (Consumer Complaints Handling) Industry Standard 2018 • Network reliability guarantee • Priority Assistance • Telco (NBN Consumer Information) Industry Standard 2018
Telecommunications Consumer Protections Code (TCP Code)	Industry co-regulation	• Provides safeguards for mobile, landline and internet customers. • Outlines rules that telecommunications providers must follow when communicating and dealing with customers, including the provision of a Critical Information Summary (CIS) and a requirement for clear unit pricing for national calls, SMS and data in their advertisements. • The CIS sets out information to allow consumers to easily compare product offers of different service providers and to determine which best suits their needs. • A CIS provides customers with important information alongside the contract, and can assist consumers to make the most appropriate choice for their circumstances
Other codes	Industry co-regulation	• Mobile premium service code • Connection outstanding code • Customer and network fault management code

(c) Which suppliers and products are subject to telecommunications sector specific consumer protection regulations?

97. As noted above, over the past three decades the telecommunications industry in Australia has seen three major changes. First, the emergence of competitors to Telstra who provide similar fixed line telecommunications services to certain customer groups or in particular areas[50] (examples include Optus, AAPT or Macquarie Telecom). Second, the emergence of operators who supply mobile phone services to consumers. Third, the emergence of new products and services, including so-called over-the-top services (OTT) which involve services supplied 'over' the public Internet without the involvement of a network operator. Some of these services are provided by companies with very different business models to traditional telecommunications suppliers, and tend to focus on specific segments of the market. Many of these services directly compete with, and are rapidly displacing, the voice, data and video services provided by traditional telecommunications providers. Notwithstanding the emergence of new competitors and suppliers, not all of the consumer protections outlined in table 13 above apply to all carriers or products. This reflects the fact that many of the protections were developed when the services were primarily provided over Telstra's fixed-line copper telephone network.

98. In Australia, the licensing and regulatory requirements distinguish between:

- carriers[51] who own telecommunications infrastructure used to supply carriage services to the public. Their facilities may include: transmission infrastructure, cabling, wireless networks, and satellite facilities.
- carriage service providers (CSPs), who use a carrier's infrastructure to carry services.[52] This includes suppliers that: resell time on a carrier network for phone calls, provide access to the internet (internet service providers); or provide phone services over the internet (VoIP service providers),

99. Carriage service providers (CSPs)[53] are not required to be licensed, but are covered by certain consumer protection obligations. For example, all CSPs who supply Telecommunications Products to Customers in Australia are required to observe and comply with the TCP Code. However, with the exception of the TCP Code – which provides protections to mobile, landline and internet consumers – many of the other protections and codes only apply to consumers of certain fixed line products, or to certain.

[50] Various forms of entry have occurred since the introduction of competition in the telecommunications industry: full-scale entrants who compete head-to-head with the incumbent in providing an end-to-end service; entrants who make certain investments in network infrastructure, but also acquire 'unbundled' access to certain services/elements of the incumbent, most notably the local copper wire network; and entrants who purchase services at the wholesale level from the incumbent and re-sell these services under a different name at the retail level.

[51] An owner of a telecommunications network unit used to supply a carriage service to the public must hold a carrier licence, unless an exemption applies or a nominated carrier declaration (NCD) is in place for that network unit. See ACMA (2015)

[52] Carriage services include services for carrying communications; for example, telephone services, internet access services and voice over internet protocol (VoIP) services.

[53] CSPs do not require a licence to supply a carriage service to the public.

suppliers.[54] Table 15 sets out how the different protections apply to different products and services and providers.

100. The transition to the NBN is also changing the nature of the consumer protections that apply. For example, under Telco (NBN Consumer Information) Industry Standard 2018 additional obligations are being placed on CSPs offering NBN service. This includes requirements to give customers specific information to choose an NBN plan (regulated 'Key fact sheet'); keep customer connected to internet and phone service when moving them to the NBN; and confirm a customer's NBN service is working.

[54] For example, Telstra is the only provider that must offer Priority Assistance as part of its carrier licence conditions, although based on ACMA reporting, a small number of other providers also offer Priority Assistance in accordance with an industry code. Providers that do not offer Priority Assistance must inform consumers of other providers that do, with the ACMA monitoring compliance with this requirement.

Table 15: Application of protections in telecommunications regulations and codes

Broad category of protection	Type of protection	Relevant code	Applies to which products and suppliers
Consumer access	**Universal service obligation**	Universal Service Obligation	Only fixed line internet and telephone services and service providers
	Restrictions on disconnections	Telecommunications Consumer Protections Code (TCP Code)	Both fixed line internet and telephone services AND mobile telephone and data service providers
Competition	**Pre-contractual information and marketing rules**	Telecommunications Consumer Protections Code (TCP Code)	Both fixed line internet and telephone services AND mobile telephone and data service providers
	Responsible approach to selling		
	Switching and changing suppliers		
	Disclosure and information requirements		
Contract terms and dispute resolution	**Minimum contract terms**	Telecommunications Consumer Protections Code (TCP Code)	Both fixed line internet and telephone services AND mobile telephone and data service providers
	Dispute resolution	Telecommunications industry ombudsman	Only fixed line internet and telephone services and service providers
Service levels and reliability	**Reliability**	Network Reliability Framework	Only fixed line internet and telephone services and service providers
	Minimum standard for connection times	Customer Service Guarantee	
	Management of customer faults	Customer and network fault management code	Both fixed line internet and telephone services AND mobile telephone and data service providers
Protection of certain consumer groups	**Priority assistance**	Priority Assistance	Only specific fixed line internet and telephone services and service providers
	Financial Assistance	Telecommunications Consumer Protections Code (TCP Code)	Both fixed line internet and telephone services AND mobile telephone and data service providers
	Disadvantaged and vulnerable consumer	Telecommunications Consumer Protections Code (TCP Code)	

(d) How are telecommunications sector specific consumer protection regulations applied?

101. This sections draws out relevant insights about how the telecommunications consumer protections are applied. Specifically, it focusses on:

- The level of prescription and detail contained in the consumer protection frameworks, and more specifically whether they appear to be more principles-based or rules-based in nature.

- The extent to which the consumer protection obligations are mandatory in nature and imposed and enforced by a government regulator, as compared to being co-regulatory or voluntary in nature.

102. Starting with the question of whether the consumer protection framework appears more principles or rules based, a review of the main components of the framework suggests that it might be classified as hybrid. It combines a mix of principles and detailed prescription across the different pieces of legislation, regulatory directives and codes. On the prescriptive side, the Telecommunications Consumer Protections Code (TCP Code) sets out very detailed requirements about the minimum content requirements of customer bills, while the Customer Service Guarantee Standard requires that a consumer must be connected within 2 working days where a phone line already exists,

103. However, in other areas the protections are more principled and open textured in nature. For example, the Responsible approach to Selling provisions in the TCP establish the principles that telecommunications products should be promoted *"in a fair, transparent, responsible and accurate manner to assist Consumers in making informed purchasing decisions"*.[55] Elements of prescription and principle are combined in some areas of consumer protection. For example, the protections relating to customer faults in the Customer and Network Fault Management Code first sets out some '*Fault Management Principles'* before specifying, in some areas, detailed requirements e.g. that customer faults must be rectified by the end of the next business day after receipt of the fault report.[56]

104. The consumer protection framework can also be seen to adopt a hybrid approach to regulation insofar as it combines statutory protections, established in statute and enforced by a regulator, with substantial use of codes that are developed in a co-regulatory way. Important among these codes is the TCP code that regulates the full cycle or interaction of a retailer and a customer, from marketing and advertising to contract terms, billing, credit and debt management, switching and complaints handling.[57]

105. Codes are developed by representative industry bodies, such as the Communications

[55] Communications Alliance (2019:31).
[56] Communications Alliance (2015:20).
[57] Examples of the types of consumer protections issues that should be set out in an industry code or standard is set out in statute in the Telecommunications Act 1997.See Section 113 of Telecommunications Act 1997.

Alliance which is funded by industry (its members include the mobile and fixed telephone, internet and telecommunications equipment sectors). Regulators such as the ACCC and the ACMA can act as (non-voting) participants, and draft codes are consulted on by regulators, consumer bodies and other stakeholders. Once developed, the codes may be registered with the ACMA. This means that the codes can then be enforced by the regulator, and the failure to comply with the code can attract penalties. Critically, where the ACMA considers that an industry code is insufficient it has an ability to establish its own industry regulation and standard in a specific area. The ACMA also has an ability to request that an industry code be developed in a certain area.

106. Although not discussed above, other areas of consumer protection are governed by voluntary, non-binding industry guidelines and guidance notes. Examples include the Guidelines that provides education and guidance to providers on how to assist customers experiencing domestic and family violence;[58] and the Guidance Note on Sales Practices and Credit and Debt Management which illustrates a range of good practices related to TCP Code provisions for CSPs to consider and apply as appropriate.[59]

(e) Experience of application of the telecommunications sector specific consumer protection framework

107. A number of recent reviews and studies have recently looked at the sector specific consumer safeguards in telecommunications. The Australian Government is currently undertaking a review of the consumer protection framework in telecommunications (known as the Telecommunications Consumer Safeguard Review).[60] In launching the Review the Government set out the following rationale:

> *"The telecommunications consumer safeguards in place today were mostly designed around fixed-line voice services supplied over the copper telephone network and primarily delivered end-to-end by a single provider. The ongoing relevance and currency of these original protections is decreasing as Australia's telecommunications industry, technology and consumers' use of telecommunications services evolves. The objective of the Review is to determine the appropriate mix of consumer protections that are needed now and into the future, and how these safeguards would be best implemented and governed*".[61]

108. The Review is focussed on three main areas: (i) complaints handling and consumer redress; (ii) reliability of telecommunications services, and (iii) choice and fairness in the retail relationship between the customer and their provider. The findings and conclusions of the first two of these areas have recently been published, while the review of the third

[58] Communications Alliance (2018).
[59] Communications Alliance (2017).
[60] Department of Infrastructure Transport, Regional Development and Communications (2020).
[61] Department of Infrastructure Transport, Regional Development and Communications (2018:1).

area is ongoing.[62]

109. In the material published from the Review to date:

- Some consumer bodies have argued the current self-regulatory approach in telecommunications has failed to adequately protect consumers, and advocated for a 'stronger regulatory posture' from the ACMA.

- Consumers and industry have taken different views on the need for changes in relation to complaints handling and dispute resolution. There were also marked differences in views within the industry, with different perspectives generally expressed by the largest providers compared to some of the small to medium sized industry participants.

- There was near universal support from both consumers, industry, and other industry Ombudsman schemes for dispute resolution in the telecommunications sector to continue being provided by the Telecommunications Industry Ombudsman (TIO), but acknowledgement that improvements could be made to the TIO Scheme.

- In terms of reliability, there was a general consensus that the majority of existing telecommunications-specific consumer reliability safeguards no longer meet community expectations. Consumer and consumer group submissions identify an ongoing level of frustration with connections, fault repairs and missed appointments.

- There were differences of view on how consumer safeguards regarding reliability should be delivered. Consumers and consumer groups support mandatory rules around reliability of voice and broadband services through direct regulation, with specific timeframes (i.e. prescription) and automatic compensation arrangements. Industry want direct intervention in the market minimised and directed to clear cases of market failure. They advocated for opportunities for industry to compete and differentiate.

- The Review recommended greater transparency around retailer service commitments, including minimum requirements to disclose information about timeframes for connections and repairs, and associated remedies, while allowing industry to make these points of competitive distinction. The Review also recommended that the government should put in place arrangements to provide assurances that timeframes and associated remedies offered by retailers are reasonable and proportionate.

[62] See Department of Infrastructure Transport, Regional Development and Communications (2018) and Department of Infrastructure Transport, Regional Development and Communications (2019).

- The Review recommended that the current obligation to provide Priority Assistance to consumers diagnosed with a life-threatening medical condition who depend on a reliable, fixed line home telephone service to be able to call for assistance at any time. (which applies mainly to Telstra and certain providers) should be widened to a shared industry approach to supporting medically vulnerable consumers, on the basis this would offer a more equitable sharing of costs and offer greater competition and choice to consumers.

- The Review recommended that the current Customer Service Guarantee (CSG) (which requires providers of standard telephone services to meet connection, repair and appointment keeping timeframes or be subject to daily financial penalties once mandatory timeframes are exceeded), should be removed in line with the recommendation on wholesale reliability rules and retail service level commitments noted above, except for voice services delivered over networks that Telstra owns or controls.

- Finally, the Review recommended that various adjustments be made to the Network Reliability Framework which requires Telstra to report on the reliability of its services on various metrics.

110. A 2018 ACCC market study on communications also examined various matters relating to consumer protection in telecommunications.[63] Specifically, the ACCC identified the following issues and concerns with the framework in place at that time:

- **Various potential barriers to switching** for consumers that could disadvantage some consumers and potentially inhibit future competition in communications markets. As noted, the ACCC found that "*Australian households are not active switchers when it comes to home phone and fixed broadband services*."[64]

- **Contract terms and conditions:** concerns about consumers being 'locked-in' to contracts; the use of early termination fees and automatic renewal clauses; lack of consumer awareness about when their contract ends (which may be exacerbated by some service providers not including the contract end date on the bill, and not notifying the customer when their contract is nearing the end date).

- **Bundling of telecommunications and other services:** integration of products can be a barrier to consumer switching when bundles require consumers to commit to a long-term contract. If a consumer wants to exit all or part of their bundled services, they often need to navigate numerous product specific processes to change their bundle or service provider.

[63] See ACCC (2018).
[64] ACCC (2018:120).

- **Lack of full compliance with the TCP code requirements relating to the Critical Information Statement (CIS)**: some service providers may include poor information in the CIS and misrepresent some information, such as the performance of services over the NBN.[65]

111. The ACCC made a number of recommendations to address these issues including:

- That they will monitor consumer complaints about bundling and take enforcement action where necessary. They will also consider issuing guidance to consumers regarding bundled telecommunications products.

- That they will continue to monitor consumer complaints about unfair terms in communications contracts and closely examine 36-month plans. The ACCC also proposed to work with industry and government stakeholders to ensure consumers are informed about the potential benefits of short-term or no 'lock in' contract options when migrating to the NBN.

- A recommendation that the TCP Code should be amended to reflect the requirement that early termination fees must not be more than the reasonable costs to the service provider. In addition, service providers be obliged to more clearly identify the contract end date to consumers.

- That the Review of Consumer Protection Safeguards by the Australian government (noted above) should review the Critical Information Statement (CIS) provisions to ensure the most relevant and meaningful information is captured for the benefit of consumers.

- That the Consumer Data Right be extended to the telecommunications sector, as planned, which will enable consumers to understand their own data usage and make better purchasing decisions.

4.2 Retail banking

112. The financial services sector is another area that is undergoing rapid and substantial change, particularly in the way consumers access and utilise retail banking services, as a result of the emergence of competitor banks, including 'fintechs', and a range of new online and digital retail banking products and services. Although not a traditional 'utility' sector, the retail banking sector shares a number of characteristics with the energy sector relevant for the discussion in this paper. Firstly, although the big four banks have a large share of the market, there are a range of different suppliers of retail banking services to consumers,

[65] In this respect, the ACCC (2018:123) noted *"ACMA's 2016–17 audit ... reviewed 111 offers from 79 different service providers and found that of these providers, 61 per cent had compliant CISs, 35 per cent had a CIS with some content or formatting deficiencies and 4 per cent had no CIS at all."*

including regional banks as well as smaller building societies and other providers. Second, as noted, the sector is undergoing transformative change, particularly as consumers increasingly use digital and mobile forms of payment. One implication of this is that the traditional supply structure for retail banking services, which comprised a network of branches where consumers could make deposits and withdraw cash, is changing, and many retail banking products and services are now provided online. Third, the sector has a long history of industry self-regulation and co-regulation, including in relation to consumer protection.[66]

113. While there are many different retail financial products and services provided to consumers, ranging from mortgages, financial advice to insurance and savings products, the principal focus of the discussion in this section is on basic retail banking services. As discussed below this is generally considered to be the most 'essential' of the services provided by bank, and often acts as a gateway product to other products and services.

(a) Why are there banking sector specific consumer protection regulations?

114. Notwithstanding the very different nature of the products and services supplied to consumers in energy and retail banking markets, the same three broad rationales for additional consumer protections appear in relation to both sectors – i.e.: that access to a specific service is essential; that certain characteristics of consumers generate a need for protections in relation to the service; and that aspects of the industry structure (including the nature and intensity of competition between banks) influence the need for the protections.

115. While consumer access to banking services is not universally considered to be an essential service – there are many parts of the world, including in developed countries, where consumers' cannot access a basic bank account – there has long been recognition of the importance of such access in Australia. The Australian government's ownership of the Commonwealth Bank was in part predicated on a need to provide basic and essential banking services across the country. The Australian Senate's 2018 inquiry into the regulatory framework for the banking sector concluded that banking *"is effectively an essential*" service[67] and that banks "*should be obliged to make all reasonable efforts to ascertain a customer's circumstances and the suitability of the products offered to them*."[68] The characterisation of access to a basic bank account as an essential service was also made in the Financial Services Royal Commission (Royal Commission), because it provides the account holder with essential banking services at a lower cost than other forms of account.[69] Similarly, the Productivity Commissions' Inquiry into Competition in the Australian Financial System referred to banks as *"institutions that are licensed to provide an essential service"*.[70]

[66] Industry codes in the sector date back to 1993 following a Parliamentary Committee recommendation.
[67] Australian Senate Economics References Committee (2018: para 1.44).
[68] Australian Senate Economics References Committee (2018: para 1.53).
[69] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019:91).
[70] Productivity Commission (2018:55).

116. In the banking sector, the need for sector specific consumer protection regulations have also been premised on the characteristics of certain consumers of such services. This specific rationale was succinctly captured in the Royal Commission which identified the considerable diversity among consumers,[71] and recommended various changes to how the Banking Code (described below) deals with customers requiring particular assistance. Of particular note was the recommendation that current provisions around vulnerable consumers be expanded to cover other types of consumers, such as those who live in remote or isolated areas, who are not adept in using English, who cannot readily produce standard identification documents, and who neither need nor benefit from products such as informal overdrafts.[72]

117. More generally, there has been a considerable focus on how consumers make decisions in relation to financial products. The Productivity Commission's inquiry found that consumers' face difficulties in readily understanding the information presented to them about different products.[73] Moreover, they found that a large number of complex and poorly explained options can lead to 'choice overload'. Similarly, ASIC has observed that decisions are often made using heuristics or 'shortcuts', and that this can lead to making decisions which appear familiar or unambiguous rather than weighing up all the options.[74] It is also sometimes argued that all consumers need a reasonable level of financial literacy to be active and engaged and motivated to seek out information and to have the knowledge and skills to assess the information gathered.

118. In relation to industry structure, although there are multiple providers of retail banking services, this is generally not seen as sufficient to protect consumers on its own because of marker power concentrations and other market conditions. The four major banks dominate retail banking and there is a tail of smaller providers.[75] The Productivity Commission's recent inquiry found evidence that the major banks have sustained prices above competitive levels and offered inferior quality products to some groups of customers (particularly those customers unlikely to change providers). This market power was reinforced by consumer inertia and limited switching,[76] and by the way in which suppliers advertise and market products using a narrow frame which highlights or downplays certain prices or features for commercial gain. Taken together these conditions can allow suppliers to exploit existing

[71] The Royal Commission expressed it in the following way: "*Not all Australians have the same access to telephone or internet banking. Not all Australians can 'step into the nearest branch' to sort out some issue that has emerged. Not all Australians have English as a first language or are as adept in using the English language as others. Not all Australians can easily produce standard identification records. Not all Australians need, or benefit from, 'standard offerings' like informal overdrafts. For some Australians, these characteristics arise from living in a regional or remote location".* See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019:88).

[72] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019:89).

[73] Productivity Commission (2018:629)

[74] See Productivity Commission (2018: 629)

[75] Productivity Commission (2018:4).

[76] According to the Productivity Commission one in two people still bank with their first-ever bank, only one in three have considered switching banks in the past two years, with switching least likely among those who have a home loan with a major bank. Productivity Commission (2018:7).

consumers.[77] Overall, the Productivity Commission concluded that low level of consumer switching and a general disengagement of consumers from financial services are a clear sign that current information provision (by regulators, advisers and brokers) is failing, and it advocated that efforts be focussed on how to inform consumers simply and effectively, rather than assuming that more information is necessarily always better.

(b) What additional consumer protections exist?

119. As in the telecommunications sector, the consumer protection framework which applies to retail banking is a combination of legislation, regulations and industry codes. Among other things, legislation in the sector sets out how entities are required to engage and interact with consumers; how disputes between consumers and entities should be resolved; and; the powers of government-established bodies responsible for oversight and external dispute resolution.

120. Most of the detailed provisions regarding consumer protection for retail banking are contained in two codes of practice: the Australian Banking Association Code of Banking Practice (which applies to the major banks); and the Customer Owned Banking Code of Practice (which applies to credit unions, mutual banks and mutual building societies). Banking codes are developed by representative industry bodies, such as the Australian Banking Association (whose members include the major banks) and the Customer Owned Banking Association (whose members include credit unions, mutual banks and mutual building societies). There is a requirement for codes to be developed in a transparent way, including consultation with relevant stakeholders including consumer and small business groups. Once developed, the codes must be approved by ASIC. The rules in the Code are considered to be binding on the signatories, and importantly, form part of the contracts between the banks and their customers.

121. Unlike in telecommunications (where the codes can be enforced by the regulator (the ACMA)) the financial services regulator (ASIC) does not administer the codes under the current arrangements. Rather the monitoring of compliance with the code is undertaken by separate independent Compliance Committees: the Banking Code Compliance Committee (for the Code of Banking Practice) and the Customer Owned Banking Code Compliance Committee (for the Customer Owned Banking Code). The Committees' are responsible for monitoring compliance with the respective codes, and can investigate alleged breaches of obligations and commitments made under the codes. If a breach is established then the Committee will work with the bank to ensure that the breach does not happen again. However, the Committees' do not have an ability to impose penalties or to provide compensation to consumers under the current arrangements.

122. Where an alleged code breach has occurred consumers can seek redress through the internal dispute resolution process of the banks, or make a claim to the Australian Financial Complaints Authority for external dispute resolution. Moreover, because the relevant terms of the Code form contractual terms and conditions between the bank and their

[77] Productivity Commission (2018: 13).

customer, consumers are able to use the relevant Codes in private litigation

123. Table 16 below sets out examples of the specific protections in the ABA Code of Banking Practice. Many of the broad categories of protection – for example relating to accessibility, minimum contract terms, dispute resolution and dealing with vulnerable consumers – are similar to those in telecommunications and in the NECF. A notable difference is an absence of any specific reference to switching, and any commitment to assist consumers who are wishing to switch banking suppliers. Requirements in relation to switching bank accounts are, however, included, within the ePayments Code which places obligations on the financial institutions that subscribe to it, to help existing and new customers when they switch their accounts between financial institutions. Among other things, the ePayments Code requires: code subscribers to give consumers clear and unambiguous terms and conditions; stipulates how terms and conditions can change (such as fee increases) and how receipts and statements need to be made; sets out the rules for determining who pays for unauthorised transactions, and establishes a regime for recovering mistaken internet payments.

Table 16: Consumer protections in ABA Code of Banking Practice

Broad category of protection	Examples of specific protections
Consumer access	• **Inclusive access to banking services:** banks commit to provide banking services which are inclusive of all people including: older customers; people with a disability; and Indigenous Australians, including in remote locations. • **Offer of basic accounts or low or no fee accounts:** banks commit to raising awareness of affordable banking products, and give consumers information that is easily accessible about accounts that have low, or no, standard fees and charges. • **Closure of banking services:** banks commit to provide readily accessible information about how to close an account. If the bank closes an account that is in credit then it commits to giving a consumer reasonable notice of the closure; paying the amount of the credit balance; and charge an amount that is a reasonable estimate of the costs of closing the account.
Competition	• **Pre-contractual information and marketing rules**: banks commit to clear information about products and services so that consumers make an informed decision about which product or service is suitable. • **Requests for information:** where consumers seek advice on banking services, advice must be given by staff authorised and trained to give that advice; or the consumer will be referred to someone else who can provide the advice (for example: a lawyer, accountant, financial adviser or financial counsellor) • **Agreement on fees**: when acquiring a new product or service there must be pre-agreement on fees
Contract terms and dispute resolution	• **Minimum contract terms:** customer contracts must include details about terms and conditions, fees and charges. • **Rights to obtain contracts:** consumers have a right to copies of certain documents – such as the services contract or statement of account – and when requested, banks must provide within 30 days • **Changes to the terms of conditions of banking services:** requirements around when and how changes to the terms and conditions are provided to consumers. • **Dispute resolution;** requirement to establish internal and external dispute resolution processes.
Service levels and communication	• **Minimum communication standards**: requirements to communicate in a timely manner; and regarding the form of communication • **Account management:** requirement to providing statements about deposit accounts; the cost of transaction service fees
Protection of certain consumer groups	• **Vulnerability :** banks commit to taking extra care with vulnerable customers, including those who are experiencing: age-related impairment; cognitive impairment; elderly abuse; family or domestic violence; financial abuse; mental illness; serious illness; or any other personal, or financial, circumstance causing significant detriment. • **Assistance for people on low incomes**: if a consumer advises a bank they are on a low income, the bank will give them information about accounts appropriate to their needs; e.g. accounts for which standard fees and charges are low; or for which there are no fees and charges (if such a product is offered).

(c) Which suppliers and products are subject to retail banking sector specific consumer protection regulations?

