



EVC response to the AER on: Review of consumer protections for future energy services Options for reform of the National Energy Customer Framework

December 2022

In response to:

<https://www.aer.gov.au/system/files/AER%20-%20Review%20of%20consumer%20protections%20for%20future%20energy%20services%20options%20paper%20-%20October%202022%2814535486.1%29.pdf>

Introduction

The Electric Vehicle Council (EVC) is the national body representing the electric vehicle industry in Australia. As the market is emerging in Australia, our work is particularly aimed at increasing certainty for investment through policy, knowledge sharing and education.

We represent manufacturers of electric vehicles, energy system actors including generation, transmission, distribution and retail, EV charging and electrical equipment manufacturers, public charging station operators, and many other organisations with a stake in the future involving the electrification of road transport.

The Australian Energy Regulator (AER) is the national regulator for electricity and gas supply in Australia. The AER has responsibility for regulation of energy networks, protecting the interests of consumers through the enforcement of the National Energy Retail Law.

This EVC submission is in response to the AER's paper linked above.

The core EVC position with respect to this issue is that the AER has not demonstrated sufficient justification to extend the NERL and/or NECF with respect to services relating to electric vehicle charging, in cases where supply for the vehicle is wholly financially separable from supply for premises.

Before it could be considered reasonable to expand the regulatory regime associated with essential electricity supply for premises to cover non-essential energy supply for vehicles, evidence of Australian Consumer Law being insufficient to adequately protect consumers

with respect to EV charging services, and the NERL being better suited to provide appropriate protections, should be presented. This should take the form of analysis of actual consumer harms and complaints, to the extent that they exist.

General notes on the paper:

We note that the AER has determined that existing regulatory provisions are likely to be insufficient with respect to ‘future energy services’, but that ‘future energy services’ remains very loosely defined. This may be appropriate in relation to some aspects of this fast-evolving market, where goods and services may not be able to be defined with clarity. However, the provision of energy for electric vehicle charging is a distinct service provision that can and should be specifically considered in any changes to the regulation of energy services.

The transition to EVs, under the **existing** regulatory arrangements will by default result in NECF protections being applied to vehicle fuel for the majority of consumers. This is because the majority of energy for vehicles will be delivered in people’s homes, behind a meter and in a retailing arrangement that is already covered under NERL/NECF. This constitutes a massive increase in general protections across the majority of consumers over the status quo, where consumers do not enjoy NERL/NECF-style protections around the procurement of fuel for their vehicles. This shift is already underway and is going to continue under BAU conditions. Before we extend consumer protections in the EV services domain further again, we should pause to see if any significant consumer harm is actually occurring.

Our first observation is that all services, energy related or otherwise, are covered under the ACL, and that some services within the energy domain are covered under NERL and NECF. No commercially supplied services are unregulated. There are likely to be some ‘future energy services’ where ACL is not sufficient, and additional regulatory coverage, potentially through an expansion of NERL and NECF, would be warranted, but it would not be appropriate to consider expanding NERL and NECF to ‘future energy services’, without **first** clearly defining the services, and then determining **which ones** warrant enhanced protection requirements, and which additional protections are necessary.

As an example – the provision of EV charging services to consumers in public is currently not within scope of the NERL or regulated under the NECF. It is a service analogous to the sale of petrol or diesel from a consumer protection standpoint, and the ACL has proven to be sufficient from a consumer protection standpoint in this domain. The provision of an EV charger installation in a standalone domestic home, under a contract that locks the consumer’s total domestic energy use to a specific supplier, would be a different matter entirely – but would already fall within the purview of the NERL and NECF, because it includes the domestic supply for the premises.

It should be clear from this pair of real world use cases, which between them cover the vast majority of energy supply to EVs, that it would not be appropriate to treat all EV related services the same way. Along these lines, we note from page 7, “...*the details of how and where to draw the line (for example which types of new services and products should be regulated) remains to be determined*”. This has the right sentiment but misses the point that all commercially provided services and products are regulated.