124. A number of pieces of Commonwealth legislation establish specific consumer rights and protections for banking and financial services. This includes the Corporations Act 2001 which: sets out financial services and consumer credit licensing, advice, training and disclosure obligations; requires financial services licensees with retail clients to have an internal dispute resolution system in place; and to be a member of at least one external dispute resolution (EDR) scheme approved by ASIC. Other legislation sets out consumer protections in specific areas of the retail banking, such as consumer credit laws and credit licensing obligations.[78]

125. In addition, as noted above, there are three main codes which apply to retail banking services. The purposes of the codes are to complement the legislative requirements and, in some areas, go beyond the legislative requirements to protect consumers and encourage consumer confidence in banking products and services. Table 17 below sets out who owns the main codes of practice, and which types of banks are required to comply with each code. A notable observation is that, as all three codes are voluntary, and as such not all banks, credit unions or buildings societies are required to sign up to them.[79]

Table 17: Banking Code administrators and signatories

Code	Code owner	Signatories to code
Code of Banking Practice	Australian Banking Association	• All members of the Australian Banking Association with a retail presence in Australia are required to sign up to the Code. • Currently there are 25 signatories to the Code
Customer Owned Banking Code of Practice	Customer Owned Banking Association	• Most credit unions, mutual building societies, mutual banks and other mutual ADIs subscribe to the Code • Currently over 60 signatories to the Code.
ePayments Code	ASIC	• Most banks, credit unions and building societies currently subscribe to the ePayments Code, along with a number of non-banking businesses. • There are currently 116 signatories to the Code.

126. Table 18 below sets out the coverage of the different codes in terms of both types of customers as well as products.

[78] This includes the National Consumer Credit Protection Act 2009, which also includes the National Credit Code

[79] However, the adoption of the ABA Code is a mandatory requirement to become a member of the Australian Banking Association.

Table 18: Coverage and protection of different banking codes

Code	Types of customers	Types of products covered
Code of Banking Practice	Applies to dealings with customers, and where relevant, a prospective customer, and is either: • an individual, who is not treated as a business under the Code; or • a small business; or • a guarantor, or a prospective guarantor	Examples of banking services the Code applies to: • bank accounts and term deposits; • credit cards, debit cards, prepaid cards; • home loan, personal loans, bill facilities, overdrafts • consumer credit insurance; • payment services; and • foreign currency exchange services. However, banking services the Code does not apply to include: • shares, bonds and other securities; • Wholesale financial products and financial services
Customer Owned Banking Code of Practice	Applies to dealings with: • individual and small business customers • individuals and small businesses who give guarantees or indemnities securing loan facilities. • in the case of commitments about the provision of information, prospective customers, and • any other customers to whom the code is voluntarily applied	The code covers: • deposit accounts, personal loans, home loans, credit and debit cards, cheques and other financial products and facilities • products and facilities issued by another organisation and introduced, arranged or otherwise distributed by a code signatory, but only in relation to the code signatories selection and distribution of the product or facility • a code signatory employees, and agents and representatives when acting on behalf of signatory
ePayments Code	• Code only protects consumers who deal with a subscriber to the Code	Applies to: • consumer electronic payment transactions, including ATM, EFTPOS and credit card transactions, • online payments, • internet and mobile banking, • and BPAY

(d) How are retail banking sector specific consumer protection regulations applied?

127. In general terms, the consumer protection framework for banking services is hybrid in nature, although relative to other sectors it does appear to be more open-textured and principles-based and less prescriptive in some areas. For example, signatories to the Customer Owned Banking Code of Practice commit to terms and conditions for its products

which strike a 'fair balance' between the legitimate needs and interests of the customer and the interests and obligations of the supplier. Similarly, the ABA Code of Banking Practice sets out four Guiding Principles, which include (among other things) commitments by banks to:

- **Be transparent**: including maintaining trust, and recognition of the role of banks in society and the impact on the wider community.

- **Operate with integrity**: including a commitment to act honestly and with integrity, and be 'fair and reasonable' in their dealings with consumers.

- **Service levels**: including ensuring that banking services are accessible, inclusive and provided to consumers in a fair and ethical manner, and working with consumers who are experiencing financial difficulty.

- **Transparent and accountable**: including communicating with consumers in a clear, transparent and timely manner.

128. Alongside these principles, there are areas in all of the codes which are more prescriptive and set out, for example, specific time limits and frames for certain actions. For example, banks which subscribe to the ABA Code of Banking Practice must provide consumers with copies of certain documents – such as their contract or statement of account – when requested, within 30 days. Banks must also resolve complaints within certain specified timeframes. Similarly, Customer Owned banks commit to respond to any communications with 3 business days.

129. The two main regulators of the consumer protections in the retail banking sector are ASIC and the ACCC. The ACCC is responsible for promoting competition and fair trading and provision of consumer protection in financial markets as a whole. ASIC is primarily responsible for oversight and regulatory activities in relation to consumer protections in the banking and other financial services sectors. Its broad functions include: protecting consumers from poor conduct; sanctioning or removing individuals or firms that breach the law in ways that harm consumers; and providing consumers with information that will help them to make better financial decisions. Among ASIC's specific roles and powers include:

- Approving industry codes, this includes ensuring that codes have been developed in a transparent way, including consultation with relevant stakeholders including consumer and small business groups.

- Requirements that the internal dispute resolution procedures of financial services entities meet particular standards or requirements that it sets, such as maximum timeframes to resolve disputes.

- Investigating breaches of the law and misconduct on the part of entities, after which it may negotiate outcomes with industry, such as an enforceable undertaking, It is also able to take the following measures: enforcement action, including criminal action; civil action, such as civil penalty proceedings; and administrative action, such as banning or disqualifying individuals from the financial services sector.

- ASIC is empowered to take compensatory action, or recover compensation on behalf of consumers. ASIC can also undertake a class action to obtain compensation for a group of consumers or investors who have suffered loss from the same type of misconduct, if it determines that it is in the public interest to do so.

- Until 1 November 2018, with the establishment of the Australian Financial Complaints Authority, ASIC was also responsible for oversight of two EDR schemes: the Financial Ombudsman Service and the Credit and Investments Ombudsman.

(e) Experience of application of retail banking consumer protection framework

130. As noted, there have been a number of recent reviews of the banking and financial services sectors in Australia, all of which have, to different degrees, looked at the adequacy of sector specific consumer protections.

131. Findings of the 2018 Productivity Commission inquiry into Competition in the Australian Financial System of particular relevance to the current study include:

- evidence of 'customer inertia', and limited switching between suppliers, which was seen to reinforce the market power of the major banks and made it more difficult for entrants. In the Productivity Commission's view, this was a 'clear sign' that information provision was failing.

- that many consumers face difficulties in readily finding and/or understanding the product information presented to them. This was seen to reduce the scope for consumers to collectively apply competitive pressure on providers to improve product offerings.

- that huge product variety combined with price obfuscation provides latitude for exploitative price discrimination, with associated profit opportunities for the relevant financial institutions. Existing customers, in particular, were seen to get a poor offer, as institutions jostle to attract new customers with products that offer temporary benefits (such as discounted interest rates and fee-free periods) on sign-up.

- reforms were needed to try to 'bolster the consumer power in markets', and improve the governance of the financial system. This was a prime recommendation in terms of policy action.

132. Later in 2018, the Australian Senate Economic References Committee published its findings into the 'Regulatory framework for the protection of consumers in the banking, insurance and financial services sector'.[80] The Committee observed that the number of recent inquiries indicated significant problems in the current system, particularly in the context of consumer protections aimed at preventing or mitigating harm caused by misconduct and unethical actions of financial entities. An important concern, which was also raised in the Royal Commission discussed below, related to the enforcement of consumer protection laws; with a lack of resources in ASIC, and inadequate penalties, argued, in may submissions to the Committee, to be contributing to the problem.

133. Of particular relevance to the current study are the conclusions of the Financial Services Royal Commission which was completed in 2019. The Royal Commission was tasked with examining the adequacy of existing laws and policies, and the forms of industry self-regulation, including industry codes of conduct, relating to access to banking services.

134. On access to banking services, the Royal Commission recommended amendments to the ABA Code of Banking Practice, to require banks to:

- work with customers who live in remote areas; or who are not adept in using English, to identify a suitable way for those customers to access and undertake their banking;

- when dealing with customers who identify as an Aboriginal or Torres Strait Islander, follow AUSTRAC's guidance about the identification and verification of persons;

- not allow informal overdrafts on basic accounts without prior express agreement with the customer; and

- not charge dishonour fees on basic accounts.

135. The review also focused on the adequacy of the co-regulatory arrangements established in the sector, and in particular the use of industry codes. It recommended that:

- ASIC's power to approve codes of conduct be extended to codes relating to all APRA-regulated institutions and Australian Credit Licence (ACL) holders.

- industry codes of conduct approved by ASIC might include some 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law.

[80] Australian Senate Economics References Committee (2018).

- ASIC take into consideration whether particular provisions of an industry code of conduct have been designated as 'enforceable code provisions' in determining whether to approve a code.

- that remedies be introduced, modelled on those now set out in Part VI of the Competition and Consumer Act, for breach of an 'enforceable code provision'.

- that financial services industry codes might, in some circumstances, become mandatory.

- that provisions relating to the terms of contracts contained in the Code of Banking Practice be designated as 'enforceable code provisions'. It was anticipated that this would include the obligations such as to engage with customers in a fair, reasonable and ethical manner; the obligation to exercise the care and skill of a diligent and prudent banker when extending credit; and provisions about guarantees.

136. In support of these recommendations, including that code provisions be made enforceable under law, the final report of the Royal Commission made the following additional observations:

- The recommendations sought to change, or add to, the law, or industry codes of conduct, in ways that will increase protections to consumers from misconduct or conduct that falls below community standards and expectations.

- That creating a system of enforceable code provisions was not intended to interfere with ASIC's powers to approve industry codes, which can provide a signal to consumers that this is a code they can have confidence in.

- If industry did not put forward its proposed enforceable code provisions in a timely manner, consideration would have to be given to whether it is desirable to establish and impose a mandatory industry code.

- ASIC's role must go beyond being the passive recipient of industry proposals. Rather, ASIC should assess whether industry has identified, from the provisions contained in the code, those provisions that should be made enforceable code provisions. In undertaking this task, ASIC should have particular regard to the need to ensure that all terms governing the contract made or to be made with consumers have been identified. ASIC should also assess whether the proposed enforceable code provisions are expressed clearly and unambiguously, so that they are capable of being enforced through the courts.

- Where banks breach an enforceable code provision, consumers should be able to elect whether to seek a remedy through existing internal or external dispute resolution mechanisms, or through the courts. Moreover, the law should be

amended to provide that breach of an enforceable code provision will constitute a breach of the law. The law should also be amended to provide for the remedies for a breach modelled on those now set out in Part VI of the Competition and Consumer Act.

- Finally, the importance of the banking industry being able to continue to develop their industry codes over time was acknowledged.

137. Following the publication of the final report of the Royal Commission in February 2019, some of the relevant codes have changed. Most notably, the ABA's Code of Banking Practice was revised in July 2019 (and is the basis for the discussion in previous sections), but will also be replaced on 1 March 2020 with another revised code. The March 2020 versions reflect the recommendations of the Royal Commission relating to the access to banking products and services. This includes the introduction of the concept of 'basic accounts' that have minimum features (including no account keeping fees, no minimum deposits, free direct debit facilities and access to a debit card). The revised code also makes changes to provide for eligible low-income customers to access basic accounts and other low and no-fee accounts, each of which must not feature informal overdrafts, dishonour fees or overdrawn fees.

4.3 Overview of approaches in other sectors

138. Although has requested a focus primarily on the consumer protection frameworks in place in telecommunications and banking services, this section provides a brief overview of the frameworks adopted in other Australian essential service sectors.

(a) Postal Services

139. Australia Post is a government-owned business, and the consumer protection framework in post has traditionally been heavily intertwined with its commitments in relation to the universal/community service obligations. Australia Post's Community Service Obligations (CSOs) are set out in statute [81] and include obligations to: provide a letter service for both domestic and international letter traffic; make the service available at a single uniform rate within Australia for standard letters; ensure the service be reasonably accessible to all Australians wherever they reside; maintain performance standards for the service which reasonably meet the social, industrial and commercial needs of the community. Other general types of consumer protection regulation relate to the security of mail services and the protection of data. There can also be regulation around mail-scams which can be used as a way of exploiting vulnerable consumers.

140. Postal operators or courier companies other than Australia Post are not generally subject to additional consumer protection or service obligations over and above those provided under Australian Consumer Law. The Postal Industry Ombudsman can investigate

[81] Australian Postal Corporation Act 1989.

complaints against postal operators, but while Australia Post is a mandatory member of the scheme, membership by other postal operators is voluntary. There are currently five registered postal operators (including Australia Post) which are members of the Ombudsman scheme.

(b) Air Transport

141. The air transport industry comprises a mix of regulated activities and competitive activities. In many jurisdictions, air traffic operations and airports remain subject to some form of economic regulatory oversight or monitoring regime or are publicly owned. However, the provision of airline services has progressively been opened up to competition in Australia, and this has given rise to new consumer protection concerns and issues. This includes certain advertising and marketing practices, such as 'component' or 'drip' pricing, where a headline price is advertised at the start of a booking process to which additional fees and charges (some of which are unavoidable) are added as the booking process continues.[82]

142. The emergence of new budget airlines and cheap point-to-point travel has given rise to a range of other consumer protection issues around contract terms and conditions under different types of tickets. For example, terms around rights to change or alter tickets, receive refunds or compensation for delays, or face additional charges (for example, not printing out a boarding pass at home). Internationally, this has led to a range of sector specific protections being introduced, including most notably a Regulation relating to Air Passenger Rights in the European Union. [83]

143. In Australia, there are no specific mandatory additional consumer protections for airline passengers over and above the general provisions of the consumer law and any protections agreed internationally. However, five major Australian airlines have established their own customer charters,[84] which set out various commitments to consumers in relation to overbookings, delays and cancellations, aircraft changes, delated baggage and for consumers with specific needs. In addition, an Airline Customer Advocate, established by the government, and funded by the airline industry, facilitates resolution of customer complaints not resolved by the airline, although it cannot make binding decisions on airlines. It does monitor and report on complaints received to identify systemic issues facing consumers and make general industry recommendations about resolving these.

(c) Water

144. In Australia, the majority of consumers of water companies receive services through an

[82] See ACCC (2014).
[83] In Europe, passengers have acquired various rights in relation to delays, cancellation and overbooking, including financial compensation and there are additional rights for people with disability or reduced mobility. EU Member States can also apply their own consumer protection requirements under their consumer protection regime.
[84] See Airline Customer Advocate (2020).

integrated operated mains system of water distribution. Regulated water companies in some states, such as Victoria, are subject to sector specific protections contained in mandatory Customer Service Codes and Customer Contracts or Charters produced by the regulator. In Victoria, for example, separate Customer Service Codes apply for urban and rural water companies. These codes specify standards and conditions of service and supply that water businesses (and their agents) must comply with in providing certain regulated services to customers. Critically, the codes are established and managed by the Essential Services Commission and not the industry. Among other things, the Victoria Code for urban water business includes the following topics and protections:

- **Connection and service provision**: including an obligation to provide service to any customer's property that is connected to a mains system.

- **Reconnections**: requirements to promptly reconnect a customer's property

- **Complaints and disputes policy**.

- **Billing obligations and bill contents**: include requirements to provide bills at least quarterly; meter reading arrangements; specific information that must be contained in a bill; specific requirements about the presentation of customer water usage and the presentation of charges

- **Payment difficulties and hardship policy:** requirement to provide assistance to customers who have payment difficulties on a case-by-case basis; requirement for a hardship policy

- **Quality of service:** including delivery quality (flow rate) requirements; and guaranteed service levels

- **Reliability:** obligation to provide reliable services

- **Family violence:** Water businesses must have and implement a family violence policy.

145. The coverage of the mains water distribution system is not universal, and in Australia it has been estimated that some 16% of households outside capital cities are not connected to mains or town water. These consumers need to store and collect water from other sources, and alternative sources of water supply include self-supply options such as rainwater captured in cisterns or storage tanks; the recycling of wastewater to produce 'grey' water; and abstraction from bore holes or wells located on a customer's premises. Aside from the requirements in relation to quality and safety imposed by public health authorities, alternative water suppliers – such as water carters – are not typically subject to specific consumer protection requirements.

5. Energy consumer protection frameworks in other jurisdictions

Chapter overview:

- Many EU consumer protections are similar in nature to those contained in the NECF. However, EU policy distinguishes between different types of 'customers' of electricity, and, the protections can vary according to the customer type (including customer; final customer; household customer; active customer and vulnerable customer). A distinction is also made for supply to final customers via so-called 'Citizen Energy Communities'. Consumer protection provisions contained in EU Directives combine elements of principle and prescriptive rules. The Council of European Energy Regulators (which represents energy regulators in EU Member States) recently set out a number of principles which it suggests should be reflected in Member State arrangements, including that: consumer rights should be safeguarded, even if customers engage in sharing; consumers need to be adequately informed of the conditions of their supply, regardless of its source; consumers need to be able to choose their supplier freely; and consumers that participate in an energy community, or engage in energy sharing, should not lose access to vulnerable consumers protection measures.
- In US states where retail choice and competition exists, many of the sector specific consumer protections are determined at the state level. In many states, the Public Utility Commission only regulates the (private) investor owned utilities (IOUs), and many of the consumer protection obligations only apply to these suppliers. Some consumer protections are provided for under state law and apply directly to the consumer (e.g.: various affordability initiatives). Rationales for regulation based on encouraging consumers to be more engaged, or to address specific behavioural biases, do not appear to be as common in many US states. The degree of prescription in the frameworks on core consumer protection issues can differ significantly across states. Many US states are grappling with questions of how to deal with consumer protection issues associated with residential solar power, the ability of consumers to be 'active' customers and the classification of microgrids, and are adopting different approaches ranging from mandating rules to relying on voluntary industry codes.
- In Britain, sector specific consumer protections are contained in supplier licences, and there are several alternatives to becoming a fully licensed supplier which has implications for which suppliers are subject to the consumer protection obligations. Licensed electricity suppliers are subject to broad Standards of Conduct that contain enforceable overarching principles aimed at ensuring licensees (and their representatives in the case of domestic supply) treat each customer fairly. These requirements cover three areas relating to: behaviour, information and process, and apply to electricity suppliers as well as any parties that represent suppliers. On some issues, a co-regulatory approach has been adopted, and voluntary codes of practice are used in some areas, including the Renewable energy consumer code (RECC).

146. This section introduces the main findings from a comparative review of key aspects of the energy consumer protection frameworks in selected jurisdictions, including the USA, the Britain and at the European Union level. The purpose of this section is to highlight key aspects of international experience which may assist in considering how the Australian consumer protection frameworks might adapt to new energy products and services.

147. It should be noted that while all of the jurisdictions surveyed are experiencing similar changes to Australia, in terms of digitisation and the emergence of new energy products and services, the supply structures and the overarching policy and institutional context can differ significantly. For example, full retail competition (i.e.: including residential and small commercial customers), where consumer can choose among different suppliers, has been introduced in only a relatively limited number of US states.[85] In EU Member States, consumer protection policies are shaped by the protections enshrined in various EU Directives and regulations. Member States may complement these protections with additional measures, but can't normally derogate to a substantial degree from requirements.

148. The survey has been undertaken within the analytical framework set out in section 1, and, for each jurisdiction, looks at the following questions:

- Why are energy sector specific consumer protection regulations introduced in other jurisdictions? What services (if any) are considered to be essential? How is the sector responding to change?
- Who and what is subject to consumer protection regulations in these jurisdictions? Is it all providers of a service, only the largest operators? Is there an exemption framework? What is the 'triggers' for the introduction/application of sector specific regulations – is it status as a retailer, the sale of electricity etc.?
- How are the consumer protection regulations applied? Are they prescribed in statute or voluntary in nature? Is a co-regulation approach adopted? What level of prescription vis-à-vis flexibility is contained in the regulations? What is the experience of enforcement of the consumer protections in the sector?

5.1 European Union

149. As noted above, in European Union (EU) Member States, key elements of the consumer protection framework in energy are framed and conditioned by the various directives and obligations established at the EU level. Broadly, the regulatory architecture in relation to energy markets in the EU is as follows. The European Commission formulates a general regulatory framework for EU member states (such as the Electricity Directives), and each Member State transposes the high-level principles of the Directives into national law. A National Regulatory Authority (NRA) in each Member State is then responsible for applying and implementing the domestic legislation. NRA's across the various Member

[85] See Electric Choice (2018).

States may, to some degree, adopt different regulatory approaches and methods even when they are regulating the same utility industries.

150. In EU Member States, four electricity Directives have influenced the regulation of the industry.[86] In combination, these Directives require Member States to take appropriate measures to protect consumers in electricity markets, and in particular, to ensure that there are adequate measures in place to protect 'vulnerable consumers',[87] and final consumers in remote areas. The most recent package of changes introduced in 2019 explicitly seeks to place consumers at the centre of 'the clean energy transition' and puts in place a stronger framework for consumer protection.

(a) Why are there energy sector specific consumer protection regulations?

151. The rationale for the introduction of sector specific consumer protections in the energy sector is set out clearly in the various EU directives, and captures all three broad rationales identified in section 3.1 above – i.e.: that electricity comprises and essential service; that the certain characteristics of consumers of the service generate a need protections; and that the industry structure, including the nature and intensity of competition between suppliers, require sector-specific consumer regulation.

152. The importance of energy to the economic and social welfare of all consumers has been noted explicitly in the Directives for the electricity market. In 2019, a new Electricity Directive was issued as part of what is known as the 'Clean Energy Package' (CEP Directive). The CEP Directive describes the essential nature of such services in this way: *"Energy services are fundamental to safeguarding the well-being of the Union citizens. Adequate warmth, cooling and lighting, and energy to power appliances are essential services to guarantee a decent standard of living and citizens' health. Furthermore, access to those energy services enables Union citizens to fulfil their potential and enhances social inclusion."*[88]

153. Sector-specific consumer protection regulations have also long been premised on the characteristics of certain consumers of such services, and in particular on the need to protect 'vulnerable' consumers, or those in energy poverty. To this end, the CEP Directive states that: "*Member States should ensure the necessary supply for vulnerable and energy poor customers… This Directive should enhance national policies in favour of vulnerable and energy poor customers*." The concept of who is a vulnerable customer is left open at the EU level, but the CEP Directive notes that the concept may capture: income levels, the share of energy expenditure of disposable income, the energy efficiency of homes, as well as any critical dependence on electrical equipment for health reasons, age or other criteria.

154. In addition to protections revolving around vulnerable or energy poor consumers, some

[86] In 1996, 2003, 2009 and 2019.
[87] Although Member States have discretion to apply this concept according to their own situation.
[88] European Union (2019: para 59).

of the protections are premised on concerns that all consumers can face 'obstacles' in fully benefiting from retail competition. A 2015 European Commission Communication, which preceded the CEP Directive, found that: "*... lack of appropriate information on costs and consumption, or limited transparency in offers, makes it difficult for consumers (or reliable intermediaries and energy service companies, such as aggregators, acting on their behalf) to assess the market situation and opportunities."*[89] In response, the CEP Directive gives consumers a right to switch suppliers and sets out rules on switching-related fees. It also prescribes that bills and billing information include information that is: *"accurate, easy to understand, clear, concise, user- friendly and presented in a manner that facilitates comparison by final customers".*[90] The importance of independent comparison tools, including websites, is also emphasised, to reduce search costs and allow smaller customers to assess different offers on the market. In this respect, the CEP Directive mandates that "*…. smaller customers have access to at least one comparison tool and that the information given on such tools be trustworthy, impartial and transparent*"[91] and that, in the absence of this tool emerging organically in the market, Member States "*provide for a comparison tool that is operated by a national authority or a private company*."[92]

155. Finally, recent changes to EU consumer protection frameworks in electricity appear to reflect, in part, concerns about a low intensity of competitive rivalry among suppliers in some Member States. The European Commission's 2015 Communication makes this point explicit, noting that there was *"[I]nsufficient competition in many retail markets, a lack of reward for active participation, and difficulties in switching act as disincentives."*[93] As described below, the CEP Directive includes a series of measures to empower consumers and make them more 'active participants' in energy markets.

(b) What additional energy specific consumer protections exist?

156. All citizens of EU Member States are protected by *general* consumer rights guaranteed in EU legislation. This includes protections under the:

- **Consumer Rights Directive:** this harmonises national consumer rules on matters like the information consumers need to be given before they purchase something, and their right to cancel online purchases, wherever they shop in the EU.
- **Unfair Commercial Practices Directive:** this requires companies to provide consumers with sufficient accurate information to enable them to make an informed buying decision. It also protects against two main categories of unfair commercial practices: misleading practices, either through action (giving false information) or omission (leaving out important information); and aggressive practices . This includes bait advertising; giving false use of limited offers etc.
- **Directive on certain aspects of the sale of consumer goods and associated guarantees:** this covers guarantees and returns, and requires traders to repair,

[89] European Commission (2015:2).
[90] European Union (2019: Art. 18).
[91] European Union (2019: para 35).
[92] European Union (2019: para 35).
[93] European Commission (2015:2).

replace, reduce the price or give you a refund if goods you bought turn out to be faulty or do not look or work as advertised.

157. The current set of 'European energy consumer rights', which must be reflected in EU Member States rules and regulations, are detailed in table 19 below.