We note from page 4, “*Currently, the NECF regulates entities that sell energy to consumers at premises.*” This same imprecise use of language was included in the original AER issues paper on this topic, which said, “*Where an EV charging service provider sells electricity to*

the end customer at their premises (household or business) then this will likely be captured under the NECF". The language of the NERL is not 'at premises', it is 'for premises'. The vehicle is not a premises, and this has been historically recognised by the AER:

Quoting from page 51 of the current NSP exemption guideline (version 6, March 2018):
"Under the National Energy Retail Law (s. 88), a person requires authorisation or exemption for the sale of energy to a person for a premises. As a vehicle is not a premises, the AER does not regulate the sale of energy for vehicles."

We would ask the AER to bear this in mind as this work progresses. Charging for electric vehicles is a service already offered in the market, and has already been considered by the AER, and appropriately been excluded from the scope of the NERL. To the extent that the AER wishes to increase the scope of their regulatory reach to capture new market activity potentially posing new consumer risks, it should be clear that energy provision for electric vehicles is not a new service, but one that has been considered by and deliberately excluded from the scope of the NERL. Any change to this position should only be based on evidence about existing arrangements for existing services not being sufficient.

Relating to section 1.5, Regulating new energy products and services:

"The complexity of the future energy market is likely to be overwhelming for many consumers"

The complexity of the whole 'future energy market' may well be too much for consumers to understand, but the individual elements for EV charging services are simple. The majority of energy delivered into electric vehicles in Australia will be either:

- 1) In the home, downstream of an existing energy meter with the bills going to the homeowner in a manner covered already under NERL and NECF (or equivalent local instruments),
- 2) In the home in multi-residential buildings, with varying arrangements for payments, for example involving a body corporate, and regulated in the same way as other services within body corporate environments, or
- 3) At a public EV charger, with payment made by app or credit card for kWh consumed or time spent charging.

Suggesting that the procurement of energy related services specifically associated with EV charging will be overwhelming for many consumers is demonstrably not correct; consumers across Australia have been able to adopt EVs and manage the charging requirements associated with them. Like in the market for petrol, where prices change across locations often on a daily basis, the competitive landscape leads to complex information being available to consumers to make buying decisions. As time goes on, that can be expected to give rise to services that allow consumers to quickly shop for the best deal for their circumstances.

"The line between NECF-protected services, and non-NECF-protected services will become increasingly blurred"

This may be less of a concern for a distinct service like the provision of energy for EV charging, which so far has been clearly delineated as not being covered by the NECF.

Outside of the energy sector, there are a very wide array of ombudsmen and dispute resolution mechanisms, which consumers manage to navigate when needed. Within the

energy sector, at a state-by-state level processes and rules vary widely. It is demonstrably not necessary for all services to fall under a common dispute resolution approach.

What will be important is clear delineation between NECF-protected services, and non-NECF-protected services. This could be supported by clearly defining the future energy services under consideration and then working out based on clear rules (such as the current NERL) which area they fall into. For the avoidance of doubt, the view of the EVC is that if NERL/NECF does not explicitly apply, then it does not apply, and ACL is the appropriate protection framework.

The EVC observes that the models as presented in this consultation paper presents a pathway to the reduction of clarity around this delineation. The application of regulation by way of broad principles, with interpretation of these principles by way of guidelines subject to amendment over time by the regulator, would likely **be the cause** of the blurring of the lines between NECF-protected services and non-NECF-protected services.

“The AER’s risk assessment to date indicates existing protection frameworks are unlikely to be adequate”

With respect to the work done to date by the AER regarding EV charging in this process, the EVC notes that the risks referable to EV charging explored in the issues paper were not aligned with real world experience or practice. We unpacked this at length in our response to the last phase of this work and provided detailed critique.