158. Many of the EU consumer protections set out in table 19 above are similar in nature to those contained in the NECF in Australia. However, there are two notable additions to the CEP Directive:

- First, EU Member states are now required to enable customers to be 'active customers'. Broadly, an active customer is a final customer (or group of final customers acting together) that consumes or stores electricity they have generated or that sells self-generated energy (other than as their primary commercial activity). The CEP Directive requires that final customers must be able to act as active customers without being subject to disproportionate or discriminatory technical requirements, administrative requirements, procedures and charges, or to network charges that are not cost-reflective. Moreover, active customers who store energy are also entitle to a grid connection within prescribed periods.

- Second, the CEP Directive requires that at least one supplier-offer comparison tools must be available in the Member State. If private entities do not produce these, it appears public authorities will have to provide them.

Table 19: EU energy consumer rights

Broad category of protection	Specific rights/protections which must be guaranteed in national legislation
Connection	• Consumers have a right to be connected to the local electricity network and be supplied with electricity. The right is to connection to a 'designated supplier' that is responsible for the local network in a particular area
Disconnection	• Suppliers shall provide household customers with adequate information on alternative measures to disconnection sufficiently in advance of any planned disconnection. Such alternative measures may refer to sources of support to avoid disconnection, prepayment systems, energy audits, energy consultancy services, alternative payment plans, debt management advice or disconnection moratoria. • There is a prohibition of disconnection of electricity to vulnerable customers, including those in energy poverty, in critical times.
Retail Choice and ability to switch	• Consumers have a right to choose a supplier and enter into a contract with any EU electricity and/or gas supplier offering services to it • Consumers have a right to change electricity and/or gas supplier in an easy and quick way, without extra charges. The switch must happen within 3 weeks, and the consumer must receive a final account no later than 6 weeks after a switch.
Pre-contractual information	• Consumers are entitled to receive clear information on an energy contract before signing; a right to withdraw from a new contract within 14 days if the contract was concluded outside the supplier's business premises or by distance means of communication (such as Internet or telephone). • Supplier must provide consumers with contract term information (described below) before the contract is signed. The contract must be clear and understandable and avoid non-contractual barriers (e.g. excessive documentation).
Contract terms	• Consumer contracts are required to include details about: the name and address of the supplier; the type of supply or service, its quality and starting date; the type of maintenance service offered; how to obtain information on tariffs and maintenance charges; how long the contract is for, conditions for renewal, withdrawal, or termination; what compensation or refund you have a right to if the supplier does not meet their obligations; what to do in case of a complaint and how disputes are settled. • If a contract permits the supplier of electricity and/or gas to vary the energy prices, the contract should state in a sufficiently clear manner for what reasons and according to what method the prices may be changed. The supplier has to inform the consumer of any intention to introduce changes to the contract or prices. Price increases must be communicated

	in a transparent and comprehensible manner. Consumers may end the contract if they do not accept the new conditions or the price increases decided by the supplier.
Disclosure and information requirements	• Consumers have a right to accurate information on their consumption of electricity and/or gas in order to regulate their energy consumption, and be billed based on actual consumption. • Information on actual use of energy must be sent frequently enough to enable consumers to regulate how much energy they use. • All energy bills, contracts, transactions and receipts should — unless the national authorities determine it inappropriate — set out clearly: the current actual prices and how much energy used; a comparison with how much was used by the consumer in the same period during the previous year; details of who the consumer may contact to find out how to save energy, for example consumer organisations, energy agencies or similar bodies, including website addresses and, wherever possible and useful, comparisons with similar types of customers • An electricity supplier must provide the consumer with information on the mix of its energy sources (renewables, nuclear, etc.) and its environmental impact. This information must be presented in an easy and comparable manner.
Protection of vulnerable consumers and those in energy poverty	• Customers classified as 'vulnerable' must be protected by adequate safeguards including a prohibition of disconnection in critical times. • The concept of who is a vulnerable consumer is determined by national legislation and Member States have some flexibility to define vulnerable customers according to their own particular situation but they must ensure that rights of vulnerable customers are enforced and that identified energy poverty is addressed by appropriate measures. • Member States must ensure that rights and obligations linked to vulnerable customers are applied. In particular, they must take measures to protect customers in remote areas. • Member States must ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms.
Complaints and dispute resolution	• Electricity and/or gas suppliers have to provide consumers with information on how to file a complaint • In the event that a complaint is not managed to the consumer's satisfaction, there is a right to send the complaint to an independent body for out-of-court dispute settlement, such as an energy ombudsman

(c) Which suppliers and products are subject to consumer protection regulations?

159. The CEP Directive sets out the requirements that EU Member States must reflect in their own national legislation relating to consumer empowerment and protection. Importantly, EU Directives place obligations on *Member States* and do not apply directly to electricity suppliers. As these obligations must be transposed into national laws, variations in the implementation approach of Member States, and in the precise detail of legislative provisions, can invariably arise.

160. An important element of the CEP Directive is to distinguish between different types of 'customers' of electricity, and, as discussed below, the protections can vary according to the customer type. The different types of customer are shown in table 20 below.[94]

Table 20: Different types of customer classifications under the EU Clean Energy Package Directive

Type of customer	Meaning
Customer	Means a wholesale or final customer of electricity
Final customer	A customer who purchases electricity for own use
Household customer	A customer who purchases electricity for the customer's own household consumption, excluding commercial or professional activities.
Active customer	A final customer, or a group of jointly acting final customers, who consumes or stores electricity generated within its premises located within confined boundaries or, where permitted by a Member State, within other premises, or who sells self-generated electricity or participates in flexibility or energy efficiency schemes, provided that those activities do not constitute its primary commercial or professional activity.
Vulnerable customer	No precise definition is given in the Directive. Rather each Member State can define the concept of vulnerable customers that may include criteria such as income levels, the share of energy expenditure relative to disposable income, the energy efficiency of homes, critical dependence on electrical equipment for health reasons, age or other criteria.

161. In terms of which types of entities are subject to specific obligations to the different categories of customer, the following observations can be made:

- Many consumer obligations in the Directive refer to 'suppliers'. 'Supplier' is not defined in the Directive, but 'supply' is defined as the sale or resale of electricity. Accordingly, those who supply electricity are expected to meet various

[94] There are also customer definitions relating to small businesses, such as 'microenterprise' and 'small enterprise'.

requirements in relation to *all* customers who purchase electricity for their own use (final customers) as well as some additional requirements for household customers (purchasers of electricity for their own household consumption) and further requirements for vulnerable customers.

- While the term supplier is not defined in the Directive, the term 'electricity undertaking' is frequently used.[95] An 'electricity undertaking' is defined as a natural or legal person who carries out at least one of the following functions: generation, transmission, distribution, aggregation, demand response, energy storage, supply or purchase of electricity, and who is responsible for the commercial, technical or maintenance tasks related to those functions. Electricity undertakings are not defined to include final customers.

- The Directive contemplates electricity supply to final customers via so-called 'Citizen Energy Communities'.[96] Under the CEP Directive, such entities are required to ensure that those customers being supplied through such communities must retain their rights as household customers and rights to be 'active consumers'.

- Finally, it should be noted that under the Directive Member States must ensure the implementation of a system of third-party access to gas and electricity transmission and distribution systems. This is of particular relevance for private networks which, following an important judgement of the European Court of Justice, cannot be exempt from third party access requirements, irrespective of size.[97] Accordingly, consumers within private systems maintain the right to choose an energy supplier, and private networks must permit electricity and/or gas to be conveyed across the private system to enable consumer to be supplied by third parties.

162. In terms of which products and services the protections apply to, the CEP Directive does not make any clear link between different types of electricity products and the consumer protections attached to these products. Rather, as noted above, the protections tend to be tailored to the different types of consumer (e.g.: final customer, household customer, active customer). In terms of the trigger for such protections to apply as noted above, the CEP Directive defines 'supply' as the sale of resale of electricity. So, as in Australia, the trigger for the consumer protections to apply appears to be the 'sale' of electricity, although the trigger is broadened to include 'resale' potentially bringing in other types of supply products (e.g.: white label products)

[95] The term 'undertaking is used in EU competition law and regulation to covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.
[96] An entity controlled by members (individuals, small enterprises or local authorities) that generates, distributes, supply consumes, or stores electricity, or provides charging services for electric vehicles or other energy services to its members where such activity is primarily to benefit its members or its local area rather than for financial profit.
[97] Citiworks AG v Sachsisches Staatsministerium fur Wirtschaft und Arbeit als Landesregulierundsbehorde (Case C-439/06)

163. The Directive does recognise the various ways in which consumers can access and be supplied with electricity such as self-generation, storage or through aggregators, intermediaries or community energy communities. However, while recognising that certain fundamental protections should apply, the Directive does not prescribe any specific consumer protection frameworks for such arrangements; this decision is left to Member States.

164. In June 2019, the Council of European Energy Regulators (CEER, which represents the National Energy Regulatory Agencies in EU Member States) published a report to support informed discussions in Member States about, *inter alia*, how the consumer protections enshrined in the Directive might be applied across EU Member States.[98] The CEER Report is framed against the background of two points:

- First that the concept of energy sharing – either directly or with a regulatory community – 'defies' the classical supplier-customer relationship, and that there is a need to analyse the impact of electricity sharing schemes on consumer rights and consumer protection. Specifically, the report notes that business models based on energy sharing blur the concept of electricity supplier, meaning that *"consumer rights regarding access to information, contractual certainty and quality of service with respect to their electricity supply may be more difficult to apply and enforce"*.[99]

- Second, that the EU regulatory framework, including the 2019 Directive, do not define a full framework for consumer rights and leaves considerable discretion to Member States in how the protections are reflected in national laws.

165. The CEER report is particularly pertinent to issues being considered in this report as it looks at what consumer protections should apply to a number of access and supply arrangements that also feature in Australia, including:

- Individual self-consumption and collective self-consumption
- Various 'sharing' arrangements
- Private networks
- White label providers
- Intermediaries, including autoswitchers

166. CEER observes that individual self-consumption is relatively prevalent in EU Member States and that the CEP Directive formally recognises self-consumers (as active consumers), and allows Member States to extend the domain of these activities beyond the self-consumers' own premises (provided it is not those individuals' principal commercial

[98] Council of European Energy Regulators (2019a). An accompanying paper describes various case studies which pre-date the 2019 CEP directive, but highlight issues that arise throughout the consumer's energy "life cycle", beginning with pre-contractual information to contracting and billing to switching suppliers. See Council of European Energy Regulators (2019b).
[99] Council of European Energy Regulators (2019a:36).

activity).

167. Beyond individual self-consumption, various types of energy sharing arrangement are contemplated in the CEER report. This includes collective self-consumption (which involves the direct sharing of electricity between producers or self-consumers and other final customers), and citizen energy communities (which includes community owned generation assets; virtual sharing over the grid; or sharing of local production through community grids). The CEER Report observes that a citizen energy community can be a de-facto supplier, and that in some energy sharing arrangements some members (which may include consumers) can be required to make varying levels of commitment (either in terms of contributions to investments to capital equipment – e.g. a battery – or committing to continue to receive supply for a period). Moreover, CEER observes that some types of citizen energy community can reduce a consumer's exposure to the retail market, and therefore potentially reduce their incentive to choose an adequate supply product. Where participation in the community is linked to some form of investment or commitment this may have the practical effect of reducing the free choice of a consumer, notwithstanding the fact that they may have such a right under consumer protection laws.

168. In relation to consumer protection, the CEER report set outs the following principles:

- consumer rights need to be safeguarded, even if customers engage in sharing.
- consumers cannot be forced into a sharing scheme or community, and cannot be prevented from joining one as long as they fulfil the technical criteria.[100]
- consumers need to be adequately informed of the conditions of their supply, regardless of its source.[101]
- consumers need to be able to choose their supplier freely, and to change their supplier without undue barriers.[102]

[100] In support it provides the example of: "*a tenant renting a property within a building with a PV plant which is shared among different flat owners have the right to choose if they want to participate in the self-generation and self-consumption model or if they to choose a form of supply completely independent of the energy community of the building. Conversely, they should also not be prevented from joining an existing energy community or sharing arrangement.*" See Council of European Energy Regulators (2019a:21).

[101] On this point, CEER (2019a:21) states: "*During the lifetime of an energy community, the consumer should keep his right to be well-informed of pre-contractual information. The consumer should also be informed of the price of his supply contract, including the price of the shared energy, if the arrangements are such that an energy price can be determined. In this perspective, one regulatory issue could be the provisions of the contracts concluded between the energy community and the consumers, particularly regarding each participant's share of energy consumption*."

[102] On this point, CEER (2019:22) continues: "*The framework for energy communities should also guarantee the right to change supplier. This right is stated in the CEP, however, in some cases consumers may not be able to effectively change supplier. For instance, if the supplier is closely linked to the local community or the supply offer includes some of the community's services, such as shared ownership of production or storage assets, the provision of services linked to energy sharing or to consumption management. Such ties may require a long-term commitment from the customer, especially if consumption management projects require investment (storage, connected objects, insulation work, etc.). Although consumers will remain legally entitled to change supplier, they may find it more difficult to do so in such cases. Contracts with energy communities should therefore guarantee that taking part in an energy community does not hinder the effective right to change supplier."*

- consumers that participate in an energy community or engage in energy sharing should not lose access to vulnerable consumers protection measures as introduced in the individual Member State.[103]
- consumers should have access to alternative dispute resolution mechanisms.[104]

169. While setting out these points, CEER observes that the provisions in the 2019 CEP Directive on sharing and citizen energy communities remain *"relatively open to interpretation, and transposition into national law will be critical to the viability and valuable role of such communities."*[105] It also cautions against energy communities becoming a vehicle to circumvent existing consumer rights. With these points in mind, CEER emphasises the importance of participants of energy communities being able to maintain the same consumer rights as other consumers. In CEER's view this is consistent with the general provisions of the CEP Directive, which in their view, *"guarantee that consumers' rights shall not be impacted through their participation in energy sharing, be it directly, or through an energy community."*[106]

170. In addition to the above points, the CEER report touches on consumer protection issues for three specific types of contractual and other supply arrangements discussed in section 2. These are set out in table 21 below.

171. While the CEP Directive and the CEER report do not directly discuss other market changes described in section 2, such as automated decision-making tools (e.g. auto-switchers) or bundled offers, a report by the European Consumer Organisation (BEUC, which is co-funded by the European Union) in October 2019 does.[107] In relation to automated decision-making tools it recommends that consumers using automated decision-making tools have the same rights as those contracting directly with a supplier. In particular, they should keep their rights to a cooling-off period and a 24-hour switching period. Consumers should also be able to give clear authorisation based on robust information to what the tools can and cannot do on their behalf.

172. On bundled offers, the BEUC report advocates that Member State NRAs should introduce measures to guard against a lack of transparency in the offers; unfair marketing practices; or lower competition due to lock-in effects. It also proposes that consumers be able to: compare bundled offers via comparison tools; switch from each individual service separately; and terminate the contract with the provider of the bundled offer at any time.

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[103] CEER (2019: 22) notes: "*Especially where such protection measures are in place through obligations on suppliers and/or DSOs, safeguarding consumer protection will need to be given particular attention within the national transposition of the Directives where communities take on tasks of suppliers or DSOs."*
[104] However, on this point, CEER (2019: 3) observes that: "*It is currently unclear to what extent members or shareholders of energy communities and self-consumers engaging in sharing will benefit from out-of-court dispute resolution mechanisms when the energy community is acting as a supplier."*
[105] CEER (2019:35).
[106] CEER (2019:21).
[107] Bureau Européen des Unions de Consommateurs (BEUC) (2019).

Table 21: Council of European Energy Regulators recommended consumer protections for specific types of contractual and supply arrangement

Supply arrangement	Meaning
Supply involves a non-fully licensed suppliers (e.g.: White label providers)	• CEER characterises this to be a particular type of community sharing arrangement, where entities that are not fully licenced suppliers take over certain supplier tasks. It notes that the licensed supplier involved is responsible for safeguarding consumer rights, and in some cases (e.g. the Netherlands) the underlying supplier must have a direct contractual relationship with the consumer and remains responsible for billing.
Supply involves participation in flexibility or consumption management services	• Where an energy community offers flexibility or consumption management services, the basic consumer rights should remain protected. This includes allowing consumers participating in an energy community to choose a flexibility or consumption management service provider outside the energy community. • CEER notes that energy communities offering flexibility and consumption management services could create particular difficulties for vulnerable consumers (e.g.: where they require a long-term investment, or where some vulnerable consumers who do not have flexibility potential, are forced, by entering an energy community proposing flexibility or consumption management services, to reduce their basic consumption).
Supply involves owning or operating a grid network (which may be designated as a Distribution System Operator (DSO), or a private grid)	• The ability for energy communities to own grid infrastructure is optional in EU Member States. CEER notes that where it is allowed it should ensure that the quality standards remain at the same level as those of a comparable DSO over the lifetime of the community. In particular, consumers should be able to expect the same level of service from a CEC grid operator as from other DSOs. In circumstances where community grids do not deliver the expected services, consumers should have equivalent right to compensation and dispute resolution as with other DSOs. • CEER proposes that the terms and conditions applicable to customers of community grids should be subject to the same level of regulatory oversight as they are for other DSOs. For private grids (not formally recognised as DSOs) CEER recommends that the principles of non-discrimination with regard to metering responsibility and contribution to grid costs need to be safeguarded, and consumers and members/shareholders of the community need to have access to complaint mechanisms to assert their rights.

(d) How are energy sector specific protections applied?

173. As noted, although there are a number of energy sector specific consumer protection requirements contained in EU Directives, the European Commission does not have any

direct ability to implement and enforce such provisions (i.e.: it can only take action against EU Member States). Accordingly, each Member State must transpose the high-level requirements of the Directives into national law, and a National Regulatory Authority (NRA) is then responsible for applying and implementing the consumer protection framework as contained in domestic legislation. It follows that EU Member States are, within limits, able to adopt different regulatory strategies and approaches to developing and applying consumer protection frameworks. With this point in mind, it is possible to make two general observations about how the consumer protections and rights contained in EU legislation are applied.

174. First, the specific consumer protection provisions contained in the EU Directives appear to combine elements of principle and prescriptive rules. On some topics, the Directives establish principles which can then be given substance by Member States according to their own criteria and objectives. This is most evident in relation to vulnerable consumers where the Directive sets out the general principle that customers classified as 'vulnerable' must be protected by adequate safeguards, but where Member States have flexibility to define vulnerable customers. Similarly, as noted, while the CEP Directive set out the principle that customers being supplied through such citizen energy communities must retain their rights, the specific protections afforded consumers who are part of citizen energy communities remain open to elaboration at Member State level.

175. On other topics, the EU Directives are quite detailed and prescriptive. This is most clear in relation to billing requirements, where Annex 1 of the CEP Directive sets out a list of minimum information to be contained on the bill and in the billing information that is provided to consumers. Similarly, on switching suppliers, the Directive sets out specific timeframes in which a switch must happen (3 weeks) and when a consumer must receive a final account (no later than 6 weeks). The Directive also specifies certain minimum contract information that must be provided to consumers, and provides consumers with an ability to withdraw from a new contract within 14 days (i.e.: a cooling off period).

176. The question of whether a co-regulatory approach is adopted when implementing the consumer protections contained in the EU Directives can only be properly addressed by examining what happens at the Member State level. That said, two points can be noted:

- First, while there is no specific requirement in the EU Directives to work with industry bodies or to apply a co-regulatory approach, such an approach does not appear to be precluded by the Directives.

- Second, and related to the previous point, if a co-regulatory approach were to be adopted this would not relieve a Member State and its NRA from its responsibilities under the Directives.

5.2 United States of America

177. As noted in the introduction to this chapter, the extent of retail competition in the US, and level of restructuring of retail electricity markets more generally, varies significantly by state, and retail choice and competition has been introduced in only a relatively small number of jurisdictions (with consumers in other states being served by integrated monopoly providers).[108] In the 15 jurisdictions where retail competition has been introduced, a default service provider, offering a standard offer service, is maintained to service those customers who do not shift supplier. This default supplier is typically the distribution utility in an area.

178. The regulatory oversight of the energy sector in the United States is complex and comprises a mix of federal, state and, to some degree, municipal bodies.[109] Broadly speaking, many of the consumer protection framework issues we are concerned with in this report are determined at the state level, sometimes by state Public Utility Commissions (PUCs), although certain protection can be prescribed directly in state legislation. This division of powers and responsibilities at the federal/state level, and across states, makes it difficult to provide an overarching picture of how consumer protection frameworks in the energy sector operate in the USA. Accordingly, this section focuses on any policies or protections at the federal level, as well as the protections offered in certain states, particularly in California and Texas which are two states where there is a relatively high degree of retail competition and high penetration of new products and services.

(a) Why are there energy sector specific consumer protection regulations?

179. As described below, while many generic consumer protections are contained in US Federal law, the Federal Energy Regulatory Commission (FERC) does not have jurisdiction with respect to the regulation of retail electricity and natural gas sales to consumers. Accordingly, it is state laws, and state PUCs, which deal with consumer protection in the energy sector within a state. Broadly speaking, while the protections afforded consumers differ between states and with other jurisdictions (including Australia), where they are introduced, the underlying rationales appear to show some similarity (although also some differences) to those described in section 3.1 above.

180. A consistent rationale for consumer protection initiatives across a number of states is the characterisation of energy as service that is important for health, economic and social

[108] These jurisdictions include: California; Connecticut; Delaware; Illinois; Maine; Maryland; Massachusetts; Michigan; New Hampshire; New Jersey; New York; Ohio; Pennsylvania; Rhode Island; Texas; Washington D.C. See Retail Energy Supply Association (2020).

[109] In general terms, the responsibility for the regulation of *inter*state activities typically tends to rest with the Federal Energy Regulatory Commission (FERC) (such as the interstate transmission of electricity and the wholesale electricity market) while responsibility for the regulation of *intra*state activities rests with the state Public Utility Commissions (PUCs), such as the regulation of the retail markets and intrastate electricity. In addition, some utilities that are municipally owned, or rural cooperatives, are regulated by the municipal authorities, and operate under a different regulatory framework to other utilities.

reasons. In California, for example, rules relating to the affordability of energy services were premised on the fact that "*Californians rely on utility services, including electricity, gas, ... for health, safety, and full participation in society*."[110] In a recent rulemaking on energy disconnections, the California PUC make this point clear, noting that: "*the ramifications of disconnection for customers can be far-reaching and compounding, including disruption of normal daily activities (e.g. potentially, the ability to maintain employment,) as well as broad public health and social impacts associated with lack of electric and gas service. Quite simply, energy access is critical to economic and social stability and well-being*."[111] Similarly, in Pennsylvania, recent changes to affordability programs for low-income households referred to energy services as being *"essential for health, safety, a liveable home, child development and maintaining vibrant communities throughout Pennsylvania"*.[112]

181. Another important rationale for certain sector specific consumer protection measures across various US states relates to consumer characteristics, particularly where consumers are on low incomes, have disabilities or are elderly. For example, initiatives recently introduced in Pennsylvania were aimed at achieving energy affordability for the *'most vulnerable households'*.[113] Similarly California has introduced a range of measures to assist various types of consumers experiencing financial difficulties.[114]

182. While the two rationales for specific consumer protections described above broadly correspond to what is observed in other jurisdictions such as Australia, the UK and the EU, the other types of rationale for the introduction of sector specific protections do not appear to feature as prominently in the USA as they do elsewhere. As discussed in section 3, sectoral consumer protections can sometimes be premised on wider concerns that all consumers may face various 'obstacles' to fully benefiting from retail competition in the sector. These protections are often aimed at making consumers more engaged in markets; to search out, and switch to, the most appropriate supplier for them, and to fully understand the various products and offers available on the market.

183. Specific policies to encourage consumers to be more engaged, and address specific behavioural biases, such as prescriptive requirements about what should be on customer bills, or minimum contractual terms and conditions, do not appear to be as common in many US states as they are in the EU or Australia. A notable exception is Texas where, as discussed below, the PUC has established detailed rules on various aspects of consumer protection (including components that must be included in customer bills and that bills must be easy-to-read). The Texas PUC also maintains a website (powertochoose.org)

[110] See California Public Utilities Commission (CPUC) (2020a)
[111] California Public Utilities Commission (CPUC) (2018a:3).
[112] Pennsylvania Public Utility Commission (PUC) (2019).
[113] Pennsylvania Public Utility Commission (PUC) (2019).
[114] Under the California Alternate Rates for Energy (CARE) programme and the Family Electric Rate Assistance Programme. However, notwithstanding these policies, disconnection rates have been increasing over recent years in California, and this has prompted the regulator to explore ways to reduce electric and gas utility disconnections, and to improve reconnection processes. See California Public Utilities Commission (CPUC) (2018a).

which allows consumers to compare offers and choose an electric provider tailored to their needs. In this respect it is notable that Texas is often cited as being the state with the most successful retail competition, and where there is the most active consumers. Some estimates suggest that up to 92% of all customers in Texas have exercised their right to choose an electricity supplier.[115]

184. Another general rationale for consumer protections in the energy sector discussed in section 3 related to industry structure, and particularly the need for protections in contexts where competition does not adequately protect consumers and ensure that they make effective choices, or where there is the possibility that suppliers might try to exploit consumer decision-making biases. At a general level, this rationale does not appear to feature as prominently in US states, which, as noted above, principally target protections on specific types of consumers. However, in Texas (which is often seen as the most competitive retail market) the PUC has observed that its role in the energy sector has shifted over time from regulation of rates and services to oversight of competitive markets and compliance enforcement of statutes and rules to ensure that customers receive the benefits of competition.[116] That said, specific protections have been introduced for specific new products and services in some states to protect consumers from being exploited at the industry-wide level (e.g.: in relation to solar panel contracts).

(b) What consumer protections apply in the energy sector?

185. As in Australia, separate to energy sector-specific protections, all consumers in the USA enjoy general consumer protections relating to fraud, unsafe products, deceptive advertising and misleading advertising. These protections are enshrined in a mixture of laws that operate at the Federal, State and municipal levels.[117] At the Federal level, important consumer protections are contained in the Federal Trade Commission Act which, among other things, prohibits *"unfair or deceptive acts or practices in or affecting commerce."* The Federal Trade Commission (FTC) is the principal consumer protection agency at the Federal level, although other agencies also enforce consumer protection laws in different areas including the Consumer Financial Protection Bureau (CFPB), and the Consumer Product Safety Commission which develops product standards. In addition to the general consumer protections provided under Federal Law, most US States have enacted laws which prohibit unfair and deceptive acts and practices. These state laws are sometimes referred to as 'little FTC Acts' because they are modelled, albeit to different degrees, on the Federal Trade Commission Act.[118] Some state legislation provides generic consumer protection in the form of 'cooling off' periods for certain contracts, or requirements that contracts be written in a way which makes them accessible and understood by consumers.

186. There are no sector specific consumer protections for energy consumer provided at the federal level in the US. However, federal agencies such as the FTC and CFPB have become

[115] See Hartley et al. (2019:1).
[116] Texas Public Utility Commission (2020a).
[117] A good overview is presented in Waller et. al (2011).
[118] See Butler and Wright (2011).

involved in specific issues that can arise in the energy sector, [119] and both the FTC and CFPB have received complaints about competition and consumer protection issues in the solar energy sector.

187. While all states have specific regulators for the energy sector, a variety of different mechanisms and approaches are adopted to addressing consumer concerns and the protections afforded are not uniform between states.[120] With this point in mind, table 22 provides a very broad overview of the types of protections that do, and do not, exist in some US states.

[119] Federal Trade Commission (2016).

[120] Waller et. al (2011): note: "*All states have different systems for addressing the special needs of regulated industries such as energy, transportation, health, and financial institutions. The fifty states have a variety of mechanisms for addressing consumer concerns in these industries, although there is little uniformity between the states or within the same state among the different regulatory structures for each industry*."

Table 22: Overview of energy specific consumer protections in different US states

Broad category of protection	Specific protection
Connection and de-energization	• Consumers do not have an automatic right to energy services, but suppliers may be required under municipal or local codes to connect households to interconnected power systems and have an active service if the premises is occupied. • Investor owned utilities in many states often have an obligation to serve customers in their service territory, and can act as default providers of last resort. • Where a consumer has a poor credit history the consumer may be required to provide a deposit to connect. The amount of this deposit can be capped by state regulators. • In some states, such as California, rules have been introduced which strengthen customer notification requirements before de-energization events and require utilities to engage local communities in developing de-energization programs
Disconnection and shut-off	• A utility may disconnect an electric or gas customer for failure to make timely payment for service • Consumers can be disconnected or 'shut off' from the energy supply for non-payment of a bill, deferred payment arrangements or deposit. • However, there is often a process which must be followed before disconnection can occur. • Many states restrict the ability of consumers to be disconnected during periods of extreme weather or because of critical medical emergencies.
Retail Choice and switching	• In states where retail choice exists, consumers have a right to choose a supplier. • In some states, such as Texas, consumers can seek redress against unauthorised switching (so-called Slamming)
Pre-contractual information	• Consumers are generally protected from contracts which include undisclosed or hidden fees. • In some states, consumers must be informed of any early termination fees.
Contract terms	• In some states, retailers are under obligations to inform consumers that their contract is about to expire within a certain time period. • In some states, such as Texas, suppliers are required to provide consumers with an 'easy-to-read' bill which includes specific information.
Disclosure and information requirements	• In some states, consumers have rights against unauthorised charges on their electricity bills (so-called cramming). There are also sometimes limitations on the ability to back-bill consumers.
Protection of vulnerable consumers and those in energy poverty	• Certain groups of consumers who cannot afford to pay a deposit or an electricity bill can apply for assistance. • In some states, this can involve a discount on the services (e.g.: 20 - 35% discount for energy under California's CARE program). In other states, consumers who are unable to pay their bills may be required to enter into a deferred payment plan. • In some states, consumers with critical medical emergency can be provided with a deferred payment plan, and be exempt from disconnection for a specific period.
Complaints and dispute resolution	• In some states, suppliers are required to follow specific dispute procedures when dealing with customer complaints.

188. A number of observations can be made about table 22, and more generally, the consumer protection framework that applies in the energy sector in some US states.

- First, consumers generally do not have an automatic 'right' to energy services enshrined in US federal and state law except in specific circumstances (for example, for certain groups such as those on low incomes or the elderly, which can be given assistance to connect).[121] This means that even if consumers are required to maintain a connection to the grid, they can be 'shut down' or disconnected from receiving energy services if they are delinquent in payment.
- Second, many states offer assistance to consumers who are unable to afford to pay their bills.[122] In California, for example, these include: the California Alternate Rates for Energy program (which provides a 20%-35% discount on the energy bill); the Family Electric Rate Assistance program (which bills some electricity at a lower rate) and a Medical Baseline programme which provides bill customers who rely on medical-related equipment at the utility's lowest rate. These programs are funded through a Public Purpose Participation (PPP) charge which is paid for by all customers through the distribution charge.
- Third, in some states, retail suppliers themselves offer shareholder-funded emergency payment assistance programs for their customers, which provide cash assistance to help offset the costs of heating and cooling their homes.[123]
- Fourth, in some states (such as Texas) the PUC rules set out the circumstances when a supplier is able to refuse service, and when they are not. For example, a supplier is able to refuse to provide service if a consumer: refuses to pay a deposit if they have a good credit history or fails to pay another bill from another provider for the same service. Suppliers that refuse to provide service must tell a consumer the reason, and the consumer then has an ability to file a complaint with the Texas PUC.
- Finally, as discussed below, in addition to the types of consumer protections set out in table 22, it is argued that consumers of specific products and services such as solar panels or batteries may need additional protections (such as for solar power in California).

189. One state with a detailed sector specific consumer protection framework is Texas, which as noted is often considered to be the state where retail competition is most active. The PUC rules has a whole chapter dedicated to the rights of customers of Retail Electric Service providers.[124] The types of protections contained in these rules are summarised in Table 23 below.

[121] Justia (2018).
[122] The federal government also provides grants to provide weatherization services and to help qualifying customers pay their energy bills under a series of federal initiatives known collectively as the 'low income home energy assistance program'
[123] See for example in California, California Public Utilities Commission (CPUC) (2020b).
[124] See sub-chapter R in Texas Public Utility Commission (2020b).

Table 23: Overview of energy specific consumer protections in Texas[125]

Broad category of protection	Specific protection
Disconnection and shut-off	• Customers must be given prior-notice within certain timeframes before any disconnection can occur. • Customers are eligible for a deferred payment plan if they have not received more than two termination notices in the past year and are not currently in a deferred payment plan • Customers cannot be disconnected during periods of extreme weather (such as in Winter) or because of critical medical emergencies.
Retail Choice and switching	• Retail electric providers are required to notify residential customers at least 30 days before a contract expires. The residential customer can switch without incurring an early termination charge if the switch is no earlier than 14 days before the contract expiration date provided in the notice. • Slamming is the unauthorized switch of an electric service. Cramming is an unauthorized charge on an electric bill without verified consent. Both slamming and cramming are illegal.
Pre-contractual information	• Consumers must be provided with an electricity fact sheet that provides them with standardized information about an electric plan, including contract terms, pricing, fees, and the percentage of renewable energy offered. The PUC requires an EFL for every plan so that customers can make an "apples-to-apples" comparison of the different offers.
Contract terms	• A contract between a Retail Electric Provider and a customer, must outline fees, length of service, and other important information such as provider's contract terms and conditions
Disclosure and information requirements	• Customers must receive a document that informs them of their rights as mandated by the PUC. An electric provider must provide customers with this disclosure.
Protection of vulnerable consumers and those in energy poverty	• A retailer shall provide the following information to an applicant or customer in English, Spanish, or the language used in the marketing of service, as designated by the applicant or customer. All retailers must make customer information available in Spanish.
Dispute resolution	• Retailers must promptly investigate customer complaints, and customers have the right to make complaints about retailers to the PUC.

190. In some states such as New York, the consumer protections are contained in a 'Consumer Bill of Rights'.[126] Energy Services Companies (ESCOs) that do not assure these consumer rights could lose their eligibility to provide service in New York. Notably, under applicable legislation, residential customers are required to be treated fairly with

[125] See Texas Public Utility Commission (2020c).
[126] New York State Department of Public Services (2020). Texas also describes various 'rights' of consumers. See Texas Public Utility Commission (2020c).

regard to application for service, customer billing, and complaint procedures.[127] The specific types of energy consumer rights in New York are set out in table 24.

Table 24: Energy Consumer Bill of Rights in New York

Broad category of protection	Customers have a right to:
Connection Disconnection and shut-off	• Receive energy delivery and 24-hour emergency services from their utility company. • Notice from the ESCO, no less than thirty days prior to the contract renewal date, of the renewal terms and the options you have as a customer.
Retail Choice and switching	• Clear procedures for switching energy suppliers, including information about the enrolment process.
Pre-contractual information	• Rescind an agreement with an ESCO within three days of receiving the agreement, if you are a residential customer. • A description of how pre-payment agreements work, if offered.
Contract terms	• A clear description of the services offered by the ESCO. • Residential customers are also entitled to the rights and protections of the Home Energy Fair Practices Act (HEFPA) which requires that all utility customers be treated fairly with regard to application for service, customer billing, and complaint procedures.
Disclosure and information requirements	• Disclosure, in simple and clear language, of the terms and conditions of the agreement between the customer and the ESCO including: price and all variable charges or fees; length of the agreement; terms for renewal of the agreement; cancellation process and any early termination fees, which are limited by law; and conditions, if any, under which the ESCO guarantees cost savings.
Protection of vulnerable consumers and those in energy poverty	• Provision of any written documents (contracts, marketing materials, and this ESCO Consumers Bill of Rights) in the same language used to enroll you as a customer.
Dispute resolution	• A fair and timely complaint resolution process.

(c) Which suppliers and products are subject to energy sector specific consumer protection regulations?

191. As noted there is variation in the energy sector specific consumer protection frameworks that apply across US states. In states where retail choice has been introduced there are also a range of energy providers including: (private) investor owned utilities (IOUs); publicly owned entities, rural electric cooperative, community choice aggregators and electric service providers. In California, for example it is estimated that publicly owned entities account for about a quarter of electricity supply.[128]

192. In many states, such as California and Texas the PUC only regulates the (private)

[127] The in accordance with provisions set out in the Home Energy Fair Practices Act (HEFPA). See New York State Public Service Commission (2008).
[128] California Energy Commission (2020).

investor owned utilities (IOUs), and publicly owned utilities are subject to local public control and regulation. This means that many of the consumer protection obligations described above only apply to privately owned IOUs. In Texas it is estimated that there are around 40 suppliers which face these obligations.

193. As noted above, while some consumer protection obligations are placed on the retail suppliers, others are provided for under state law and apply directly to the consumer. For example, the various affordability initiatives described above can be accessed directly by the consumers who are on low incomes or who qualify in other ways. The issue of the affordability of energy services is a topical one and PUC's in some states, such as California and Pennsylvania, have recently undertaken reviews to explore how to best address the high costs facing the poorest households in those states, even with existing assistance programs.[129]

194. As in Australia, a number of US states are grappling with questions of how to deal with consumer protection issues that are arising in relation to new products and services, such as where consumers obtain energy from solar power, batteries, mini-grids or standalone networks. Similar to elsewhere, fundamental questions are being raised about whether, and how, these new sources of energy should be classified under the existing rules, and it follows, what consumer protections frameworks should apply. Four areas are discussed below:

- Protections afforded consumers who agree to long-term third-party solar power agreements.
- The 'rights' of consumers who operate solar and battery facilities.
- Consumer protections for members of Community Choice Aggregation
- The ability of consumers to 'share energy' within a microgrid.

195. Gaps in consumer protection are perhaps most evident in relation to installed residential solar power where the vast majority of consumers enter into an arrangement where a third party installs the system at the customer's property, often with no upfront costs, and is responsible for maintenance. Under a solar lease, the customer gains access to the energy produced and makes monthly payments to the solar provider. While under a Power Purchase Agreement (PPA) the customer pays an agreed rate for the electricity generated by the system. The deal struck between the third-party operator and the customer – including the price paid for electricity – is negotiated, and accordingly the terms will vary depending on the extent to which the customer wants to contribute to the up-front installation costs and the length of the contract. In some cases a long-term contract is negotiated which sets a fixed, predetermined price for a period of up to 20 years (although the price typically increases annually by a nominal amount).

196. Some state PUCs, such as the Office of Ratepayer Advocate in California, have previously concluded that there are sufficient regulations in place to address common

[129] See Pennsylvania Public Utility Commission (PUC) (2019) and California Public Utilities Commission (CPUC) (2020c).

consumer protection matters in these arrangements,[130] and that the California PUC (CPUC) needs to ensure that generic laws and avenues for redress are readily accessible to all customers.[131] However, others have raised concerns about false and misleading acts in the marketing and sale or lease of solar panels, and the CPUC itself in California has acknowledged that consumer protections will 'grow weaker' as new technologies, financial vehicles and business models emerge.[132] These concerns are not limited to California and at the federal level the Federal Trade Commission received over 1,200 complaints between 2012 and 2016 regarding solar panels and their installation.[133] The complaints covered issues such as false representations of savings, confusing contracts and poor installation of solar panels. Additional claims have also been made to state Consumer Protection Bureaus and Attorney General offices across various US states.

197. In response to these concerns, several states have passed mandatory rooftop disclosure laws and community solar disclosure regulations, which require developers to provide certain details about the PV systems and transaction to customers upfront (e.g.: Arizona, New Mexico, Utah, Minnesota and Maryland).[134] In other states, the PUC has issued Solar Consumer Protection Guides which need to be initialled and signed by prospective customers prior to purchase. The California PUC guide, for example, sets out four 'rights' that consumers have to: receive a copy of the solar contract and agreement in the language which was used to make the sale; to read the entire document; to receive a solar disclosure document; and to have a 3-day cancellation period after signing the contract.[135] In other states, such as Mississippi and Massachusetts, the Attorney General's office has issued Consumer Guides

198. A related consumer protection issue is the ability of consumers that have access to solar and/or battery facilities to be 'active' customers (in the sense envisioned under the EU CEP Directive described above). In 2018, Colorado was one of the first states to pass a new law which, among other things, gave consumers a 'right' to install, interconnect and use energy storage systems on their property without unnecessary restrictions or regulations and without unfair or discriminatory rates or fees.[136] In February 2019, a proposed Solar Bill of Rights was introduced in California, which among other things proposed that:[137]

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[130] ORA Office of Ratepayer Advocates California Public Utilities Commission (2018:15).
[131] This includes protections under state laws such as: Unfair Competition Law (Business and Professions Code, the False Advertising Act, the Consumer Legal Remedies Act (Civil Code), and the Home Improvement Sales Persons Code.
[132] A report published by the California PUC as part of its Customer Choice Project it is noted that *"As new technologies, financial vehicles and business models emerge, customary and expected consumer protections grow weaker. For example, rooftop solar leases are contracts between two private parties… the transaction between the rooftop owner and the leasing company is not subject to CPUC rules to protect customers against fraudulent marketing. … Similarly, we are aware of abuses in marketing Property Assessed Clean Energy (PACE) loans for energy efficiency improvements or purchase of rooftop solar panels. Again, these loans are also transactions between two private parties and the CPUC lacks the explicit authority to provide customer protections."* See California Public Utilities Commission (CPUC) (2018b).
[133] Campaign for Accountability (2017).
[134] NREL (2020).
[135] California Public Utilities Commission (CPUC) (2019a).
[136] General Assembly of State of Colorado (2018).
[137] California Legislature (2019).

- all California residents, businesses, non-profits, and government entities have the fundamental right to generate and store renewable energy and to reduce and shape their use of electricity obtained from the electrical grid, whether their facilities are off-grid or interconnected to the grid.
- such fundamental rights to self-generation and storage extend to all California consumers regardless of income level, geography, or property type.
- residential customers have a right to consumer protections that ensure adequate transparency in sales and contracts for renewable energy and storage installations and services.
- Improvements be made to the time required for utility review and approval of interconnection applications and the transparency in interconnection costs, which had impeded customer adoption of solar and energy storage systems.

199. The California Bill is still being debated, however, it is notable that almost all of these rights and protections have now been amended, and the current version of the Bill now addresses a different topic altogether.[138]

200. Community Choice Aggregators (CCAs) are government entities that are formed by cities and counties to procure electricity for residents, businesses and municipal facilities within a specific area.[139] They were initially created with the purpose of 'out greening' the investor owned utilities (IOUs), and CCAs are now permitted in around eight US states. An important characteristic of CCAs are that when they are established all the customers of an investor owned utility (IOU) in the designated service area are automatically enrolled in the CCA, and have to opt-out to continue to be served by the IOU. CCAs procure electricity for customers in its designated areas, and the rates are regulated by the CCA following its own process. However, the IOU still performs other functions such as transmission, distribution, metering, billing, collection and customer service. This means that a bill that a CCA customer receives will come from the IOU and separately identify the amount the customer owes the CCA for procuring electricity, and the amount that is owed to the IOU for the other services.

201. Critically, state PUCs generally do not have oversight of the CCA on consumer protection matters. In California, for example, the CPUC cannot adjudicate customer complaints between CCAs and customers. In addition, given that CCAs are not regulated through a PUC there is no visibility regarding cost allocations amongst different customer classes. Responsibility for rate setting and consumer protection generally rests with the CCA Board of Directors, which are elected officials and are therefore assumed to act with integrity and be accountable through the electoral process.[140] While not covered by

[138] That is, bill concerning who can and cannot serve on a Democratic county central committee in the state of California, according to California Legislative Information.
[139] A useful background to CCAs is presented in California Public Utilities Commission (CPUC) (2018c)
[140] In California, this has been expressed as: *"CCAs are controlled by elected officials and, therefore, CCAs have a strong incentive not to participate in deceptive or fraudulent practices in their dealings with customers. Protections for CCA customers exist through the built-in checks and balances of the electoral process, since those same customers could vote the elected officials operating the CCAs out of office. In the event a consumer could*

standard consumer protections, CCA customers are eligible to participate in California Alternate Rates for Energy (CARE), Family Electric Rate Assistance (FERA) and Medical Baseline programs.

202. The final area involves the consumer protection frameworks that apply to consumers that, individually or in aggregate, share electricity as part of a 'microgrid'. Microgrids can help electricity customers manage their needs better and can act as an aggregated single entity to the distribution system operator.

203. In some states, local distribution utilities are provided with a monopoly to service consumers in a specific geographic area, and in these areas, it has been argued that microgrids (above specific supply levels) should automatically be classified as public utilities, which would mean that consumers are subject to the same protections. More generally, it has been suggested that a microgrid is likely to be classified a utility if it intends to serve multiple, otherwise unrelated, retail customers.[141] These provisions were originally intended to protect consumers from unfair practices by suppliers not covered by consumer protection laws. However, the classification of microgrids as utilities is now seen as a potential barrier to their development, which might be harmful to consumers that wish to share locally generated power. For example, if a microgrid is classified as a distribution utility it may assume an obligation to serve.

204. In California, the current Public Utilities Code prevents entities other than utilities from distributing electricity that is generated at one property to more than two neighbouring properties or to non-adjacent properties.[142] However, a Bill initiated in 2018 requires the CPUC to develop policies which, among things, reduce barriers to microgrid deployment.[143]

(d) How are the additional consumer protections implemented

205. As noted, the current consumer protection frameworks that apply to the energy sector in the USA comprises a mix of federal, state and municipal laws and codes, which can be enforced by a range of public bodies as well as through private action. As one recent survey observed, while the U.S. mechanisms for consumer protection lack centralization and often exist separately from each other, there is depth and variety to the protections and in the array of governmental actors, formal legal rights, and remedies protecting consumers.[144]

206. Although important generic consumer protections are contained in federal laws, energy sector specific consumer protections are contained in state laws, codes and regulations. Unlike in the EU and Australia, there is no explicit or implicit requirement to achieve consistency across state boundaries. It follows that states and PUCs can adopt different regulatory strategies and approaches to developing and applying consumer protection

not resolve a complaint against his or her CCA, the customer would need to seek assistance from a state or local entity with jurisdiction over the CCA". ORA Office of Ratepayer Advocates California Public Utilities Commission (2018:16)

[141] Hirsch et al.. (2018).

[142] Section 218 (b2) of California Code, Public Utilities Code - PUC § 218.

[143] California Public Utilities Commission (CPUC) (2019b).

[144] Waller et. al (2011:2).

frameworks. In addition, as described, the authority of PUCs in many states is often limited to private investor owned utilities (IOUs) and does not extend to publicly owned utilities (including municipality owned or Community Choice Aggregators) which are typically subject to local public control and regulation. This means that many of the consumer protection obligations described above only apply to privately owned IOUs. Another important difference between the US approach, and that in other jurisdictions, relates to the enforcement of consumer protections laws. In many states, Attorney Generals can file lawsuits on behalf of consumers, investigate possible violations, issue injunctions and obtain restitution on behalf of consumers. In addition, consumers themselves can initiate actions against suppliers using common law statutory causes of action such as the 'Little FTC' Acts .

207. While there is little uniformity between the states in the approach taken to consumer protection in the energy sector,[145] it is possible to make a number of very general observations about the degree or prescription in the frameworks based on the preceding discussion.

- First, the degree of prescription in the frameworks on core consumer protection issues can differ across states. For example, in California the framework of disconnection rules and policies are broadly framed, and each IOU institutes its own unique procedures and protocols pertaining to disconnection and reconnection, which means that the impetus for disconnection, repayment options, reconnection times, can differ across the IOUs.[146] In contrast, the Texas PUC has in place rules regarding disconnection including those facing disconnection must be issued with a written notice, and that disconnection can only occur after a 10-day notice period.[147] It also specifies a range of circumstances in which a customer may not be refused service.

- Second, in states such as California the PUC has suggested that some of the 'new' consumer protections issues that are arising – for example, in relation to solar power – can be accommodated within the more generic consumer protection laws and frameworks, such as unfair competition laws, false advertising and codes which regulate the conduct of sales persons. Given their wide application, these types of laws tend to be broadly framed and based on general principles.

208. Given the variation in approaches across the different states it is not possible to be definitive on the question of whether a self- or co-regulatory approach is adopted implementing the consumer protections. That said, a number of observations can be made:

- First, important protections such as those which provide assistance to consumers who are on low incomes require the customer themselves to make an application to

[145] Waller et. al (2011).
[146] California Public Utilities Commission (CPUC) (2018a:3).
[147] Texas Public Utility Commission (2020d).

their utilities to enrol in the relevant programme. Put differently, the supplier is not required to identify customers to which these protections should apply; rather it is the responsibility of the consumer themselves to gain access to these protections.

- Second, and related to the previous point, in a number of states, the suppliers themselves can have in place low-income assistance programmes which complement or supplement those put in place by the state. For example, in California each of the main IOUs have in place shareholder-funded emergency payment assistance programs that provide cash assistance to help offset the costs of heating and cooling their homes.[148]

- Third, in some states such as New York, certain basic customer protections are legally enshrined in a Bill of Rights which entitle consumers to basic protections when dealing with all competitive retail suppliers. In other states, energy suppliers have voluntarily set out their own Bill of Rights for customers in their area, which includes commitments relating to billing, deferred payment agreements, deposits, dispute resolution.[149]

- Fourth, different approaches can be observed across states in terms of establishing protections for some new products and services such as the sale of solar power equipment. In some states, legislation mandates certain disclosures, while in other states the PUC has issued a Solar Consumer Protection Guide which need to be initialled and signed by prospective customers (e.g.: California).

- Fifth, complementing these initiatives have been the development of industry codes such as the Solar Energy Industries Association (SEIA) Business Code which sets out commitments that participating members agree to abide. The SEIA code includes: guiding principles; commitments about unfair, deceptive, or abusive acts or practices; advertising commitments; sales and marketing commitments; commitments relating to the form and content of contracts. [150]

- Finally, the structure of the rule-making for some state PUCs involves naming one or more utility companies as Respondents to that Rule Making. For example, in the CPUC Orders instituting Rulemaking (OIR) on affordability, and on new approaches to disconnections and reconnections, the four largest electric and natural gas IOUs are named as Respondents. This usually requires them to take specific action in the rule-making process, e.g., file data or comments on a particular subject or respond at hearings to matters covered in the OIR.

[148] California Public Utilities Commission (CPUC) (2020b).
[149] See for example, Xcel Energy (2020).
[150] Solar Energy Industries Association (2015).

5.3 Britain[151]

209. The UK was one of the first countries in Europe to introduce full retail competition.[152] There are now around 60 retail energy suppliers, and the six largest suppliers have a market share of around 70% in electricity.[153] The British energy regulator, Ofgem, regulates the network elements of electricity supply (transmission and distribution networks), including arrangements for connection of distributed generation, and more generally oversees wholesale and retail markets and various aspects of consumer protection, including the licensing of suppliers. All electricity suppliers are required to obtain a supply licence to supply electricity to premises. The standard electricity supply licence contains various provisions relating to the supply of electricity to domestic consumers, including various consumer protection requirements (relating to marketing methods, tariff design and payment methods), and information requirements relating to bills. An exemption framework is applied, and exemptions can apply to individual cases or by supplier category (such as size of facility) and may be unconditional, or subject to certain conditions including being time-limited.