In the EV domain, rather than relying on the results of a risk assessment undertaken without reference to real world consumer behaviours or outcomes, the EVC would encourage the AER to instead gather data from the various ombudsmen to establish what actual consumer harms are occurring, which require further expansion of consumer protection regulation.

This should include both complaints made to electricity ombudsmen in relation to EV charging, whether those complaints are within scope for the ombudsman to address or not, as well as complaints made about EV charging under the ACL. This would present an opportunity to assess what regulatory frameworks may be best suited in relation to the provision of energy for EV charging, and how they may need to be expanded, in an evidence-based manner.

We also suggest further industry consultation to be able to utilise real data about actual consumer behaviour, rather than relying mostly on hypothetical scenarios.

This approach would minimise the risk of regulation doing more harm than good, by imposing a regulatory burden that drives up costs for consumers, and increases barriers to entry resulting in less competition. We are at a point today of approximately 70,000 EVs being on Australian roads – every driver is using energy related services relevant to those vehicles already.

Feedback with respect to the models:

Model 1 (questions 1 to 4)

The example principles (access to energy, access to competition, energy interoperability) are very broad, and loosely worded. They would lend themselves well to regulatory overreach covering a very wide spectrum of activity, with the onus on the regulated party to

prove that they should **not** be subject to regulation. At a minimum, if this approach were to be considered, the principles should be much more tightly defined to avoid the risk of a blurring around where the new proposed regulations would apply.

“all entities that sell energy to residential customers”, would constitute a significant extension of the NERL, which currently relates to energy supplied for the premises (per above). It is possible to sell energy to a residential consumer, at their premises, for the explicit purpose of charging a vehicle, without this energy going through the dwelling energy meter or individual customer connection.

An example would be an apartment complex, where the supply to the EV charger is from common property power in the car park, and cost attribution is managed by the owners corporation or a third party under strata bylaws. This activity is not currently within scope of the NERL. Decision-making structures within owners corporations often require delayed timeframes for any changes to common property. State legislation regulating entry of owners corporations into supply contracts add a further layer of complexity. These are regulatory burdens that already complicate and delay access to EV charging on the premises for residents of apartment complexes. Adding further regulatory burdens by bringing these services into the scope of the NERL, without any evidence of problems with the current regulatory framework that are intended to be addressed by the change should be avoided.

If applying this model, the EVC would recommend that an exemption class should be created related to the supply of electricity for the purpose of charging electric vehicles, in circumstances where the supply of energy to the vehicle is wholly financially separable from the supply of energy for a premises. This could potentially be done through the creation of a ‘Tier 6’ in Table 2, for ‘Entities that provide energy services that are deemed exempt’. Entry requirements and consumer protections would be ‘per Australian Consumer Law’.

The creation of an exemption along these lines would continue the existing state of regulation. This is appropriate for an established service, where no evidence of regulatory failure has been provided, under circumstances where it is reasonable to expect that such failure would be identified eg through existing ombudsman schemes. This is also effectively the approach that the Victorian Essential Services Commission has re-confirmed under the new General Exemption Order under the *Electricity Industry Act 2000* (Vic) which comes into force on 1 January 2023, confirming that no energy retail licence is required for the sale of electricity used to charge a vehicle.

Relating to 2.1.2 Policy positions and assumptions underpinning Model 1

“...Energy is an essential service...”

We would observe that energy **for premises** can reasonably be considered an essential service. Energy to support private vehicular transport (currently mainly petrol and diesel) is not currently considered an essential service to consumers, and no evidence has been presented so far in this workstream to demonstrate why this should change.

“Where the actions of an energy service provider may affect a customer’s access to energy they should be regulated”

The actions of a public EV charging station operator will absolutely affect the consumer’s access to energy at that particular location, but nothing stops the consumer from accessing energy for their vehicle from somewhere else. The absence of monopolistic supply arrangement enables free market competition at the point of supply, every time the driver

chooses to charge their car through a charger that is accessible to the public. This alone provides adequate justification to limit the level of protections to ACL for this use case, unless systemic failures that ACL cannot deal with emerge.