210. Although the United Kingdom is no longer formally a Member State of the European Union, the rules and protections currently in place reflect the various requirements established under the EU Regulations and Directives described in section 5.1 above It remains to be seen whether, and how, these will change in the future.

(a) Why are there energy sector specific consumer protection regulations?

211. That energy is considered to be an essential service is unambiguous in the very first sentence of Ofgem's State of the Market report: *"Energy is an essential service and the lifeblood of our economy."*[154] This view is shared by the UK Parliament, which, when debating the Domestic Gas and Electricity (Tariff Cap) Bill noted ,that *"Energy is a special and essential service…. an unavoidable necessity of life, which amounts to a significant portion of household budgets". In the words of the Minister:[…] There is something very fundamental about energy—about heating and lighting a home—particularly for the most vulnerable customers."*[155]

212. Specific protections for vulnerable consumers or those that experience fuel poverty have long featured in the British energy sector. Ofgem has a statutory duty to consider the needs of people with disabilities, who are chronically sick, of pensionable age, on low

[151] The discussion in this section refers to Britain rather than the United Kingdom, as Northern Ireland has its own regulator.
[152]The retail electricity market was gradually opened to competition in the period from 1998-1999. Formal price controls on domestic retail energy consumer were removed in April 2002.
[153]Ofgem (2020a).
[154] Ofgem (2018).
[155] House of Commons Business, Energy and Industrial Strategy Committee (2018:6).

income or living in rural areas, as well as the specific needs of other groups of consumers.[156] As Ofgem notes, the rationale for this, is that: "*energy is an essential service that affects people's comfort and health, and the market cannot be considered to be functioning well until it is meeting the specific needs of a wide range of people across a wide range of circumstances".*[157] Since 2013, Ofgem has had in place a Vulnerability Strategy which describes how it defines vulnerability and outlines its priorities to help protect gas and electricity consumers in vulnerable situations. It covers five themes including: data, affordability, customer service, innovation and partnership. An important part of Ofgem's strategy has been to introduce a vulnerability principle as a licence condition; this requires supplier to incorporate considerations of consumer vulnerability in delivering products and services.

213. In addition to specific protections for vulnerable consumers, some consumer protections reflect long standing concerns in Britain about low levels of consumer understanding and engagement with energy markets. Various inquiries by Ofgem and the Competition and Markets Authority (CMA) have found that, notwithstanding that the retail market has been open to competition for almost two decades, consumers are characterized by various decision-making biases and remain insufficiently active and engaged. Since 2008, Ofgem has introduced various remedial measures to encourage consumers to be more active, and to limit the potential for suppliers to exploit specific consumer biases. These have included: limiting the number of tariffs offered to consumers to just four (aimed at reducing consumer confusion);[158] introducing standards that suppliers treat customers fairly by taking account of their circumstances (to build confidence and trust); and various requirements around how information is presented on customer bills (to address issues with framing and potential loss aversion associated with switching supplier). In 2016, following a two-year investigation, the CMA concluded that a substantial number of customers still remained disengaged from retail energy markets, particularly those who might be classed as 'vulnerable',[159] and that this disengagement meant that there were material and persistent unexploited savings available to consumers if they switched away from the main suppliers, or if they changed tariffs with their own supplier.[160]

214. A final rationale for some of the energy specific consumer protections in the UK relates

[156] Ofgem (2020b). The concept of vulnerability applied by Ofgem is a broad one and includes where *"a consumer's personal circumstances and characteristics combine with aspects of the market to create situations where he or she is: significantly less able than a typical consumer to protect or represent his or her interests in the energy market; and/or significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial."*

[157] Ofgem (2019a:2).

[158] This was since removed following the CMA Market Investigation

[159] The CMA found that consumers on low incomes, with low qualifications, over 65 or living in rented accommodation were more likely to be disengaged, notwithstanding the fact that for these households energy constitutes a higher proportion of their total expenditure. See Competition and Markets Authority (CMA) (2016).

[160] A number of other barriers to engagement were identified by the CMA including: the lack of quality differentiation of gas and electricity which may fundamentally reduce consumer enthusiasm for, and interest in, engaging in the market; and that consumers are generally not aware of how much gas and electricity they are consuming at the time it is used. They also found that consumers on low income or with low levels of education were less likely to use price comparison websites on the Internet, and that some consumers did not trust or believe such websites.

to concerns about a low intensity of competitive rivalry among the largest retail suppliers. One of the main findings of the CMA inquiry was that weak customer response gave suppliers a position of market power over an inactive customer base, and that some suppliers had exploited this position by engaging in price discrimination and pricing the default tariff (standard-variable tariff or SVT) materially above a level that could be justified by cost differences from their non-standard tariffs, and/or by pricing above a level that is justified by the costs incurred in operating an efficient domestic retail supply business. The CMA also found that energy customers receive a poorer quality of service from the six main suppliers than they would in a 'well-functioning' competitive market. Various changes were recommended to address these concerns about weak competition among suppliers. Among these: that the regulator introduce an ongoing programme to identify, test and implement measures to provide different or additional information that could promote greater consumer engagement in retail energy markets; that a regulator-controlled consumer database be established to allow rival suppliers to contact consumers who have been on the default (SVT) tariff for more than 3 years with better deals; and that improvements be made to price comparison websites, and other intermediaries, to help consumers find better deals. In addition, in 2018 a default retail price cap was introduced by the Government for all consumers that were on the default tariff.

(b) What are the energy sector specific consumer protection regulations?

215. As in Australia, energy consumers in the UK are protected by various general consumer rights guaranteed in legislation. This includes protections under various pieces of legislation including:

- **Consumer Rights Act:** which requires that all products – including digital products – be of satisfactory quality, fit for purpose and as described. This Act covers unfair terms in consumer contracts and consumer notices, rules around how services should match up to what has been agreed, and what should happen when they do not, or when they are not, provided with reasonable care and skill.
- **Consumer Contracts Regulations :** which sets out consumer rules on matters like the information consumers need to be given before they purchase something; rules on unsolicited supply of goods and additional payments; the right to cancel; and cooling off periods.
- **Consumer Credit Act:** which protects consumers with loans or hire agreements.
- **Consumer Protection from Unfair Trading Regulations:** which protects consumers from unfair practices and aggressive sales tactics and misleading actions and omissions
- **Misrepresentation Act:** which protects consumers from false or fraudulent claims that induce them into entering into a contract.

216. In addition to these general statutory protections, there are sector specific consumer protections for energy consumer which are contained in the supplier licences. As noted, these broadly reflect those which are required in all EU Member States, but go considerably

further in some areas. A summary of the protections contained in the electricity supply licences are detailed in table 25 below.

217. Outside of the provisions contained in the supply licences, energy consumers also have legislative sector specific protections in relation to complaints and dispute resolution.[161] Specifically, suppliers are required to handle and record complaints efficiently, fairly, truthfully, and transparently. Suppliers must also publish their complaints handling procedure, and signpost consumers to the Energy Ombudsman if their complaint can't be resolved promptly. Suppliers are required to publish complaints data on an annual basis.

218. There are various Consumer Protection Codes in place that protect customers in relation to various renewable and heating products. This includes the Renewable energy consumer code (RECC) which sets out consumer protections in marketing, pre-contractual information, quotations, deposits, contracts, guarantees and after-sales service for domestic consumers.[162]

219. The RECC applies to small-scale heat and power generators, whether from renewable or other low carbon sources, and any product connected or linked to the Energy Generator to Consumers. It was established in 2006 under the (then) Office of Fair Trading (OFT) approved code scheme to raise consumer standards within the renewable energy industry. The RECC has evolved and been adapted over the years to reflect Government Initiatives including the Feed-in-Tariff incentive (FiT) scheme (now closed) and the Domestic Renewable Heat Incentive (DRHI). It has also recently been expanded to cover domestic Battery Storage Systems and other related products. Its current membership is just above 1,500 members. Since 2013 it is under the oversight of the (not-for-profit) Chartered Trading Standards Institute (CTSI) which has conducted audits on two occasions in 2014 and in 2019.

220. The overall assessment of the most recent audit in July 2019 was that the Code has adapted well to deal with the changing landscape of the sectors and the requirements of the membership.[163] Those in charge of managing the Code were assessed as having high level of knowledge and expertise in the administration of the Code and the application of their Bye-Laws. Other points of relevance noted in the 2019 audit include:

- There is a high number of applications for membership of RECC (although it was noted that a number of members did not renew their membership because of changes to the Feed-in-Tariff scheme).

- Monitoring of compliance is risk-based, comprehensive and focussed on those areas

[161] These are contained in The Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008.
[162] Renewable Energy Consumer Code (2020). Other industry codes include the Home Insulation and Energy Systems Contractors Scheme (HIES) which covers the installation of home energy products. See Home Insulation and Energy Systems (2020).
[163] Chartered Trading Standards Institute (2019).

where potential risk of consumer detriment and/or non-compliance is greatest. A variety of monitoring activities are conducted, including: desk and site based audits, mystery shopping, compliance checks and consumer satisfaction questionnaires. In 2018, 81 members were subject to a Compliance Check, 15 of which went on to have a desk-based audit.

- A comprehensive database is maintained ('Watch list') showing members of concern along with all information received about that member. 112 Members were on this list at the time of the audit, and 3 members going through the formal disciplinary process for potential breach of provisions of the Code and/or the Bye-Laws. In 2018 the Executive convened 1 hearing of the Non-Compliance Panel

- The auditor's assessment was that members can access to a comprehensive suite of advice, guidance and model documents. They also have access to training and extensive training materials to ensure that members are as up to date as possible with the requirements of the Code and relevant consumer protection legislation.

- 1,023 disputes were received in 2018 of which 143 (14%) fell within the remit of RECC. This is compared with 780 and 179 (23%) in 2017.

- In 2018, 35 disputes were resolved by the Executive's Dispute Resolution Team through mediation, and 14 disputes were referred for arbitration, 13 of which resulted in a financial award. In 2018, the total amount of compensation awarded to domestic consumers through RECC's dispute resolution process was £145,232.

Table 25: Key consumer protections in electricity supply licences in Britain

Broad category of protection	Specific rights/protections
General provision to Treat Domestic Customers Fairly	• Each domestic customer, including each domestic customer in a vulnerable situation, is entitled to be treated Fairly. This requires suppliers to behave in a fair, honest, transparent, appropriate, and professional manner, and provide information that is complete, accurate and not misleading. Domestic suppliers also need to make an extra effort to identify and respond to the needs of domestic customers who are in vulnerable situations • A supplier would not be regarded as treating a domestic customer fairly if their actions or omissions give rise to a likelihood of detriment to the customer, unless the detriment would be reasonable in all the relevant circumstances
Connection	• Suppliers must offer to enter into a domestic supply contract with that customer upon request (a Duty to Supply).
Disconnection	• Suppliers must prepare a statement setting out their obligations regarding customers in payment difficulty and their disconnections policy, and publish this statement on their website. At least once a year, suppliers must take all reasonable steps to inform each customer of this statement and how to obtain it, and must provide a copy of the statement on request, free of charge • Suppliers must include certain terms and conditions in domestic supply contracts about customers terminating their domestic supply contracts when they no longer occupy or own a premises to which gas or electricity is being provided by that supplier
Retail Choice and ability to switch	• Suppliers must satisfy the overarching principle of helping customers make informed choices about their energy supply. The regulatory expectation associated with the principle is that suppliers proactively seek to understand the information consumers need to have communicated to them, and then act on these insights • Suppliers must also satisfy an overarching consumer engagement objective by acting in a manner which is designed to promote each customer to engage positively with their energy supply. • Suppliers must provide certain information to domestic consumers as prompts to engage (including the cheapest tariff message), estimated annual costs, "about your tariff" labels and tariff information labels. • Suppliers must take all reasonable steps to complete a Supplier Transfer within 21 days.
Pre-contractual information	• Suppliers must follow principles when marketing or selling their tariffs to consumers: the structure, terms and conditions of tariffs must be clear and easily comprehensible; tariffs must be easily distinguishable from one another; • Suppliers must put in place information, services, and/or tools to enable domestic customers to easily compare and select tariffs, taking into account their characteristics and/or preferences. • Requires suppliers to provide the tariff information label and estimated annual costs at the same time as principal terms.
Contract terms	• A domestic supply contract must: be in writing; and include all the terms and conditions for the supply of electricity. With the exception of white label tariffs, in any region, the licensee must not use more than one Tariff Name for each of its Tariffs at any time

	• Suppliers face general requirements for information provided (in writing or orally) to: be complete, accurate and not misleading, be communicated in plain and intelligible language, with more important information being given appropriate prominence, relate to products or services which are appropriate to the customer it is directed to, and in terms of content and presentation not create a material imbalance in the rights, obligations or interests of the supplier and customer in favour of the supplier. • All contracts that are sent to customers must include specified terms, conditions, and information. Suppliers must send a customer their consumption data free of charge and on request. • Suppliers must include certain information on all notices in the event of a price increase or disadvantageous unilateral variation, and on all domestic statement of renewal terms notices. • There is a general prohibition on suppliers creating new 'dead tariffs' (variable tariffs with no end date that are no longer open to new customers).
Disclosure and information requirements	• Suppliers must ensure that each customer is provided with relevant billing information, and where relevant bills or statements of account, so each customer can understand and manage their costs and consumption • Where there are price increases, disadvantageous unilateral variations, or fixed term contracts come to an end, suppliers must provide affected customers with a notice containing certain information. Suppliers must provide this notice in a form and at an appropriate time that is designed to prompt customers to make an informed choice, leaving reasonable time for customers to avoid any changes before they take effect. • Suppliers are required to include certain information on all bills and statements of account. Bills and statements of account must either be provided in a form that allows customers to easily retain a copy, or be made easily available for reference. • Suppliers are required to include data relating to a tariff's fuel mix and its environmental impact on at least one bill for every financial year, and on all promotional materials sent to customers
Protection of vulnerable consumers and those in fuel poverty	• Licensees must seek to identify each Domestic Customer in a Vulnerable Situation. • When applying the Standards of Conduct do so in a manner which takes into account any Vulnerable Situation of each Domestic Customer • Suppliers must establish and maintain a Priority Services Register (PSR) of domestic customers who may need priority services because they are in a vulnerable situation. Suppliers must take all reasonable steps to communicate and promote the existence of the PSR, identify customers who may be vulnerable, and offer details of the PSR to these customers during interactions with them. • Suppliers must send information about money management to certain customers as soon as they become aware that that customer is struggling to pay their bills.
Complaints and dispute resolution	• Suppliers must ensure that each customer is provided with information they can quickly and easily understand: how to identify and contact relevant parties if they have a problem or question, including how to contact Citizens Advice, and as appropriate in the circumstances, what their rights are relating to dispute settlement and how to access appropriate assistance and advice

(c) Which suppliers and products are subject to energy sector specific consumer protection regulations?

221. The consumer protections in table 25 are set out as standard conditions in the licences of electricity suppliers. An important question this raises is how suppliers are classified for the purposes of licensing, and more specifically which types of energy supply activities are required to hold a licence. 'Licensable activities' involve the 'supply'[164] of electricity to domestic and non-domestic premises, or non-domestic premises only. The key consideration is that supply is undertaken across electrical lines to a consumer's premises (which are defined as any land, building or structure).

222. All forms of supply are, in principle, licensable, subject to an exemption regime described below. Licensees are required to maintain, become party to, and/or comply with the network industry codes in accordance with the conditions of their licence, as well as applicable UK and EU legislation. In April 2019, Ofgem published its conclusions on the review of the licensing regime in which it noted that: "*it is more important than ever that firms with innovative business models, products and services can enter the market in a way that delivers benefits for consumers. That said, energy is an essential service; there are minimum standards that suppliers must meet and any company entering the market needs to be well-prepared*". [165] Among the changes proposed as part of this review was that new entry requirements be introduced requiring prospective licence applicants to show that: it has appropriate resources for their proposal to enter the market; it understands their regulatory obligations and has appropriate plans in place to meet these; and it is fit and proper to hold a licence.

223. However, some activities that fall within the definition of a licensable activity are, in fact, exempt from the need to hold licences. These exemptions can be individual or class exemptions and may be conditional or unconditional, and are granted by the Secretary of State (not the regulator, Ofgem).[166] Guidance on supply exemptions notes that "*in most cases it is not appropriate to grant exemption from the requirements of supply licence. This is because it is rarely considered appropriate for these activities not to be subject to the full terms of licensing regime*", and that applications for exemption may still be possible in *"exceptional circumstances."*[167] However, there is no need to apply for a class exemption if you undertake an activity which falls within one of four pre-identified classes of exemption, being:

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[164] Under Section 4(4) of the Electricity Act 1989 *""Supply", in relation to electricity, is defined to mean its supply to premises in cases where it is conveyed to the premises wholly or partly by means of a distribution system, or (without being so conveyed) it is supplied to the premises from a substation to which it has been conveyed by means of a transmission system, but does not include its supply to premises occupied by a licence holder for the purpose of carrying on activities which he is authorised by his licence to carry on."*

[165] Ofgem (2019b:4).

[166] An example of a class exemption is for small scale generators producing no more than 10 MWs of electrical power from any one generating station or 50 MWs in the case of a generating station with a declared net capacity of less than 100 MWs. Individual exemptions are considered for individual supply undertakings.

[167] Department of Business, Energy & Industrial Strategy (2017:5).

- **Small suppliers**: Supply of up to 5MW of self-generated electricity, but no more than 2.5MW to domestic premises. Can operate across the public network. Ofgem has power to set the maximum prices charged under these arrangements.

- **Resale of electricity supplied (by exempt or licensed supplier) to premises (such as a landlord to its tenants):** The maximum price at which electricity may be resold to domestic consumers is the same price as that paid for it by the reseller.

- **On-site supply:** Allows the supply of self-generated electricity (either exclusively or in combination with power procured from a licensed supplier) to consumers that are on the same site. Ofgem has power to set the maximum prices charged under these arrangements.

- **Off-shore Generation**: Off-shore generated power supplied to off-shore premises.

224. Although exempt from the specific licence conditions, licence exempt distribution and supply undertakings (irrespective of size) – such as private wire networks – are still under a duty to facilitate third party access to their electricity and gas networks.[168] Such third-party access is required to give electricity and gas customers (both domestic and commercial) the right to choose from whom they receive a supply of electricity and/or gas to facilitate competition. For such a supply to be given, electricity and/or gas must be conveyed across networks (in this case networks owned by licence exempt companies) to enable a supply to customers from third party suppliers. However, the third-party access obligations are only triggered when a customer has expressed an interest in being supplied by an alternative supplier or has signed a contract with a third-party supplier. Certain other protections for consumers of exempt suppliers are provided for in legislation including in relation to change of supplier, switching arrangements, customer contracts, customer information and dispute resolution.[169]

225. In addition to an exemption, there are several alternatives to becoming a fully licensed supplier, including those shown in table 26 below. While all of these alternatives are seen as promoting innovation and allowing new forms of suppliers and supply arrangements, they differ in terms of who has a direct relationship with the consumer and who has the obligations for consumer protection. Specifically, Licence Lite suppliers have a direct contractual relationship with a consumer and are required to fulfil all of the licence conditions and obligations relating to consumer protection. In contrast, white label providers and sleeving organisations do not need to satisfy these consumer protection obligations which remain the responsibility of the licensed supplier.

[168] See Department of Energy & Climate Change (2012).
[169] Ofgem (2020c:12).

Table 26: Alternatives to licenced supply or licence exempt supply in Britain

Alternative	Available for those who wish to	Relationship with customers
Licence Lite (electricity only)	• Sell electricity over the public network to consumers • Sell electricity as part of a community energy scheme • Supply electricity you generate to a single building or site • Facilitate peer-to-peer trading • Provide electric vehicle charging services	• Involves a new supplier entering into a commercial arrangement with another licensed electricity supplier (called a third-party licensed supplier (TPLS)). • Under this arrangement, the TPLS carries out compliance for those parts of the supply licence which requires them to be a direct party to network codes.[170] • However, the Licence Lite supplier (LLS) is required to comply with all other licence conditions and obligations. • An aspiring LLS must apply for an electricity supply licence along with a request for a Licence Lite direction. The direction relieves the LLS of the obligation to be a party to the network codes set out in the supply licence. • An LLS has a direct relationship with customers. Accordingly, LLS are required to follow all of the general licence conditions, including those relating to consumer protection.
White label	• Sell electricity over the public network to consumers • Sell electricity as part of a community energy scheme	• White label providers have a commercial arrangement with, and use the infrastructure and resources of, established suppliers to offer tariffs under the white label's branding (e.g.: a supermarket chain or a community scheme offered by a local council). • The white label provider is not a supplier and does not need to apply for a licence or become a party to, or comply with network codes. • The white label effectively acts as an agent of (and therefore under the control of) a licensed supplier. The white label's activities operate within the parameters of the licence and industry arrangements of its licensed partner supplier. As such the licensed supplier (not the White label provider) is ultimately responsible for ensuring that the white label's activities comply with its supply licence. • Critically, the contractual relationship with the consumer is the responsibility of the licensed supplier and not the white label, and this must be made obvious to customers. • Ofgem has noted that the term White Label is increasingly being used capture a series of innovative services negotiated between an intermediary organisation and a licensed supplier These arrangements often cover specific groups of consumers. These are usually (but not always) domestic consumers, who share common characteristics which can be defined by geography or lifestyle preferences (e.g. local energy, green energy). As well as supply, these

[170] These are the Master Registration Agreement (MRA), the Distribution Connection and Use of System Agreement (DCUSA), the Connection and Use of System Code (CUSC), and the Balancing and Settlement Code (BSC).

		arrangements often involve the consumers bringing additional value to the arrangement such as collective ownership of a generation facility or behavioural characteristics that can provide for aggregated demand-side services. This means that emerging White Label relationships could cover both the traditional services covered by a supply contract and additional provisions for power purchase or other services.
Sleeving	• Supply electricity you generate to a single building or site • Supply less than 5MW of energy you generate to your own sites • Facilitate peer-to-peer trading	• Allows organisations with excess on-site generation to transport this excess to another site using the public network. This excess could be consumed by the same party that generates it or by other consumers. Sometimes referred to as peer-to-peer trading. • The generating organisation contracts with a third-party licenced supplier to buy its excess power and supply it to the other site, which could be owned by the same organisation or a different one. • As with the white label model, the peer-to-peer relationship operates within the parameters of the licence and industry arrangements of the licensed partner supplier.

226. In addition to different forms of supply, and suppliers, emerging in the British market there is are also circumstances where a business sells electricity but this 'sale' does not meet the definition of supply in the Electricity Act 1989 (see para 221above) . Ofgem has noted that this includes where *"electricity is sold via Electric Vehicle (EV) charging points. Although the charging points themselves would be a premises (or part of a premises), It is our view that EVs do not usually meet the definition of "Premises" under the Electricity Act 1989. This means that supplying electricity to EV charging points would be supply, but selling electricity to EVs from those charging points won't necessarily be supply"* (emphasis added).[171]

227. In addition, the British market has seen the development of switching websites and auto-switching sites that automatically switch consumers to better value tariffs, and therefore do not require any direct customer engagement with the market, unless they want to cancel an upcoming transfer. Ofgem estimates that there are currently 10 automated switching services in operation, although the number of subscribers to such services is still relatively small (estimated at around 130,000 in June 2019).[172] Ofgem generally views such providers as beneficial for consumers in terms of potentially reducing search costs and increasing the competitive pressure on existing suppliers and on traditional supplier-customer arrangements. However, in its Consumer Vulnerability Strategy it acknowledges that there is concern among some that unregulated entities, such as third-party intermediaries, auto switching sites, could create consumer risks in the absence of regulatory protections for consumers in vulnerable situations.[173]

228. On this last point it should be noted that some licence conditions including the Treat Customers Fairly principle - apply to suppliers and their representatives. Licensed suppliers are responsible for ensuring that such representatives comply with the rules. A 'Representative' is defined broadly in the licence as *"any person directly or indirectly authorised to represent the licensee in its dealings with customers*". Ofgem has suggested that this could include, for example, price comparison websites.[174]

(d) How are the additional consumer protections implemented?

229. As noted, Ofgem oversees wholesale and retail markets and various aspects of consumer protection, including the licensing of suppliers. To perform this monitoring role, Ofgem requires suppliers to submit certain information to Ofgem on a regular basis as shown in table 27 below. While Ofgem is principally responsible for consumer protection in the energy sector, other Government departments (e.g. the Department for Business, Energy & Industrial Strategy, BEIS) and other regulatory bodies (e.g. the Competition and Markets Authority, CMA) may introduce regulatory requirements, laws and/or licence conditions which suppliers need to be aware of and ensure compliance with.

[171] Ofgem (2020c:14).
[172] Ofgem (2019c: 35).
[173] Ofgem (2019a: 18).
[174] Ofgem (2019d: 9).