Relating to 2.1.4 Pros and cons:

“extending the NECF to energy products and services that do not involve a ‘sale of energy’ (as currently defined) creates a risk of over regulation where customer risks are not yet fully known”

The risk of regulating without understanding customer risks or indeed customer expectations in a new space is that **the market**, not just the innovative players in the market, will be stifled. With respect to EVs, Australia is already running at the back of the pack in the OECD on EV uptake, and we have some of the most robust consumer protections around energy in the world. One of the AER’s strategic objectives is to support the energy transition – we would consider over-regulation likely to inhibit the transition to EVs to be incompatible with this objective.

As previously raised, it must be considered that the transition to EVs, under the **existing** regulatory arrangements, will by default result in NECF protections being applied to vehicle fuel for most consumers.

We do not need new regulation created in advance of perceived potential risks around EV charging services to slow uptake of EVs in Australia further. What would be far more appropriate would be review of actual negative consumer outcomes associated with EV charging services, and then the creation of considered and targeted new regulation as and where the ACL proves to be insufficient.

The EVC, as the industry peak body, has already engaged with the energy sector ombudsmen to undertake periodic review of customer complaints to ombudsmen in order to better inform our guidance to industry and government. We understand that to this point, only a handful of complaints have been received, but as an industry our strong preference is to conduct ourselves in such a way that additional heavy-handed sector-specific regulation is not needed.

Model 2 (questions 5 to 7).

Model 2 takes the concept of broad principles evinced in Model 1, creates two layers of these principles (market entry and exit, and customer protection) and appears to empower the AER to interpret these layers of principles in order to determine what level of compliance or authorisation is required for a particular kind of activity in the market, for existing, new, and future activities.

Further, this line:

“the AER could be empowered to create guidelines setting out how these principles should be interpreted. Where necessary, the guidelines could be amended to reflect the changing market.”

would mean that there would be no certainty over time for industry that a business model or approach which is legitimate will not suddenly be made illegitimate through the process of a guidance change, rather than a legislative or regulatory change requiring consultation and testing of regulatory impact.

The EV industry has seen this sort of thing happen this year with respect to guidance from fire services, and guidance from the energy distributors who agree and provide the state-based service and installation rules applying to electrical equipment that may be connected to the grid.

In the fire services example, non-public guidance emails issued by fire services to fire engineering consultants have had the effect of preventing building developers from executing EV charging installations that are compliant to all existing regulatory requirements. Opinions expressed in these private guidance notes, without any corresponding evidence being provided, are being considered ahead of independent expert guidance and resulting considered regulations. This is holding back EV charging infrastructure being included in buildings, whether they be new developments or retrofits for existing buildings. This in turn delays uptake of EVs.

In the service and installation rules example, a recent change in the interpretation of the QECM by Energy Queensland has made it unlawful to install the vast majority of EV charging equipment available in the Australian market on general power circuits. The expected result is that the organisations inclined to comply with the rules will stop installing EV charging hardware. Some smaller organisations that ignore the rules may pick up the work.

Where organisations like the fire services, the energy distributors, and the AER have regulatory authority, and the ability to write guidelines that have the practically effective force of regulation, market outcomes have shown that there needs to be far better checks and balances in place than, *“the guidelines could be amended to reflect the changing market”*.

This model is not quite carte blanche for the regulator to do as it wishes (that would be model 3), but it's pretty close. Business would have no certainty with regard to the regulatory environment over time and would have no choice but to factor in the risk of additional ad-hoc regulation into their product development and go-to-market plans.

This model is not suitable for application to the energy services needed for the EV sector.

Regarding 2.2.2 Policy positions and assumptions underpinning Model 2

“Prescriptive legislation is difficult to future-proof.”

This is 100% correct. If the practice that one is trying to write rules or legislation for is not understood, writing the rules is very difficult to do well, and very easy to do poorly. It's far better to observe the emergent practice, until it is properly understood, and then write the rules, unless the failure mode and harms are likely to be catastrophic.