Table 27: Compliance monitoring information required by Ofgem

Broad area of compliance	Frequency	Specific protection
Social Obligations	Quarterly and annually	• Suppliers are required to submit data on their performance against their social obligations for domestic customers. • This includes data on payment methods, customers in debt, disconnections, smart meters, the priority services register, and energy efficiency
Guaranteed Standards of Performance	Quarterly	• Suppliers submit data on the Guaranteed Standards of Performance for domestic and microbusiness customers. • This includes number of appointments, missed appointments, faulty meters, reconnections, and payments to customers due to the above issues.
Complaints	Monthly and quarterly	• Suppliers submit complaints to Ofgem and Citizens Advice on domestic and non-domestic customers • This includes the number of complaints received, those resolved, and timing of resolution
Retail market monitoring report	Monthly and quarterly	• Suppliers submit data on a number of indicators relating to customer numbers, erroneous transfers, switching, delays, and final bills.
Microbusiness debt and disconnections	Quarterly	• Microbusiness suppliers must submit microbusiness customer numbers, debt and disconnection numbers
Customer numbers	Every 6 months	• Domestic suppliers submit customer numbers by tariff type and payment method
Pre-Payment Meter price cap	No more than five working days after the start of each charge restriction period	• Suppliers must submit data about their prepayment tariffs in accordance with their licence obligations

230. Since 2013 licensed electricity suppliers have been subject to broad Standards of Conduct that contain enforceable overarching principles that are aimed at ensuring licensees (and their representatives in the case of domestic suppliers) treat each customer fairly. These requirements cover three areas relating to: behaviour,[175] information[176] and

[175] Suppliers must behave and carry out any actions in a fair, honest, transparent, appropriate and professional manner.

[176] Suppliers must provide information (whether in writing or orally) which is: complete, accurate and not misleading (in terms of the information provided or omitted); communicated in plain and intelligible language; relates to products or services that are appropriate to the customer to whom it is directed; and fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence).

process.[177] Domestic suppliers also need to make an extra effort to identify and respond to the needs of domestic customers who are in vulnerable situations. These standards of conduct cover electricity suppliers as well as any brokers or third-party intermediaries that represent suppliers.[178] According to Ofgem the aim of the broad principles is to *"provide sufficient certainty to suppliers to encourage innovation as well as front-line staff to advise consumers of what they can expect*".[179] They also potentially allow Ofgem to remove some of the prescriptive rules throughout the domestic licence.

231. The principles are deliberately framed broadly to allow them to apply across a number of supplier activities (in contrast, narrow principles relate to specific policy areas (e.g. sales and marketing)). Table 28 below sets out Ofgem's interpretation of how the broad principles, narrow principles and prescriptive rules relate to one another

Table 28: Interaction between principles and prescriptive rules in British energy regulation

Type of 'rule'	Interpretation	Example
Broad principles-based rules	High level principles are sufficiently generic to sit across multiple areas of policy	Customer Objective in the Standards of Conduct that customers should be "treated fairly".
Narrow principles-based rules	Specific principles are higher-level requirements than prescriptive rules but, unlike broad principles, apply to specific policy areas.	Suppliers must take all reasonable steps to ascertain a customer's ability to pay when in payment difficulties.
Prescriptive rules	Prescriptive rules specify detailed obligations that suppliers must meet.	The licensee must provide a written copy of a tariff information label to a person free of charge within 5 days of the request received.

232. As is apparent from the distinctions made in table 28, the overarching approach is best characterised as a 'hybrid', rather than a principles-based approach. Indeed, while Ofgem has introduced the broad principles, it is still the case the current standard conditions of

[177] Suppliers must: make it easy for the consumer to contact them; act promptly and courteously to put things right when they make a mistake; and otherwise ensure that customer service arrangements and processes are complete, thorough, fit for purpose and transparent.
[178] In the Report which preceded the introduction of the Standards of Conduct, Ofgem stated that it intended to use the term Representative to focus its "*oversight on more direct and express relationships between a supplier and another person. This includes chains of sub-delegation arising from such a relationship, such as a person directly appointed as an agent. This is because we consider these relationships lead to more prominent interactions with a consumer on behalf of a supplier. On this basis, depending on the circumstances of the case, we do not generally envisage focusing on the relationships between a supplier and a broker or switching site which may arise via the payment of commission or other indirect arrangements, unless the broker is selling energy on behalf of only one or a limited number of suppliers."* See Ofgem (2013: paras 4.40 and 4.41). However, as noted above more recently, Ofgem has contemplated that a Representative could include a price comparison website. See Ofgem (2019d: 9).
[179] Ofgem (2016:3).

supplier licences are lengthy (around 480 pages), detailed and highly prescriptive in setting the obligations of suppliers in some areas of consumer protection.[180]

233. While the supplier licences contain a number of general and specific consumer protections which are enforced by Ofgem, on some issues a co-regulatory approach has been adopted with the industry and suppliers. Table 29 below sets the areas where voluntary codes of practice are used. These are non-mandatory codes that market participants can choose to sign up to. Other than the Confidence Code, which is administered by Ofgem, all of the other voluntary codes have been developed and are administered by Energy UK which is trade association for the UK energy industry.

Table 29: Voluntary codes of practice in Britain

Code name	Developed and Administered	Coverage
Confidence Code	Ofgem	• Code of practice for domestic price comparison websites, • Sites accredited to the Code must ensure they provide a transparent, independent, reliable, and accurate service to customers.
Energy switch guarantee	Energy UK	• Allows consumers to switch energy account from one supplier to another in a simple, reliable, and hassle-free way. • Participating suppliers agree to ten basic commitments to facilitate this.
Code of Practice for accurate bills	Energy UK	• Aims to improve billing standards. Members of the code focus on, and are audited for, five 'commitment areas': switching, meter reading, energy bills and statements, payments and refunds, and back-billing.
Commitments to reduce closed account balances	Energy UK	• Commits the biggest six energy suppliers to ten actions that will help return credit balances from closed accounts to former domestic customers.
Prepayment meter principles	Energy UK	• Commits suppliers to a "comprehensive assessment process" to determine whether or not a customer may be vulnerable and provide assistance for those who are.
Safety net for vulnerable customers	Energy UK	• Commits suppliers to never knowingly disconnect a vulnerable customer from their energy supply. • Also sets out an illustrative debt collection path, which includes an example of the steps a supplier may choose to take between issuing a bill and the warrant visit or approved remote disconnection, along with indicative timescales for each stage.

[180] Gas and Electricity Markets Authority (2019).

6. Evolution of energy consumer protections for new products and services

Chapter overview:

- In developing guiding principles that might inform the transition of the consumer protection framework in the face of new energy products and services, one approach is to orient away from 'supplier obligations' and towards 'consumer outcomes'. Five core principles that might be used to guide the transition are: (i) consumers should have access to at least one source of reliable energy supply; (ii) consumers should have choice, and ability to choose another supplier/ source of energy and to switch supplier without undue impediments; (iii) consumers should have access to sufficient, accurate and timely information; (iv) vulnerable consumer circumstances should be adequately taken into account in supply arrangements; and (v) consumers should have access to low cost and accessible dispute resolution mechanisms.
- It is useful to identify the key areas of consumer risk that may be associated with new products and services. This may include: consumers cannot access at least one reliable energy source/supplier which jeopardises their 'health, safety and wellbeing'; consumers cannot, or do not, effectively exercise choice among competing sources/suppliers which dampens competition among suppliers; consumers do not fully understand the terms and conditions for unfamiliar products and services, and risk agreeing to adverse contract terms and conditions; vulnerable customers do not have appropriate protections; and consumers do not have access to low cost and accessible avenues for resolving disputes.
- Policymakers and regulators have experimented with, or adopted, a range of different tools and approaches to achieve the dual aims of ensuring consumer protection while supporting innovation in relation to new products/services. Among the broad types of tools/approaches adopted include: a shift towards a more principles-based approach; use of an exemption regime; a forbearance strategy with reliance on *ex post* measures; regulatory sandboxes; the use of impact assessments and the introduction of flexible governance arrangements.
- Elements of energy supply that might be considered to be of an essential nature include: the ability of consumers to connect to at least one (reliable) energy source; protection from disconnection for consumers who rely on only one source of electricity; and the ability of those on life support equipment to access a reliable source of energy. Whether default products, fair and reasonable terms, access to dispute resolution and data rights are considered essential elements of supply for new products and services depends, among other factors, on: whether consumers multi-source energy; the reasons why different types of consumers access such products; whether consumers face more or less risk in the new environment of choice; and the extent and intensity of competition.

234. This section builds on the discussions of foundational principles in section 3, and the comparative review of other sectors and jurisdictions in sections 4 and 5, to consider a range of questions about how energy consumer protection frameworks might evolve in response to new products and services in Australian electricity markets. Specifically, it:

- Identifies a set of guiding principles which might inform the transition of the consumer protection framework for new energy products and services, particularly towards one characterised by co-regulation or by industry frameworks.
- Addresses a set of specific questions identified by the AEMC.
- Considers issues surrounding the essential nature of electricity provision, and in particular which elements or aspects of the supply of electricity might be considered to have this characteristic of essentiality.

6.1 Guiding principles

235. In developing guiding principles that might inform the transition of the consumer protection framework in the face of new energy products and services, the suggested approach is to orient away from supplier obligations and towards consumer 'outcomes'. In other words, if the proposed guiding principles are satisfied throughout the transition, consumers should not experience significant detriment/harm as a result of the emergence of the new products and services, and should be enabled to take advantage of any benefits arising from the new market arrangements/environment. In reaching these outcomes, the principles may need to reflect the initial unfamiliarity of consumers with the new products/ services and market arrangements, as well as the evolving competitive landscape in transitioning industry structures.

236. Table 30 below sets out five core principles that might be used to guide the transition. Each principle is related to an underlying rationale for consumer protection we have discussed throughout this report. Two points should be noted about table 30:

- We have deliberately not sought to assess whether or not the suggested principles might be adequately reflected in the Australian Competition Law or, if relevant, the NECF. Such an assessment would require a detailed legal analysis of, among other things, the nature of the specific products and services being sold, and the specific supply arrangements under which consumers' might purchase and use the product or service.

- Similarly, the discussion does not consider how these principles are best implemented, that is, whether it is more appropriate that they form part of a voluntary industry code or if they should be reflected in a mandatory statutory framework overseen by a regulator (such as for the NECF).

Table 30: Suggested core principles to guide the transition to new energy products and services

No.	Principle	Desirable consumer outcome	Why is this principle needed?
1	**Consumers should have access to at least one source of reliable energy supply**	No consumer is left 'stranded' without access to any energy source/supply	• Given the critical and essential importance of energy to health, economic and social wellbeing, it is important that consumers maintain access to at least one source of reliable supply of energy throughout the transition to new product and services. • Access does not necessarily involve the sale of electricity, but might involve 'self-supply' or 'collective sharing' of energy among groups of consumers where there is no financial exchange. • This principle will require that various protections be put in place to ensure that: consumers can connect to a reliable source of energy; to protect against consumers being abruptly denied access to a reliable energy source (e.g.: rules regarding disconnection); and that supply is sufficiently reliable (i.e.: the number of interruptions are kept to a minimum level). • In practical terms, this may require that consumers have can access a 'default supplier' or a 'Supplier of Last Resort' as is common in other jurisdictions and sectors. There are separate questions about whether consumer might be able to 'opt out' from such an arrangement, and how such a default supplier might be funded, particularly if a large number of consumers come to rely on grid supplier electricity as a back-up product. However, this issue has been addressed in other jurisdictions and sectors – e.g.: through the socialisation of the costs across all users, or through various charges such as 'indifference charges'.
2	**Consumers should have choice, and ability to choose another supplier/ source of energy and to switch supplier without undue impediments**	Consumers are not unduly 'locked-in' to poor deals, and suppliers face strong demand-side pressure to compete on price and quality	• An important rationale for consumer protection policies in liberalised retail energy markets is to encourage consumers to be active and engaged and to choose retail suppliers and products that are suited to their preferences and needs. Allowing consumers to switch supplier can also act as an important competitive discipline on suppliers in terms of price and other aspects of quality. This general rationale remains true as the market transitions to new products and services. • However, as discussed, for some products and services that involve individual or shared investments, it may be the case that consumers will have less of an incentive to switch, or may need to pay their share of any investments they had committed to funding prior to exiting that supply arrangement (i.e. undue impediments is a relative concept). • In practical terms, this principle will again likely require that consumers' can access a 'default supplier' or a 'Supplier of Last Resort' if requested.
3	**Consumers should have**	Consumers have sufficient information to assess	• Given the information asymmetry between consumers and suppliers and various decision making biases (e.g. underweighting of risks or, alternatively, inertia) it will be important that during the transition consumers are provided with information that alerts them to the possible

	access to sufficient, accurate and timely information	risks, the merits of different offers and to make informed choices	risks of choosing that new energy product and service, but also to potential benefits, and allows them to make an informed choice. • The need for a full understanding and appreciation of the consequences of purchasing a new product and service is arguably more important in a context where it is a relatively new occurrence and can involve complex and long-term financing arrangements which consumers may not be familiar with. • Consumers in transitioning markets may be unlikely to know what voluntary codes or other industry arrangements exist under which participating suppliers commit to additional consumer protections. Where voluntary industry codes exist in relation to a service or product, it could be a mandatory requirement that suppliers advise consumers that they do or do not participate in it.
4	**Vulnerable consumer circumstances should be adequately taken into account**	Particular care is given to vulnerable consumers entering into supply arrangements for new products and services	• Given the rationales for consumer protections related to vulnerability (e.g. critical dependence on electricity for health reasons, financial vulnerability, age etc) suppliers of new products and services could be argued to have a special responsibility to take account of such circumstances in proposing their products/services to such individuals and contracting with them. • This may be the case, in particular, if such products or services will involve significant up-front investments, lead to increased practical impediments to changing supplier; reduce reliability of supply or increase price volatility.
5	**Consumers should have access to low cost and accessible dispute resolution mechanisms**	Consumers have a pathway to low cost and informal means of dispute resolution	• Access to low-cost and accessible dispute resolution or ombudsmen schemes is likely to become more important as different suppliers and business models emerge, which give rise to differences in supply arrangements over which disputes and misunderstandings might arise. • Arguably, such schemes benefit both consumers and suppliers, by avoiding the higher costs associated with more formal processes of dispute resolution. The possibility of a low cost and accessible means of redress can also increase consumer confidence in new products and services and be market expanding. For this reason alternative dispute resolution (ADR) schemes are often voluntarily introduced by suppliers in some sectors.

6.2 Key questions

237. Drawing on the discussions in previous sections of the report, this section addresses a set of key questions that have been identified by the AEMC.

(i) There are currently clear rules around disconnecting consumers on retail energy contracts. What (if any) protections should apply to consumers of new energy products and services?

238. The overarching rationale for these types of protections for consumers on retail energy contracts relates to the essentiality of the service, and the magnitude of potential harm that will be sustained by consumers where service is abruptly disrupted or, in some cases, disrupted at all. As described in sections 4 and 5, protections of this type feature in other essential service sectors in Australia, such as telecommunications, and are a feature of retail energy contracts in other countries (including EU Member States, UK and USA). In the UK and EU, protections involve restrictions on the ability of suppliers to disconnect customers for non-payment, while in the US customers can be disconnected, but must be given adequate notice. In most jurisdictions examined there are prohibitions on disconnection at certain critical times in some countries (such as winter); and for certain customers (those with life threatening illnesses, or households with elderly persons or with children).

239. The core question here is whether such consumer protections should differ depending on the form of supply arrangement that a consumer enters into - e.g. supply from the grid under a traditional retail energy contract or supply from new sources and/ or by alternative service providers. Prima facie, as noted under principle 1 in table 30 above, if the new product and service is the only way that a consumer can access energy then the potential detriment to that consumer associated with disconnection is the same as it would be if they had a traditional retail energy contract. In these circumstances, it may be appropriate for the disconnection rules that apply to new products and services to resemble those of traditional retail energy contracts, particularly the rules about notification of disconnection, and restrictions on disconnecting certain customers at certain critical times.

240. The rationale for having specific disconnection rules for consumers who have access to multiple sources of energy is less readily apparent for the obvious reason that, in the event of disconnection, the consumer can access energy from another source/supplier. However, at a minimum, given the essential nature of energy and that consumers may come to rely on a particular source/means of accessing energy, it may be appropriate that minimum disconnection notification periods and standardised processes are introduced across all new products and services. Consistent with principle 5 in table 30, there may also be additional protections put in place for disconnections of vulnerable consumers or those experiencing financial hardship (e.g.: such as a requirement to offer the consumer a deferred payment plan as exists in some US states).

(ii) What are the key areas of consumer risk where energy consumer protections are needed for consumers of new energy products and services?

241. One way of thinking about the key areas of consumer risk that may be associated with new products and services is to relate them to the non-achievement of the desirable economic outcomes attached to each of the suggested principles set out in table 30 above. Put another way, the risks are associated with various forms of detrimental consumer outcomes that could arise in the absence of specific consumer protections.

242. Table 31 below sets out examples of possible areas of consumer risk and suggests how they could manifest for new energy products and services. It also describes how such risks are managed for traditional retail energy contracts under the NECF. Depending on the assessments of: (a) the likelihood of this risk arising; and (b) the magnitude of the impact on consumer if it does arise, similar sorts of protections may be necessary across traditional and new products and services.

Table 31: Possible areas of consumer risk for new energy products and services

Specific risk	How might risk manifest for new products and services?	Specific examples of protections under the NECF
Consumers cannot access at least one energy source/supplier, which jeopardises their 'health, safety and wellbeing'	• Risk can arise if there is no back-stop provider, and the provider of the product or service does not have obligations to connect customers on request; does not have restrictions on disconnection; or does not face obligations to identify and protect consumers for whom unreliable supply or disconnection would have particularly grave consequences.	• **Connection services**: requirement to provide connection services if requested • **Disconnection and reconnection:** general obligation to maintain a customer connection, limitations on interruptions and requirements before disconnections • **Life support**: protections for customers on life support equipment
Consumers cannot, or do not, effectively exercise choice among competing sources/suppliers. This dampens competition among suppliers.	• Consumers do not have the information they need (presented in a way they can understand) to assess the suitability of new products or services and therefore may either enter unsuitable arrangements, or fail to take advantage of/adopt new services and arrangements that may be beneficial for them. • These risks may be highest in transition periods, when new products and services are unfamiliar to consumers, meaning consumers are less competent at assessing suitability. • Existing aspects of market regulation may impact on consumers' ability to assess new products. For example, if consumers don't have access to their historical consumption data, or new suppliers don't have access to such data (to identify which consumers might benefit most from their products), consumers and new suppliers will lack information that could improve consumer engagement and choice as well as competitive pressures in the market. • Arrangements which involve contractual lock-ins to supply (e.g. exit charges) or practical 'lock-ins' (e.g. substantial up-front investments) can prevent ongoing exercise of choice and dampen competition in supply.	• **Disclosure and information requirements:** includes historical billing data; bill review; end of fixed term contract notice; • **Rules which encourage consumers to search and switch:** standardised switching times and processes
Consumers do not fully understand the terms and conditions for the	• Could arise when consumers face unfamiliar contractual arrangements, for example, where supply contracts involve property right/aspects e.g. leases of assets such as solar panels, or	• **Pre-contractual information and marketing rules:** requirements to disclose certain information prior to a contract being

products and services they are purchasing and risk agreeing to adverse contract terms and conditions.	commitments to fund the purchase of joint asset. (historically, a consumer may have been unlikely to involve a lawyer in a review of the contractual terms of a traditional retail supply contract but may require such a review for arrangements that involve significant investments in assets, or long term financial commitments). • Contracts involving variable and potentially volatile charging arrangements could, in principle, generate the same need for protections as might be considered usual for financial products with variable outcomes. •	struck and certain restriction on marketing, canvassing and advertising. • **Established minimum contract terms:** relating to billing; payment obligations; pricing; ability to exit
Vulnerable customers are not protected in service provision	• Could manifest if new products/services are purchased by those for who they are entirely unsuitable because suppliers haven't identified characteristics of consumers (or the particular consumer) that mitigate against suitability, or , have in fact exploited known vulnerabilities to secure the customer. • New suppliers are not as familiar as traditional retail suppliers with identifying or assessing protections required for those in circumstances of vulnerability.	• **Financial difficulty**: requirements to provide support and assistance to those experiencing financial difficulty.
Consumers do not have access to low cost and accessible avenues for resolving disputes	• A large number of disputes could arise for products with complex pricing arrangements or simply for novel product/supply characteristics. Relevant to settings where there is likely to be a number of disputes and where costs of the avenues of redress for resolving disputes act as an effective barrier.	• **Established minimum contract terms:** for customer complaints and dispute resolution. • **Small customer complaints** handled by jurisdictional energy ombudsman

(iii) Is it necessary to have specific consumer protections applicable to a type/category of new energy products or services? If so, why? If not, why not?

243. As described in section 2, there is substantial variation in the types of new energy-related products and services that are emerging on the market. Answering this question in relation to any specific product would require a close consideration of the product characteristics, the likely terms of supply, and the settings in which it will be sold to consumers. In other words, a full assessment would require a detailed mapping of whether, and at what scale, the various risks identified in table 31 could manifest for the new product or service.

244. That said, it is possible to make some general observations about the different dimensions that might make some specific consumer protections more or less applicable to particular types of new products/services. For example, different types of new products and service might be classified according to whether they involve :

- **Long-term supply arrangements or financial commitments:** if a new product or service involves a long-term commitment by a consumer, then protections premised on ensuring that consumers make informed decisions, are not 'locked in' beyond what is reasonably required under the arrangement; understand the terms of pricing; and have access to accessible and low cost dispute resolutions processes for disputes that arise over the course of what will be an ongoing, long-term relationship are potentially relevant. On the other hand, consumer protections premised on enabling consumers to search and switch, or otherwise be more active in the market (such as those around standardised bills etc) are potentially less relevant.

- **The consumer making an investment (including a shared investment) in an asset:** for these products and services, pre-contractual information and marketing rules may be important to ensure that consumers are fully aware of the nature and terms of the investment, and how such investment can impact (practically, if not legally) on the consumer's ability to switch to alternative supply arrangements.

- **Being supplied from an embedded or stand-alone provider:** in the absence of a default back-stop provider, obligations on the supplier in terms of connections and disconnections will be relevant. Consumers who enter into such arrangements may need to understand the impacts this might have in terms of their ability to access other supplier/sources of energy. Pre-contractual information and marketing rules may be important here.

245. Given the emerging nature of many new products and services, and the likely challenges in mapping and assessing all potential consumer risks of each type *ex ante*, another approach may look towards particular consumer outcomes irrespective of which

energy products and services they consume. In other words, to adopt a more general 'principles-based' approach applicable to all suppliers of new products and services. Table 30 above sets out five suggested principles that could apply to all new products and services in the market. As described in section 3, such a principles based approach is not uncommon, particularly in settings where risks are heterogeneous and where there are a wide variety of suppliers pursuing different business models. These principles might be elaborated through industry codes or regulatory guidance or supplemented by more detailed protections/rules where it is evident from existing experience, or it emerges over time, that specific consumer detriments have arisen, or are being experienced by consumers, in relation to particular products.

(iv) Given the nature of new energy products and services, what are the best regulatory tools to protect consumers and support innovation in the energy market?

246. The question of how best to achieve the dual aims of ensuring consumer protection while supporting innovation is one confronting policy makers, regulators and other stakeholders across jurisdictions and regulated sectors. Generally speaking, no single 'tool' or strategy has been adopted across jurisdictions or sectors; rather policymakers and regulators appear to have experimented with, or adopted, a range of different tools and approaches. Table 32 below provides a general overview of some of these tools and approaches.

247. In addition to the tools and strategies detailed in table 32, another more 'structural approach' is evident in some jurisdictions/sectors. This approach typically involves the appointment of a 'backstop' provider of the essential service, and for that backstop provider to have minimum obligations to all consumers (and be compensated financially for assuming those obligations). Consumers can opt to use new products and services (which may have a lower level of consumer protection), or use the services of the backstop provider. This approach, which can be useful when an industry is transitioning from one set of services to a new set of services, is perhaps most evident in the telecommunications sector, where the traditional provider of fixed line voice services often face different consumer protection obligations than providers of new products and services (e.g.: Skype, FaceTime etc.). For example, as described in section 4, Telstra faces a universal service obligation to provide reasonable access, on request, to a standard telephone service for all people in Australia. It is also required, under the Priority Assistance programme, to take steps to prioritise connection and fault repair for telephone services of people with particular vulnerabilities e.g. a diagnosed life-threatening medical condition.

248. Leaving aside questions about funding, a primary, in principle, benefit of this more structural approach is that it ensures that the consumers can always exercise choice to access a service/product which offers specific (known) level of protections (i.e.: it provides a form of insurance). An in-principle, limitation of this approach is that consumers who

utilise new products and services may not have adequate protections, which can become a bigger issue over time if a large proportion of consumers come to use new products and services rather than the traditional backstop service. However, the magnitude of this risk may be lower if providers have incentives to 'self-regulate' in relation to their services and interaction with consumers (e.g.: voluntary codes) in the interest of increasing confidence in, and uptake of, new products and services of if the market is sufficiently competitive to compete for business on customer service and quality aspects.

Table 32: Regulatory tools/strategies to achieve the dual aims of ensuring consumer protection and supporting innovation

Tool/strategy	Description	'In principle' assessment of merits
Principles-based strategy	• As described in section 3, typically involves specification of outcomes or principles, cast at a high level, which can capture a wide range of suppliers and behaviours. Suppliers are required to exercise judgement and apply the principles to their specific circumstances. • Principles based strategies are perceived to be more appropriate in innovative sectors as they are potentially more adaptive to changes in the market.	• Benefits: flexible in implementation; avoids compliance or enforcement gaps based on drafting gaps of technicalities; encourages suppliers to take more responsibility for achieving outcomes; relatively durable, as open-textured provisions can capture changes over time in market arrangements and new consumer risks that emerge. Allows for the development of more bespoke co-regulatory arrangements e.g. industry codes that reflect particular parts of the market (what will satisfy the principle may be differ legitimately in different segments of the market). • Risks: Potential for imprecision and vagueness which can make it difficult/onerous for suppliers to determine what behaviours are and are not permissible; devolves some responsibility to suppliers, and can create an accountability gap; can lead to over- or under-compliance depending on level of precision of regulation, and the risk profile and resources of supplier; some prescriptive rules may still be the only option to avoid certain behaviours which would cause significant consumer detriment; suppliers may be confronted with a proliferation of guidance giving content to the principles.
All products/ services subject to consumer protection obligations, but with an exemption regime	• Assumes that all suppliers of new products and services should, in the first instance, be subject to sector specific consumer protection obligations. • However, allows suppliers to apply for an exemption from these obligations for certain new products and services if it can be shown that the risks to consumers are minimal/non-existent.	• Benefits: ensures a baseline minimum level of protection for consumers; allows risks of new products and services to be assessed on a case-by-case basis; only triggered on application for exemption. • Risks: If applied too rigidly/cautiously has potential to chill new innovations; could lead to many applications for exemption which could become unwieldy; may result in inconsistent decision making if similar risks assessed/treated differently.

Forbearance strategy and reliance on ex post measures	• Assumes that all new products and services should, in the first instance, not be subject to sector specific consumer protections. • If a risk is shown to manifest and there is evidence of a new product/service causing consumer detriment then will become subject to protection obligations.	• Benefits: Should encourage new products/services and business models; does not automatically presume that consumer harm will arise; avoids the potential for all products and services being treated the same, irrespective of risks. • Risks: does not provide a minimum level of protection for all consumers; raises potential for significant risks of new products and services to only be addressed after the harm/detriment has manifest; could result in asymmetric treatment of traditional products/services and new products/services; could lead to weak incentives to provide appropriate quality of service to consumers for suppliers of new products/services (i.e.: race to bottom). May require regular supplier reporting to regulator on particular metrics (e.g. complaints, service levels etc) in order to ensure awareness of manifesting risks.
Regulatory sandboxes	• Varying interpretations, but one interpretation is that new products and services are allowed to be 'tested' at a small scale to assess potential risks, before the new products/services are allowed on to the market.	• Benefits: Should encourage new products/services and business models to develop by giving them comfort as to future regulatory treatment; allows regulator or other body to assess actual risks and scale of possible detriment at a small scale prior to product/service being launched in the wider market. • Risks: the results of the small-scale assessment of risks/detriments cannot be scaled up either because they do not adequately capture all potential risks, or do not capture all possible detriments that may be experienced by specific consumer groups.
Impact assessments	• Requires suppliers of new products and services to undertake an impact assessment prior to the product being launched which assess the potential risks and impacts on different types of consumers. • The results of this impact assessment could then be provided to a regulator. Could be part of an application under an exemptions regime.	• Benefits: Encourages suppliers of new products/services to think through, test and self-assess the potential risks and scale of possible detriments for different customers. • Risks: suppliers may have incentives to skew results of assessment or may not undertake a full assessment of all the potential risks or detriments that may be experienced by specific consumer groups. Suppliers may adopt different approaches and methods to undertaking the impact assessment

Flexible governance arrangements/	• This can involve an independent Code administrator/manager (involving regulator and industry) being responsible for deciding when additional consumer protections should apply to new products and services, and what those protections should be. • Assessments could be achieved through a structured and open process, where it is open to all parties to provide evidence, and where the decision of Code administrator/ manager can be appealed to the regulator.	• Benefits: Allows for a flexible and transparent decision-making process which can be responsive to requests and evolving risks. Possibility of appeal to regulator ensures that decisions are not unduly skewed. Successfully used in other parts of energy supply chain. • Risks: Could result in inconsistent assessment and a lack of holistic policy (i.e.: a piecemeal approach); risk of low participation in process by specific consumer groups (e.g.: vulnerable or financially deprived groups etc). May require regular supplier reporting to Code manager on particular metrics (e.g. complaints etc) in order to trigger review of code provisions.

6.3 Essential service elements

249. This section considers which elements of energy provision might be commonly considered to be of an essential nature. It also considers how various essential supply elements identified by the AEMC might change with the evolution of the market and the emergence of new products and services, and how the consumer protection framework might need to adapt to these changes.

250. As set out in section 3 above, in many industrialised countries electricity supply is classified as an essential service on the basis that it critical for health, economic and social welfare. In Australia, this has been expressed in terms of electricity being essential to the '*health, safety and wellbeing'* of Australians.[181] With this notion of essential in mind, it is important to make two conceptual distinctions:

- **'Sale' of energy and 'access' to energy:** Traditionally for most consumers, the two concepts of 'sale of energy' and 'access to energy' were effectively one and the same thing: the only way that a consumer could access energy was through a monetary exchange (i.e.: sale) with a retail supplier. However, as discussed in previous sections, as the energy sector has evolved, there are now new ways in which consumers can 'access' energy, some of which do not involve a 'sale' (i.e.: do not involve an exchange of energy for money). Most obviously, some consumers can now access energy from sources which they own either individually or collectively (e.g.: solar panels or batteries). In addition, there is the potential for consumers to access energy through collective 'sharing' arrangements among a community in ways which do not necessarily involve a traditional sale. For example, a consumer may be a 'member' of a community that collectively owns a generation or storage facility, and is therefore effectively accessing its 'own' energy.

- **'Essential' service and 'universal' service:** as already noted in section 3, there is a difference between an 'essential service' and a 'universal service': the former being defined as a service which is important for the '*health, safety and wellbeing'*, the latter typically being defined to be services which are made available to all consumers in a jurisdiction irrespective of their geographic location and at an affordable price.

(i) Ability to connect to a reliable energy source

251. The ability of consumers to connect to an energy source is the perhaps the most 'essential' element/aspect of the supply of electricity. Traditionally (and for many consumers still today) this element of the supply chain has been inextricably linked with

[181] See Ministerial Council on Energy Standing Committee of Officials (2008:18).

the ability to access grid sourced electricity.[182] For these consumers, the ability to connect to grid sourced electricity remains critical and should remain part of any future consumer protection framework.

252. However, as noted above, increasingly consumers are accessing energy from alternative sources and under different supply arrangements including self and collective supply arrangements and from certain forms of storage. This has two implications for the relevance of the ability to connect under any consumer protection framework:

- First, for consumers who have the option to access non-grid supplied energy, there is a question about whether the ability to connect to grid sourced electricity is still essential – i.e.: is access to grid sourced electricity necessary to protect their '*health, safety and wellbeing'* – or can the alternative source offer adequate protection.

- Second, it raises a question about whether, and under what circumstances, alternative energy sources/suppliers should be obliged to offer a connection to all customers. For example, should members of a community energy scheme have to offer all residents in an area the ability to connect. As discussed in section 5, the approaches adopted in other jurisdictions appear to require all customers to be able to connect to such communities. In the EU, for example, the CEER recommends customers not be prevented from joining an existing energy community or sharing arrangement. Similarly, in the USA, all the customers in a designated service area are automatically enrolled in a Community Choice Aggregators, and have to actively opt-out to continue to be served by another (more traditional) supplier.

253. In sum, the ability to connect to at least one (reliable) energy source is likely to remain the most 'essential' element/aspect of the supply process, and one that needs to be preserved in a consumer protection framework. Wider questions as to who must provide this essential element, and what happens when consumers can multi-source, leaves room for discussion/further consideration.

(ii) Protection from disconnections

254. The ability to stay connected to a source of electricity supply is another essential feature of the supply process given the potential health and other risks associated with disconnection of service, particularly in extreme weather events (such as very hot summers, or cold winters) or for particular consumer groups (e.g.: those with medical equipment). As discussed in response to question (i) above, for consumers who rely on only one source of electricity this protection remains critical in consumer protection frameworks.

255. However, the potential consequences of disconnection will differ for consumers who

[182] This differs from some other essential services such as water and gas, where there is not always universal access, but the product can be stored and altered (i.e.: liquefied in the case of gas) and transported to those who are not connected to the grid.

multi-source electricity. For example, self-supply consumers, who operate onsite generation facilities with storage capacity may have access to another source of supply in the event of disconnection from one source, which may reduce the necessity of specific protections regarding disconnection being applied to all suppliers/sources of energy (although, minimum notification requirements are likely to still be required across the industry to prevent gaps in supply). It is instructive to examine what is done in other sectors, notably telecommunications, where, as discussed in section 4, under the TCP Code, there are restrictions on disconnections for fixed line internet and telephone services and mobile telephone and data service providers, but such obligations do not extend to other forms of voice communication such OTT providers (e.g.: Skype).

(iii) Supply for life support customers

256. The ability of those on life support equipment to access a reliable source of energy is critical, and such consumers with a single source of electricity require specific protections around this vulnerability.

257. The question of whether a consumer that multi-sources electricity should receive the same protections across all sources is less clear cut. Again, as discussed in section 4, notwithstanding the different ways in which consumers can now make voice calls (alternative suppliers (e.g.: Optus), mobiles, Skype etc.) in telecommunications, only a designated supplier, Telstra, has been required to provide Priority Assistance services to those customers with a life-threatening medical condition who depend on a reliable, fixed line home telephone service to be able to call for assistance at any time.[183]

(iv) Default retail product, safety net

258. Default retail products are a feature of electricity retail markets in a number of jurisdictions. The default products, which take the form of standard offers in some jurisdictions, are premised on protecting two broad types of consumers:

(i) those whose circumstances have changed (i.e.: they have moved into a new house, their retail contract has expired without another in place, or their supplier as gone out of business) and they need to maintain access to energy during a period of adjustment.

(ii) those consumers which either choose not, or feel ill equipped, to make decisions in complex market settings, by allowing them access to an electricity service on pre-specified regulated terms and conditions.[184]

[183] A recommendation of the recent Telecommunications Consumer Safeguard Review was that this obligation should be widened to a shared industry approach to supporting medically vulnerable consumers, on the basis this would offer a more equitable sharing of costs and offer greater competition and choice to consumers.
[184] For the avoidance of doubt, the distinction between a default service product and a supplier of last resort/default service provider requirement should be recognised. The former policy is largely directed at ensuring that specific groups of consumers have access to an electricity service on specified terms and

259. Under the NECF, traditional retailers can offer two types of contracts. A standard retail contract (which is a form of default retail product) must be based on model terms and conditions as set out in legislation, while a market retail contract allows a small customer and a retailer to negotiate and enter into a retail market contract for retail services and any other services (subject to certain baseline regulated minimum terms and conditions).

260. While many jurisdictions feature some form of default or standard product, the question of whether the prices for such default retail products should be regulated is controversial and one on which there are different views across jurisdictions. One view is that the existence of such regulated products can have negative effects on competition (by acting as a focal point for suppliers) and have the unintended consequence of reducing competition (and ultimately harming consumers) by blunting the incentives for consumers to engage with the market and seek out good deals.[185] For this reason, some jurisdictions – such as EU Member States – have increasingly sought to withdraw price regulation for such products and encourage more consumers to engage with the market.[186] Another view, which has gained increased prominence in recent years in countries such as the UK and to some degree Australia, is that some form of default price regulation is necessary to protect the large number of consumers who do not engage in the market and whose inertia is potentially being exploited.

261. The question of whether default products are essential depends on the reasons why different types of consumers access such products:

- Such products may be accessed only on a temporary basis, to deal with a transition period. The default product is essential but only as a short-term safety net.

- Such products may be use on an enduring basis, where consumers have choice of alternative suppliers/sources, but for various reasons do not feel equipped or prepared (perhaps based on confidence in the market for alternative products), to exercise that choice. Here, the default product is 'essential' only because of consumer characteristics and not because the consumer does not have access to other sources of supply.

262. This latter rationale for preserving a default regulated product as the market evolves to

conditions, while the latter requirement is a protection directed at all customers in terms of ensuring continuity of supply.

[185] See Decker (2014:55, 138 and 252). Armstrong, Vickers and Zhou (2009) present a formal model of this phenomena, and conclude that although the imposition of price caps can have the direct effect of reducing prices, it can have the indirect effect of reducing search which, in turn reduce each firm's demand elasticity by such a degree that average prices increase.

[186] The CEP Directive has sought to further restrict the ability to impose price regulation. Recent analysis by the European Commission did not find evidence that regulated prices lead to better affordability nor lower levels of energy poverty, but did find that a lower share of households under regulated prices correlates with positive developments in indicators for competition, both when looking at individual years and over time. See European Commission (2019:261).

one where consumers have multiple options for accessing energy, but choose not too because they are disengaged, is a contested one. One argument is that inactive/inert customers still need to be protected from being exploited by their supplier (who, for practical purposes, has an effective monopoly over them) and should be able to access electricity on regulated minimum terms and conditions and a regulated price. Conversely, it is argued that maintaining such protections on a long-term basis could be inimical to the development of competition and innovation (especially when the default retail price is set at low levels, as it is in some countries), and therefore detrimental to consumers over the long term. Aside from restricting entry and innovation, there may be a potential 'moral hazard' associated with over-protecting consumers with a default product so they do not acquire the skills to make effective, and potentially beneficial decisions in the market.[187]

(v) Fair and reasonable terms

263. General prohibitions against unfair contractual terms are a common feature of consumer protection regimes in many jurisdictions, including the UK, EU and in the USA and are also an important element of Australian consumer law. In addition, to these general protections, under the NECF, suppliers are required to specify certain mandatory minimum terms and conditions for retail contracts for residential and small business consumers. As described, these include requirements relating to: billing; payment obligations; pricing; customer complaints and dispute resolution.

264. Historically, the rationale for these specific protections reflects perceived attributes of the sector – e.g. the service is essential and therefore the stakes associated with errors high; reputational mechanisms are insufficiently engaged; the product/ service is complex to understand or technical; and the contracting parties vary greatly in size and bargaining power (traditional monopoly utility vs residential customer).

265. In a more competitive environment, where consumers may have access to alternative supply arrangements, the question is the extent to which each of these historic factors remain relevant. Could generic consumer law alone suffice in the new context? Alternatively, could the new environment have made some traditional sector-specific protections less relevant, but introduced a need for certain new protections? For example, do consumers face new risks in a competitive environment including confusion associated with the number and range of new unfamiliar services/ products on offer and difficulties comparing traditional and new products effectively?

266. These questions cannot be addressed in the abstract. However, one general approach to dealing with heterogeneous risks in this changed context might be to adopt a more principles-based approach to regulating behaviour but take a more prescriptive approach to information provision, and pre-contractual information provision (to assist consumers to compare services/offers in a multiple-choice environment), rather than to focus on specific

[187] Armstrong (2011:4).

prescriptive contractual terms. This could allow for contracts to better reflect what is fair and reasonable in different circumstances. Evolving regulatory guidance could assist with examples of compliance with such principles in relation to specific supply models/arrangements and technologies.

267. In terms of what 'fair' means, this too is an area of much debate. However, some insight can be gleaned from other sectors and jurisdictions. As noted in section 5, the broad principle that customers should be treated fairly is one which has featured in Britain since 2013. In Britain, Ofgem has defined the concept of what is 'unfair' in the following way: *"The licensee or any Representative would not be regarded as treating a domestic customer fairly if their actions or omissions give rise to a likelihood of detriment to the domestic customer, unless the detriment would be reasonable in all the relevant circumstances".*[188]

268. In Australia, as described in section 4, a principle under the ABA Banking Code of Practice is that banks are 'fair and reasonable' in their dealings with consumers. As noted, the Royal Commission into financial services recommended that this principle be designated as an enforceable code provision. What is considered to be 'fair' is also set out in the Customer Owned Banking Code of Practice as outcomes which strike a 'fair balance' between the legitimate needs and interests of the customer and the interests and obligations of the supplier.

(vi) Access to dispute resolution schemes and ombudsmen schemes

269. The NECF contains specific provisions in relation to small customer complaints and dispute resolution. Specifically, every retailer and distributor must develop, and publish on its website, a set of procedures detailing its procedures for handling small customer complaints and disputes ('standard complaints and dispute resolution procedures'). In addition, a small customer may make a complaint to the energy ombudsman concerning the retailer or distributor. Such schemes can benefit both consumers and suppliers, by avoiding the higher costs associated with more formal processes of dispute resolution. However, they also typically impose separate costs on suppliers in terms of a requirement to have such processes in place, and, potentially, to fund and participate in an ombudsmen scheme or other dispute-resolution mechanism.

270. A policy question here is whether existing requirements are likely to remain fit for purpose given the changes that are occurring in the market, particularly where some new products and services involve consumers bearing more risk, and where disputes may involve more complicated matters than have arisen under the traditional retailer-consumer relationship (e.g.: disputes around long term leasing arrangements, or around the metering of new products). Also relevant to the question is the likely scale, nature and frequency of future disputes.

[188] Ofgem (2019e:9).

271. On the one hand, access to low-cost and accessible dispute resolution or ombudsmen schemes may become more important as different supply arrangements emerge over which disputes and misunderstandings might arise. So too, access to complaints or adjudicatory processes may have increased importance if the consumer protection framework moves to a more principles-based approach, for which a supplier's specific behaviour may have to be assessed/adjudicated for consistency with the principle.

272. On the other hand, some of the rationales for some mechanisms may be less applicable to new products and services, - for example, the cost of funding standing schemes may be disproportionate to the number of disputes that may arise in relation to some products/services; arrangements/disputes may be too diverse or too technically complicated for standardised processes; and the relative power between consumers and suppliers may be less asymmetric in a competitive environment than under historical conditions, possibly enhancing supplier incentives to resolve complaints before external dispute resolution processes are engaged.

(vii) Data rights

273. There is currently no specific direct consumer right to grant third-party access to their energy data provided for under the NECF. However, the Australian Government has announced its intention to include energy data in the consumer data right (CDR). This will allow consumers to require that an energy retailer share their data with an accredited (third-party) service provider such as a comparison site to get more tailored, competitive offers. Consumers will need to consent and authorise their data to be shared under the CDR. The underlying rationale for providing consumers with a right to share energy data is that it should promote competition between energy service providers. The ACCC is currently developing its policy position on this issue.

274. The initial rationale for allowing consumers such data rights stems from the UK Competition Commission decision in its Retail Banking Market Investigation, which required banks to make customer specific transaction data more readily available, including by price comparison websites. This led to what is known as Open Banking, which was mandated to be implemented by the nine largest current account providers in the UK. A similar Open Banking policy was introduced at the EU level in January 2018 as part of the second Payment Service Directive (PSD2). In essence all of these initiatives are aimed at giving consumer's greater access to and control and of their data which can make them more engaged, but also facilitate innovation by third-party providers who can use this information as part of other products and services.

275. Key questions this raises are whether such data rights are 'essential', and what should the scope of application of these right be – for example, should all suppliers/sources of energy be obliged to share such data, or only specific suppliers:

- On the first point, there is currently active debate across many domains about who 'owns' and should have 'access to' consumer/individual data, and whether access to such data is an important part of a consumer's well-being. As digitisation allows ever increasing amounts of data to be collected about individual's activities, including energy consumption through smart appliances and meters, there are some who argue that it is essential that consumers have an ability to access all of this data across multiple sources for their own purposes. In reviewing the CEP Directive, the European Parliament made this point clear: *"it is essential that consumers are and remain owners of their data and that they have full control of and access to it, in order to be able to verify, correct, delete it and transfer it in the event of switching supplier."*

- On the scope of the energy data rights, this touches on the wider issue of the scope of consumer protection obligations discussed in section 3. However, at a more specific level, given the wide range of potential new participants which a consumer might engage with in energy markets in the future – including aggregators, brokers, comparison sites, data handling companies, other intermediary companies and consumer organisations that help consumers achieve better energy deals – it would seem important that consumers can access all their data on energy use. Put differently, consumers should be able to access data from all energy sources, and provide this to a range of third-parties. This would suggest that such an energy data right might be extended to a wide range of energy suppliers/sources, and not just limited to traditional retail suppliers.

7. Adapting consumer protections for the traditional sale of energy

Chapter overview:

- For traditional suppliers of energy, a potential motivation for adopting self/ co-regulation approaches may be to enhance flexibility relative to the current statutory, one-size fits all, framework. Other reasons firms can have positive incentives to participate in self/ co-regulation measures; include an ability to input and shape regulation, and an ability to elaborate the content of high-level principles in a manner that is coherent with their specific product or service. Governments/ regulators might also have incentives to sponsor a self or co-regulation initiative if this improves the problem of asymmetric market information; increases flexibility in regulatory tools to deliver policy objectives faster, and reduces costs relative to statutory regulation.

- Assessments of industry codes in other sectors (e.g.: telecommunications and banking) highlight a number of aspects of the design and implementation associated with better (or worse) performance. These include: whether the codes are tailored to different products/services and business models; extent of participation in the codes; the ability of the code to adapt over time; and how active the regulator is in overseeing the codes, and ensuring that consumers are, ultimately, adequately protected (i.e.: the 'regulatory posture' adopted).

- The survey of other sectors and jurisdictions suggests a number of possibilities for how the consumer protection regulatory frameworks for the traditional sale of energy could evolve in Australia. Two general ways in which the frameworks could be adapted are: (i) a shift towards a greater reliance on co-regulatory arrangements, where the regulator remains responsible for some tasks (such as approving and overseeing codes) and the industry is responsible for developing and implementing codes; and (ii) a shift towards a more principles-based approach which could combine high-level principles with prescriptive rules in specific areas.

- Specific areas where the NECF could change or adapt to market and technological changes are: (i) making information provisions less prescriptive to reflect the fact that consumers increasingly communicate through digital means and in real-time (e.g.: suppliers might be placed under a general obligation to communicate in a way most suited to the customers' needs and requirements, but be required to offer a default bill format if the consumer does not choose to be contacted in another way); (ii) making informed consent process less prescriptive and more 'outcomes focussed' (particularly where such prescriptive requirements might be limiting the take-up of new products or switching supplier), while recognising the potential for new risks; and (iii) allowing consumers on *solicited* retail market contracts to be able to opt-out, or waive, their right to a cooling-off period (e.g.: they may elect to do so, for example, where they wish to expedite the transfer of supplier).

276. This section builds on the discussions of foundational principles in section 3, and the comparative analyses of other sectors and jurisdictions in sections 4 and 5, to focus on consumer protection frameworks for the traditional sale of energy. Specifically, it:

- addresses a set of specific questions identified by the AEMC relating to industry co-regulation and self-regulation arrangements.
- considers whether some elements of the existing consumer protection framework for traditional sale of energy under the NECF need to change or could be improved, such as in relation to information provision requirements; explicit informed consent processes and cooling off periods.

7.1 Key questions on self-regulation and co-regulation approaches

277. All of the questions below seek to explore aspects and dimensions of self- and co-regulatory approaches, and the merits or effectiveness of such approaches. When considering the merits or effectiveness of particular regulatory approaches, it is often most fruitful to adopt what is sometimes referred to as a comparative institutions approach. [189] This approach recognises that, in practice, all regulatory approaches have strengths and weaknesses, and the effectiveness of any one approach can depend on how it is applied, and the context in which it is applied.[190]

278. This point is sometimes overlooked in policy assessments and debates about different regulatory approaches, where a 'flawed' form of regulation is often compared to an ideal (or textbook) form of regulation (where it is assumed, for example, that there is perfect monitoring and enforcement, and no potential for regulatory capture). In practice, there is arguably no 'ideal' regulatory approach, and problems of undue influence/capture, poor monitoring and weak enforcement can arise under self-regulation, co-regulation and mandatory regulation. The appropriateness of a specific regulatory approach will therefore depend substantially not on abstract conceptions, but on an assessment of how effective a system of regulation is likely to be in the context in which it is to be applied.

(i) There are other markets, such as telecommunications, where coregulation is used to provide consumer protection. What are the key factors that enable self-regulation or co-regulation to work or not work well in different industries?

279. Some factors which can contribute to the effective operation of self-regulation and co-regulation have already been introduced in section 3 above. Building on this discussion, as well as more general insights, table 33 below sets out some of the other factors which are seen as contributing to the effectiveness of self- and co-regulatory approaches.

[189] This approach has its origin in the work of Demsetz (1969) who drew a distinction between a 'nirvana approach' and a "*comparative institution* approach in which the relevant choice is between alternative real institutional arrangements.

[190] Specifically, alternative regulatory approaches can create different incentive effects for firms, involve different transaction costs, and have different monitoring and sanctioning processes.

Table 33: Factors that can contribute to the effectiveness of self and co-regulation

Alternative	Specific protection
Wide participation in development of regulation	• Self and co-regulatory arrangements are most effective when there is wide participation in development of regulatory rules and codes. This includes not only industry but consumer representatives and other stakeholders. • Such wide participation allows a broad range of perspectives to be reflected in the regulations. In turn, this can give balance and legitimacy to the approach and to the rules.
Large number of suppliers sign up to code	• Self and co-regulatory approaches are typically more effective the larger the number of relevant suppliers (of a similar product/service) that participate in the code. • Wide coverage avoids potential gaps emerging which could be detrimental to consumers. • It also reduces the potential ability of some suppliers to free-ride off others in a sector.
Allowing for sectoral diversity to be reflected in different codes	• In settings where there is substantial diversity in the activities or business models of different participants, then separate self or co-regulatory codes may be more effective than a single 'one-size fits all' approach. • In the Australian banking sector for example differences between privately owned banks and customer owned banks are reflected in different codes.
Legislative backing	• In essential service sectors it can be important that co-regulatory arrangements are underpinned by framework legislation which sets out (a) a requirement to develop a code or standards (including consultation requirements for consumer or other stakeholders in this development), and (b) general principles for conduct and consumer protection which then provide a framework for elaboration in the Code. • Legislation may, in some cases, specify a role for the regulator in directing the development of codes (and sometimes funding this), approving codes developed by industry, or enforcing aspects of them. • Legislation in some sectors gives codes additional reach by specifying the terms of codes form a part of consumer contracts (e.g.: retail banking). • In the Australian telecommunications sector, legislation specifies that sections of an industry should develop codes, the matters that might be dealt with by industry codes, and factors that ACMA must have regard to when approving a code.
Oversight role of the regulator	• The role that a regulator occupies for co-regulation can be an important to consumer outcomes. For example whether the regulator has to approve a code or not, and the degree of oversight that the regulator exercises over co-regulatory bodies, can influence the effectiveness of the approach. In the retail banking sector, it has been suggested by some that a less-engaged regulatory posture led to poor consumer outcomes. • There may be some critical areas where a regulator needs to reserve the power to regulate or issue its own codes if industry does not develop these. • Even where a self-regulation rather than co-regulation approach is adopted, a regulator might still offer an external endorsement or approval to signatories to that code.