For the avoidance of doubt, the EVC is very much in favour of robust electrical safety related rules. We are not arguing in favour of de-regulation with respect to electrical safety, where under-regulation costs lives, results in structure fires, and can challenge grid stability. The regulations contemplated here, however, are not solving for that type of harm – they're looking at limiting small potential financial losses that may result in future, from business practices that don't exist yet.

If there are significant harms emerging, sufficiently close observation will show those harms early enough that legislation can be written promptly. If the harms are serious enough, the practice can be outlawed.

The failure mode with embedded networks, which should be learned from, is that regulators and legislators took years to adequately respond to actual consumer harms. Regulators and legislators should move faster in response to actual harms, rather than attempting to move in advance of potential harms, or attempting to grant themselves the power to respond at any time without due process.

Model 3: questions 8 to 10.

Model three is based on new powers given to ASIC in 2020, which puts a significant onus onto the service provider to prove that they're operating in the best interests of the customer, and enabling the regulator to compel the service provider to change their product where the product *“has resulted in, will result or is likely to result in significant consumer detriment”*

The context of the provision to ASIC of these powers was the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Many industry players in that sector had comprehensively and deliberately deceived their customers for financial gain, up to and including billing deceased persons for ongoing service delivery.

In response to that type of behaviour, granting carte blanche to the regulator to clean house is still a very serious call, but could potentially be considered appropriate. Given how new these powers are, it will take some time to understand if they are effective in practice.

With regard to services related to EV charging in the energy sector, there is no evidence of inappropriate or illegal practices remotely approaching the egregious conduct brought to light by the Royal Commission. To the contrary, a tight regulatory framework to protect consumers exists that is much more prescriptive than the ACL. The AER as regulator is active and well-resourced to enforce that framework, also liaising with the ACCC in relation to ancillary areas of consumer protection. Further, as previously noted, increasing EV uptake will already extend protections under the NERL for large amounts of energy bought by consumers for EV charging, where this occurs in the context of energy being provided to a premises. Giving the AER this much power over newly emerging energy-related services, including EV charging, in the absence of widespread industry misconduct not addressed by current regulatory frameworks, is not appropriate in the view of the EV industry

This model is not appropriate for regulation of energy services related to EV charging.

With regard to 2.3.2 Policy positions and assumptions underpinning Model 3

“the most important aspect of regulation is to ensure consumers receive good outcomes”

The risk with model 3 is that organisations that wish to follow the rules and have the resources to develop good market solutions and support them may find the regulatory requirements too burdensome, and may choose to not enter the market as they consider that they cannot profitably operate.

The gap in service delivery could be filled by organisations that are less concerned about following the rules. They may invest less in regulatory compliance in relation to consumer interfaces and in general. This could result in poorer consumer outcomes.

In the EV space, the result could be a combination of retarded EV uptake and an increase in the numbers of EV driving consumers simply disengaging from specialist service providers, by plugging their car into the 10 Amp or 15 Amp powerpoint on the garage wall.

Future EV sector energy-related services, and in conclusion:

If we look to the anticipated future of EV sector energy-related services, Vehicle to Grid (V2G) is worth consideration. This is the concept of using EVs as flexible batteries that can feed energy back into the grid as needed. It is a significant element of the dispatchable supply in the AEMO ISP under the step change scenario out to 2050, but it is insignificant today. We unfortunately still have substantial regulatory difficulties with respect to the development of a viable vehicle to grid market in Australia. Most importantly, the technical standard (AS4777) is not fit for purpose, the product approval scheme for inverters (run by the CEC) will need re-working after the standard is fixed, and regulations will need review to ensure that DNSPs and retailers develop new network and retail tariffs that support V2G.

The creation of complex new market regulations over the top of these existing challenges will only make it more difficult for Australian industry to get this technology up and running in Australia for the benefit of consumers and society at large.