Regulatory ability to request or mandate codes	• Some co-regulatory approaches allow for industry to develop codes in the first instance, but also provide the ability for a regulator to have a reserve power to mandate a code/industry standard in specific circumstances • Similarly, regulators in some areas (such as telecommunications) have an ability to request that an industry standard be developed in a specific area
Effective monitoring	• To be effective self and co-regulatory approaches need to be subject to monitoring to ensure that signatories/participants are complying with the rules. There are different ways in which this can be achieved. • In some sectors where co-regulatory approaches are adopted – such as banking in Australia – monitoring is undertaken by independent bodies (but who are not regulators). In other sectors, such as telecommunications, monitoring can be undertaken by the regulator (AMCA).
Enforcement of regulatory provisions	• A critical aspect of the effectiveness and legitimacy of self and co-regulatory approaches is the ability to enforce the regulatory rules and provisions. As discussed in section 4, different approaches to enforcement have been applied in the banking and telecommunications sectors with varying perceptions of effectiveness.
Variation of rules/codes	• Another important aspect of the effectiveness and legitimacy of rules/codes pertains to how such codes can be varied or changed over time. There are two key elements here: first, who is able to suggest a variation (i.e.: the regulator, consumer groups, industry only), and the process in which variations are considered.
Ability to seek redress	• Self and co-regulatory approaches often involve the establishment of an industry ombudsman to resolve disputes. • These can be independent of the sector and established under regulation (as in telecommunications), or can be established and run by industry. Examples of both approaches can be seen in other sectors (e.g.: telecommunications and retail banking).

(ii) What incentives are necessary to adopt co-regulation or self-regulation for the traditional sale of energy?

280. In section 3, it was noted that there are a number of in-principle well-recognised benefits of self-regulation and co-regulation for both industry and government. Drawing on these insights, this section sets out the general incentives for traditional suppliers and government to adopt such an approach.

281. For traditional suppliers of energy, a potential overarching motivation for adopting such measures may be to enhance flexibility relative to the current statutory, one-size fits all, framework. The general literature on self-regulation also posits a number of other reasons why firms can have positive incentives to participate in self or co-regulation measures, including:[191]

- *Ability to input and shape regulation*: relative to statutory regulation, industry has an enhanced ability to shape and influence rules under co-regulatory approaches. This can allow them to draw on their greater information and familiarity with the sector, including the types of consumer protection issues that can arise, to fashion rules that are better tailored to specific parts of the sector, and deliverable. It can also potentially encourage greater compliance with consumer protection obligations (as rules have not been externally imposed).

- *Ability to elaborate the content of high level principles*: if energy legislation becomes less prescriptive and more principles-based, elaborations of the content of such principles in specific scenarios will invariably be required. This may come in the form of regulatory guidance. Alternatively, industry, through co-regulatory arrangements such as codes, would have an enhanced ability to elaborate and influence the content of regulatory principles.

282. An obvious concern of moving from the current (statutory) NECF type arrangements to one where suppliers of traditional energy products having more control over consumer protection measures either through self-regulation or co-regulation may be that such change would lead to a deterioration in consumer standards/reduced consumer protections. However, again the self-regulation literature posits reasons why this would not necessarily be the case as the adoption of adequate consumer protection measures:

- *Enhances collective reputation*: Traditional energy suppliers might have a collective incentive in protecting their reputation, and maintaining customers who may look to alternative means of accessing energy because of dissatisfaction with

[191] The more general literature on self-regulation posits a number of other reasons why firms might, in some circumstances, find it in their own interest to agree to voluntary regulation initiatives. See in particular, Office of Fair Trading (2009: 1 and 8). More generally, at pages 68 and 69, they list other potential advantages and disadvantages of self-regulation.

traditional suppliers. In this respect, traditional energy suppliers may have incentives to work above 'minimum standards' and to monitor and enforce such standards to ensure poor-performing suppliers are excluded from quality-signpost mechanisms (like industry consumer protection codes) and do not damage the reputation of the industry generally.[192]

- *Maintains broader social reputation:* Traditional suppliers may also have incentives for robust self-regulation or co-regulation to enhance their social reputation in matters other than those relating to quality – e.g.: in treatment of vulnerable consumers, or in terms of energy efficiency. In short, where suppliers collectively agree to take measures consistent with an underlying social consensus, this can be market expanding (and therefore in their own interests). In this respect it has also been suggested that the reputation of an industry is enhanced further where it acts 'voluntarily' in an area of social concern rather than as a result of statutory regulation.

- *Reputation assurance*: if regulation is voluntary, traditional suppliers might have individual incentives to take advantage of the 'recognition' that such voluntary arrangements offer them in terms of being seen to be good corporate citizens. E.g. for marketing purposes, or to improve their public image. More generally, such participation can be important for the 'reputation assurance' of some firms – particularly highly visible firms, who need to manage their reputation and maintain credibility with governments, and a broader range of stakeholders including consumer representatives, communities and workers.

283. Given the essential nature of some aspects of energy services, and States' broad legislative and enforcement powers the notion that government might prefer self/co-regulatory approaches to mandatory regulation might seem counter-intuitive. However, there are a number of reasons why a government/regulator might prefer to sponsor a self or co-regulation initiative than to introduce mandatory regulation:[193]

- *The problem of asymmetric information*: a major difficulty associated with the design and implementation of different regulatory arrangements across all areas is the problem of asymmetric information. The superior information that firms operating in an industry hold relative to a regulator is a principal shortcoming of traditional statutory regulation when designing and applying regulations. In this respect, self- and co-regulation initiatives could mitigate the effects of this asymmetry in designing consumer protections for traditional energy products. In particular, the participatory process associated with co-regulation can allow

[192] See for example, Tirole (1996: 1).
[193] See generally, Australian Treasury (2017:2) which notes: *"Effective industry self-regulation can avoid the often overly-prescriptive nature of regulation and provide industry with the flexibility and agility to adapt the rules to changing circumstances and market conditions. Further, it avoids the potentially time consuming Government approval process associated with prescribing codes into law under the CCA."*.

government departments to learn about the preferences, and operational details, of suppliers in a sector in a more effective way than where regulation is imposed top-down via statutory processes.

- *Speed, cost and flexibility*: government might prefer self/co-regulation to mandatory regulation because of the relative speed, cost and flexibility of the two approaches. In short, there is a perception that, in some settings, self/co-regulation can deliver policy objectives faster, and in a less costly manner, than statutory regulation.

- *Cost-effectiveness*: A preference of government for self-/co-regulation may also be motivated by a perception that it is more cost-effective (i.e.: cheaper relative to outcomes) than statutory regulation. There are two aspects to this point. Firstly, because of a more streamlined process (e.g.: compared to legislative change), self-/co-regulation might reduce the transactions costs associated with negotiating and introducing new regulations for energy products. Secondly, it is sometimes argued that self-/co-regulation can involve lower administrative and enforcement costs than statutory regulation. The general argument is that, unlike statutory regulation, which relies on state enforcement, self-/co-regulatory arrangements can enlist the help of the industry to 'police' itself, and to identify those who are not complying with consumer protection obligations. However, it is very difficult to assess the robustness of these claims and in some cases the lower costs may be attributed to more lax monitoring and enforcement.

(iii) What makes an industry code a successfully used code in other sectors, including telecommunications for example?

284. Section 4 set out the various recent assessments of the performance of the industry codes that are used in the telecommunications and banking sectors in Australia. One interesting high-level insight from these reviews across the two sectors is that, while issues and problems were identified with the codes in both areas, none of the reviews across the two sectors have recommended that the industry code approach be entirely abandoned in favour of statutory regulation (although as discussed there were concerns expressed about how well the code arrangements had protected consumers). Indeed, the Financial Services Royal Commission expressly acknowledged the importance of the banking industry being able to continue to develop their industry codes over time.[194]

285. With this general point in mind, a number of aspects of the design and implementation of the codes in the two sectors appear to have been associated with better (or worse performance). These include:

[194] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019:111).

- *Tailored codes to different products/services and business models*: in both sectors, separate codes have been developed for different types of suppliers and providers. For example, there are different codes for fixed line and mobile providers in telecommunications, and similarly separate codes for banks and community-owned banks in financial services. In short, there has not been a single, one-size-fits all code adopted across all participants in the wider sector.

- *Widespread participation*: in both sectors there appears to be widespread participation in the codes. In some cases, this may reflect the fact that the codes are prescribed mandatory codes (which are legally binding on all industry participants specified within that code) rather than prescribed voluntary codes (which are only binding on industry participants if they agree to 'opt-in').[195]

- *Ability to adapt to change*: the ability of a code to adapt to change appears to be critical to their relevance and effectiveness. This is perhaps most evident in the telecommunications sector where there was a general consensus in one of the Reviews that the majority of existing telecommunications-specific consumer reliability safeguards no longer meet community expectations.

- *Enforcement is critical:* perhaps one of the most important insights to emerge from the reviews in both sectors is that enforcement had been lacking in the past. In telecommunications, there was recommendation that ACMA adopt a stronger 'regulatory posture'. In banking, the Royal Commission recommended that ASIC's role must go beyond being the passive recipient of industry proposals, and moreover, that that provisions relating to the terms of contract contained in the Code of Banking Practice be designated as 'enforceable code provisions' which could be pursued by consumers through the courts.

- *The role of regulator*: as already indicated, across both sectors the role and effectiveness of the respective regulators (ASIC and ACMA), including in approving and overseeing the implementation of the industry codes, was challenged by some parties. In particular, there were concerns raised (particularly by consumer groups) that the regulators had not been active enough in overseeing the codes, and ensuring that consumers were protected.

(iv) What elements in other consumer protection regulatory frameworks could be implemented in the energy market for the traditional sale of energy?

286. The survey of other sectors and jurisdictions suggests a number of possibilities for how the consumer protection regulatory frameworks for the traditional sale of energy could evolve in Australia. Three key features of other frameworks that could be implemented are

[195] On this point, see Australian Treasury (2017).

summarised briefly below.

287. First, and as already discussed, one possible change might involve a shift towards a greater reliance on a co-regulatory approach, where the regulator remains responsible for some tasks (such as approving and overseeing codes) and the industry is responsible for developing and implementing codes. As described in section 4, this approach is adopted in two sectors (telecommunications and banking) which share a number of characteristics with the energy sector, including that they both: involve services that are considered essential; involve multiple suppliers of varying sizes, business models and (in some cases) technologies; and are undergoing market change as a result of new entry and digitisation. As described in section 4, recent reviews of the effectiveness of regulation in both sectors have identified some deficiencies in the current co-regulatory arrangements in the sectors, and if such a shift were to be adopted this would need to be examined carefully. However, it is noteworthy that none of the reviews have recommended the co-regulatory approach be abandoned entirely in favour of a more traditional statutory approach. In addition, it is worth noting that the use of regulatory approaches involving collaboration with industry is common in other areas of the economy where there are multiple suppliers, and for some new products and services that are emerging in the energy sector (e.g.: Solar Retailer Code of Conduct). Indeed, the Australian government has stated that "*effective self-regulated codes are generally the preferred method of addressing specific problems in an industry*."[196]

288. Second, the experience of other sectors – notably telecommunications as compared to banking – suggests that should a co-regulatory approach be adopted in the energy market for the traditional sale of energy, the role and powers of the regulator under the approach should be considered carefully. The design and experience of other frameworks suggest:

- there may be value in setting out the overarching consumer protection objectives or principles in legislation, or binding regulatory directive. This ensures that any codes or rules that are developed by industry must always meet these overarching statutory/mandatory goals.

- the regulator must have adequate powers and resources to be able to monitor and take enforcement action if necessary to ensure that the consumer protection objectives are satisfied. The experience of the banking sector, in particular, highlights the problems when a regulator leaves too much discretion to the industry. Although a regulator should have a role in monitoring/enforcement, these powers could be reserve powers and only triggered if there appear to be deficiencies in the monitoring or enforcement actions of the bodies established by an industry. For example, a regulator might obtain periodic reports from industry/code owners (or an independent monitoring body) on the specific areas where issues have arisen (e.g.: billing problems, interruptions, contractual disputes) to assess where

[196] Australian Treasury (2017:2).

consumer protections are failing and direct/trigger code reviews.

- the regulator should allow the industry to develop codes which flesh-out the high-level principles and objectives in the first instance, but should make it clear that when assessing such codes for approval that it will pay particular regard to how consumer representative views are reflected in the code. This should include the views of representatives of vulnerable consumers, and those with other special needs. Moreover, the regulator might have an ability to insert its own provisions into industry codes, or, as a default, impose its own code if it is not satisfied that the code developed by the industry provides a sufficient degree of consumer protection commensurate with legislative principles. .

- industry codes could operate as 'living' rulebooks which can be adapted and added to over time as specific issues arise. The flexibility to adapt industry codes to changing circumstances, and in response to new problem areas, or market changes making former protections unnecessary, is one of the key benefits of such codes. The ability to request a code or rule change should be open to a wide range of parties (including consumer groups), and an independent and robust process should be put in place to consider such code/rule change requests. The possibility of appealing a decision of the code review panel to the regulator should also be considered.

289. A third feature of other consumer protection frameworks that could be considered in the energy market for the traditional sale of energy is to shift towards a more principles-based approach. The merits of such an approach have been described in some detail in earlier sections of the report, particularly sections 3 and 6. Such an approach is a feature of the regulation of traditional suppliers in the British energy sector, and is also a feature of the co-regulatory approach adopted in other sectors in Australia such as the banking sector where the Code of Banking Practice sets out four Guiding Principles. Should such an approach be contemplated then a number of points should be kept in mind:

- First, as described in earlier sections, in practice almost all of the consumer protection frameworks which adopt a more-principles based approach tend to be 'hybrid' in nature – i.e.: they combine high-level principles with prescriptive rules in specific areas.

- Second, as suggested above, there may be value in setting out the overarching consumer protection objectives or principles in legislation or in binding regulatory directive. This ensures that any codes or rules that are developed by industry must always meet these overarching statutory/mandatory goals.

- Third, and related to the previous points, a shift towards a principle-based approach does not necessarily entail the full abandonment of prescription in certain key areas. For example, certain consumer protections – such as rules about a right to connect or disconnection – may be tightly prescribed in legislation or regulatory directives,

while other protections – such as in relation to billing requirements and marketing rules – might be more open-textured and set out at a high-level. It will then fall to industry codes to provide content/substance to these high-level principles – i.e.: to give guidance as to how they can be satisfied in practice.

7.2 Changes to NECF in specific areas

290. This final section considers whether some elements of the consumer protection framework for traditional sale of energy under the NECF (as identified by the AEMC) need to change or could be improved, such as information provision requirements; explicit informed consent processes and cooling off periods.

(i) Information provision

291. The NECF sets out various rules about the type and nature of information that is provided to customers, and when retailers need to engage with customers to convey or highlight information. Among other things, these information provisions set out rules about: (i) the contents of bills (of which there are 24 requirements) and the form of bills (e.g.: written bills); and (ii) notification 'triggers' which alert customers to significant changes that could impact the cost of their energy.

292. At a general level, consumer protection requirements relating to information are typically premised on two arguments. Firstly, timely and accurate billing information can build confidence and trust in the market by allowing consumers to better understand how, and on what basis, their charges have been calculated. Secondly, such requirements can aid informed switching decisions, by allowing consumers to understand whether they are getting a 'good deal', or whether alternative suppliers offer a better deal. However, such requirements impose additional costs on suppliers, who have to comply with specific requirements and lose some of their autonomy to develop their own billing processes. In addition, such processes may not be fit for purpose as the market evolves and customers interact with third-party suppliers (such as auto-switching providers), and come to interact with information about consumption and billing in a different way (e.g.: through an app on their phone).

293. Whether the existing substantive information provisions for bills or the circumstances in which a customer must be notified of a change remain fit for purpose can only be assessed on the basis of detailed analysis of evidence of their effectiveness (i.e.: do consumers actually pay attention to these various bits of information? does the information and the way it is presented encourage them to search out alternatives? do customers ignore notification statements? etc.) . However, at a general level it is notable that similar types of highly prescriptive requirements are a features of other jurisdictions such as the EU and the UK, and to some degree in the USA (e.g.: Texas).

294. As regards the form of bills and notification requirements, this raises a question about how a supplier can best interact with customers more generally. One possible area where the NECF could change or adapt is to make these provisions less prescriptive and more general in nature, to reflect the fact that consumers increasingly communicate through digital means and in real-time. Specifically, suppliers might be placed under a general obligation to communicate with customers in a way most suited to the customers' needs and requirements, but be required to offer a default bill format if the consumer does not choose to be contacted in another way. This would ensure that customers who wish to interact with their supplier in different ways – e.g.: through a mobile app – can opt to do so, while at the same time protecting those customers who wish to receive a standard written bill. It also provides the option for consumers to receive more frequent notifications and information if they so wish.

295. Adapting the information provisions to allow them to be tailored to different ways in which consumers access information is likely to become more significant as more consumers come to interact with third-parties who manage their energy consumption (such as smart home system providers) or subscribe to third-parties who control their supply arrangements (e.g.: auto-switching providers).

(ii) Explicit informed consent

296. Explicit informed consent processes provide protections for customers to make sure that before a customer enters into a contract or agrees changes to a contract, she or he receives from the supplier all relevant information needed to make an informed decision about whether to enter the contract (or accept the contractual change). Under the current rules, explicit informed consent must be obtained when small customer enters into a market retail contract, including into a prepayment meter market retail contract, but also when a customer enters into various other arrangements. The current rules set out set various requirements to establish whether a customer has given explicit informed consent (i.e.: what the supplier must have disclosed), and how the supplier must record and document that explicit informed consent has been obtained.

297. Explicit informed consent protections are seen as particularly important in contexts where an activity is being opened to competition, as the consumer may not fully appreciate the potential risks associated with the new contractual arrangements (and may historically, not have paid attention to the detail of contracts provided by traditional suppliers on the basis they were not negotiable, or would not seek to exploit them). Informed consent processes may have particular merit where a service/ arrangement is complex or technical, or where a market is undergoing substantial change and consumers may be particularly prone to being 'caught out' by the specifics of new/novel arrangements. In addition, absent such protections, suppliers may, in some contexts, have incentives to exploit the biases and limitations in consumer decision-making (such as limited attention span, or over-optimism bias) towards their own ends by, for example, not drawing attention to the fact that there is an early termination charge associated with termination of a contract. Such disclosures

benefit the individual consumer, and consumers more generally, because the imposition of an early termination charge may minimise the incentives of consumers to switch suppliers, and therefore limit the competitive pressure placed on suppliers.

298. In its discussion paper on the Traditional Sale of Energy, the AEMC poses questions about whether explicit informed consent policies remain fit for purpose given that consumers are more familiar with energy retail competition. In addition, it notes that the mechanics of informed consent processes may not align with use by consumers of third-party auto-switchers i.e. is consent required for each transaction or can global consent be provided to the third party? While these questions can only adequality be responded to on the basis of evidence and analysis, the following general points can be noted:

- Explicit informed consent policies are based on the characteristics of consumers (rather than those of suppliers), and therefore arguably will remain relevant insofar as evidence demonstrates that consumers, in fact, do not fully appreciate or comprehend the potential risks associated with the new contractual arrangements they are signing up to. It follows that the continuing relevance of specific requirements depends on evidence such as: whether consumers have become more familiar and savvy reading retail energy contracts and pre-contractual information; and whether contracts (and pre-contractual disclosures) are evolving to contain less 'small print' and be more user friendly.

- The impact of technological developments and new business models on the need for explicit informed consent protections are unclear. On the one hand, such developments could provide benefit consumer, for example, by automatically switching them onto the best deal/product based on a potentially sophisticated understanding of available contracts/products. On the other hand, some technological developments and business models may raise the potential for new areas of consumer harm insofar as consumers do not fully understand the products and services they are being switched to, or what they are committing to via a third party/representative.[197]

- There is another question as to whether informed consent processes should be prescriptive or more-principles-based. The risk with too detailed prescription is that the process for taking-up new products, or switching supplier, may be unduly bureaucratic and time-consuming for consumers, particularly in the context of consumers being more active in the market. However, establishing a general principle that customers are made aware of all important terms and conditions in contractual arrangements (including all uses of the customer's consent) may create uncertainty for suppliers, and a lack of consistency in how consent is obtained from consumers.

[197] In its vulnerability statement, Ofgem (2019a: 46) notes more generally: *"While innovation has the potential to bring many benefits, we are concerned that it may also have negative impacts on the most vulnerable groups, or that they will excluded and unable to benefit from changes."*

- Finally, as informed consent policies are based on the characteristics of consumers – not the characteristics of suppliers – any obligation to obtain customer consent for all important terms and conditions should potentially apply to all providers who interact with consumers directly. This is consistent with the approach adopted in Britain where, as described in section 5.3, the broad Standards of Conduct that contain enforceable overarching principles that apply to licensees and their representatives in the case of domestic suppliers (which could potentially cover auto-switching providers).

(iii) Cooling off periods

299. Consumers currently have a right under both the ACL and the NECF to reconsider their purchase and potentially withdraw from a contract within a prescribed period of time. Under the ACL, consumers who agree to unsolicited agreements have a 10-day cooling off period during which they can withdraw from a contract without a penalty being incurred. This protection is extended under the NECF to cover both solicited and unsolicited agreements (for market contracts), and the NECF also prescribes certain requirements about how a consumer can notify a supplier that they wish to terminate an agreement, how provisions about a cooling off period must be presented in a customer's contract and requirements about how a supplier must record each withdrawal during the cooling off period.

300. The overarching rationale for such protections is that consumers may act on the basis of poor information or understanding at the time they sign up to an arrangement. As described in section 3, there are various consumer decision making biases which can lead consumers to take impulsive decisions which may not be in their long-term interests, and the purpose of cooling off periods is to allow them time to reflect on such choices. Moreover, as described in section 5, cooling-off periods are a common feature of consumer protection frameworks in the energy sector in other jurisdictions.

301. In its discussion paper on the Traditional Sale of Energy, the AEMC asks whether the current NECF cooling off period provisions remain appropriate for solicited retail market contracts given that: consumers who enter into such contracts may have a greater understanding of retail market competition; consumers are in a greater position to make informed decisions using better data (from advanced meters); switching can now happen within a period of two days (so, as transfer to the new service will presumably not occur until after the cooling off period, this delays transfer to the new service beyond what is logistically necessary); and emerging technologies and business models can allow consumers to switch much more frequently in response to market signals (e.g. auto-switchers can switch their customers' suppliers frequently in response to best market offers, and delaying the transfer of service for cooling-off periods may reduce the benefits of these services)

302. Given that all consumers have a basic protection to withdraw from unsolicited contracts under the ACL, the core question is whether the additional protections provided under the NECF for *solicited* retail market contracts remain relevant. In assessing this question, the following considerations remain relevant:

- First, as with explicit informed consent policies, the rationale for cooling off periods are largely based on the characteristics of consumers (rather than those of suppliers), and therefore remain relevant insofar as consumers of solicited retail market contracts act impulsively and do not fully assess the potential risks associated with new contracts when switching supplier.

- Second, other things equal, it might be expected that consumers that *solicit a new* retail market contract might have assessed the terms of the offer they are soliciting. It might also indicate the consumer is active and engaged, and may be reasonably well informed about the risks and potential benefits of new supply arrangements. In short, the need for additional protections may not be as relevant to these consumers as they may be for less engaged consumers. However, this may not be true across consumers soliciting new products, and there may be perverse incentives if consumers who engage in the market, and investigate new products, lose a protection available to those who don't engage. There may, however, be an argument for consumers on *solicited* retail market contracts to be able to opt-out, or waive, their right to a cooling-off period. They may elect to do so, for example, where they wish to expedite the transfer of supplier.

- In terms of cooling-off periods generally, across solicited and unsolicited contracts, changes occurring in the market may be making cooling-off period less significant. Consumers that find themselves signing up to a bad deal are arguably subject to lower detriment than they were in the past where it was more difficult to search the market, it took longer to switch, and consumers tended to sign up to longer-term supply arrangements – i.e. if a consumer is unsatisfied with their supply contract then the ability for them to exit that agreement is arguably easier (i.e.: transaction costs lower) than it was in the past.

- In addition, the length and nature of the cooling off period provisions could potentially be impeding the market and technology developments in ways which are actually harmful to consumers. As for explicit informed consent policies, the prescriptive nature of cooling off periods provisions may result in a situation where the process for switching supplier becomes unduly delayed and time-consuming for some consumers. In particular, for those consumers prone to status quo bias, this may reduce their incentives to engage with the new ways of switching.

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