

On borrowed time? The future of the retail energy market

Dr Ron Ben-David^{1,2}

Professorial Fellow

Monash University

ron.ben-david@monash.edu

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¹ Dr Ron Ben-David holds a Professorial Fellowship with the Monash Business School and is an associate of the Monash Energy Institute and Monash Sustainable Development Institute. He is the principal of Solrose Consulting and a board member at ClimateWorks Australia, the Consumer Policy Research Centre, and the Regulatory Policy Institute (of A-NZ). He is an advisory board member for the Centre for Market Design and a special adviser to Utilities Regulation Advisory. Ron has been a member of the Australian Energy Regulator's Consumer Reference Group and Consumer Challenge Panel. He is deputy chair of the Victorian Gambling and Casino Control Commission and was recently appointed to the Independent Pricing Committee for the National Disability Insurance Agency. Ron has written and presented extensively on energy market- and regulatory design.

² The views expressed in this paper are those of the author alone, and not the Faculty or its staff.

GLOSSARY

Consumers	In this paper, the term “consumer” refers to a party who is connected to, uses and relies on the energy system. For the most part this paper concerns itself with ‘small consumers’ – typically, households, and small businesses and other small organisations.
Energy	In this paper, the term “energy” primarily refers to the electricity used by consumers (defined above). On occasion it may also refer to reticulated gas used by consumers.
NEM	The National Electricity Market. Strictly speaking, the NEM refers to the wholesale electricity market only, however, it is colloquially used to refer to the entire supply chain of service providers (generators, networks and retailers). This paper uses the term in the latter sense.
NEO	National Electricity Objective states the objective of the National Energy Law (NEL) is “to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity..”
Regulation	Refers specifically to ‘economic regulation’ which seeks to promote economically efficient market (or market-like) outcomes.
Regulators	Refers to state, national or federal economic regulators, rule makers, market operators, and on occasion, policy makers and legislators.
ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Market Regulator
CER	Consumer Energy Resources (alternatively, DER
DER	Distributed Energy Resources
EV	Electric Vehicle
NEL	National Electricity Law
NER	National Electricity Rules

Introduction

Thank you for the invitation to present at this conference. I am grateful for the opportunity.

I don't work for a retailer. I don't have any financial interests in a retailer. I am not here to lobby for retailers. Likewise, I am not a consumer advocate and have no interest in advocating on their behalf. There are others who are much better placed than me to do that. Nor am I an energy market regulator. That is in my past.

I am, however, someone who sees the entire purpose of the energy market and regulatory framework as existing in service of the citizenry – not investors, not innovators, and not “the system” (whatever that really means). My interest – what I write and think about – lies in understanding and debating how the energy market is designed and regulated, and what that means for consumers. All consumers.

My presentation today is made up of a series of snapshots, or different perspectives, of what it means to be a retailer, a consumer and a regulator during the “energy transition”. Toward the end of the presentation, I'll draw these threads into a picture of where, I believe, the consumer facing energy market is heading *and* where I think it needs to head.

I have written a short paper in support of today's presentation and will make it available in the next day-or-two.

But first, some history – for those that do not know history cannot be entrusted with the future.

1. Competition is better than not

Has anyone here ever wondered how come we have retailers in our energy market? After all, for most of electrical history, there was no such thing as an energy retailer. They started appearing in Australia almost thirty years ago and have since become so entrenched in our conception of the energy market that it seems like they have always been there; that they are part of the natural order of things. But they are not.

Looking out at the audience today, I suspect most of you have never known anything other than an energy market with retailers – so I suppose, there has never been a reason for you to wonder about why retailers exist. Their presence in the market feels as natural as clouds in the sky. But that is wrong. Unlike clouds in the sky, there is nothing natural about the retail energy market.

Unlike other consumer markets, the retail energy markets is not a market that emerged over time. It did not emerge through a process involving producers and consumers negotiating the terms of exchange. Instead, it is an administrative invention entirely defined by pages and pages of rules and regulations. Nothing can [legally] happen in

this market that is not enabled and permitted by all those pages of rules and regulations.³

So why was this market invented, and by whom?

The answer to those questions lies back in the 1990s and 2000s. There's no time today to recount the history of the national electricity market but it starts with a major reorientation of microeconomic policy in Australia.⁴ Back in those days, economic policy underwent an extraordinary reset. The focus of economic policy across the political spectrum was on now introducing competition into services which were either previously provided by the state or protected by the state.

An enormous amount of work went into disaggregating (and often privatising) the electricity system into a highly competitive wholesale market and a regulated, natural monopoly network sector. In comparison, very little intellectual effort went into thinking about the retail end of the market. In fact, the motivation for creating retail competition was quite simple – I daresay, quite simplistic. It went something like this: Competition is better than no competition, so let's create retail competition.⁵ To be honest, that was about it. No-one really contemplated what retail competition was expected to deliver – or how it served the “long-term interests of consumers”. I'll return to the long-term interests of consumers shortly, but first, let's cast our minds back to the 1990s and ask: What would energy retailers do?

The answer is pretty simple. Retailers would run billing and payment systems, manage customer complaints and payment arrangements, they would pass through regulated network costs, and they would intermediate between customers and the wholesale market. Now think about it. What competitive advantage can be extracted from those 3-4 functions? I dare say, not much.

Within *and beyond* these core functions, the retail market was expected to be innovative. After all, if it is a competitive market then surely it must also be innovative – though no-one really knew what that meant.

If you go back and have a look at any of the “competition reviews” conducted by the AEMC between around 2007 and 2019, you'll see how desperately the commission latched on to any sign of anything that might look like innovation by retailers. Looking back, it's almost comical what was cited as evidence of innovation.

When I became chair of the Essential Services Commission here in Victoria in 2008, I had well-and-truly drunk the competition Kool-Aid. I too was convinced retail competition was a wondrous gift bestowed upon consumers. But slowly, slowly, my rosy view of the market faded. Perhaps my most famous (or rather, infamous) paper came in 2015 when I stood up at an energy conference and started questioning whether

³ Ben-David (August 2024)

⁴ See Ben-David (June 2023) and Ben-David (July 2024) for further discussion on the history of the national energy markets,

⁵ Ben-David (October 2024)

the retail energy market really was competitive – or whether it just looked competitive.⁶ I questioned whether the retail energy market was delivering genuine benefits to consumers. I postulated that retail competition was actually leading to higher prices rather than lowering them as you might expect competition to do.

From that day onwards, the energy industry, through its lobby group, had it for me. My fellow regulators were horrified that I should be questioning the wonderful gift of retail competition. The policy department was furious that a regulator should be questioning such things. The only people who were not enraged by my observations were Ministers. Why? Because they knew something was wrong. Their constituents were telling them so.

2. The morphing of consumers and the complexification of contracts

But that was then, and this is now; and now is very different to then. Back then, electricity consumers were only required to shop around for the best price. And for the most part, price just consisted of a daily supply charge and a single (or flat) usage charge. Now, everything is changing.

A few months ago, I published a paper tracing how, until the 1990s and 2000s, consumers were viewed as disinterested and passive “takers” of electricity – where system load was simply the sum total of consumers’ countless unconscious decisions to use electricity as they went about their daily lives.⁷ Then along came the regulators who decided it was necessary to convert consumers *en masse*. With the wave of the regulatory pen, consumers were converted from mere takers **of** electricity into “shoppers” **for** electricity. Since that time, the message *ad infinitum* to consumers has been that they should shop around for a better deal.

It's worth asking why regulators started treating end users as shoppers rather than takers. It goes back to my earlier observation about the regulators’ presumption that competition is necessarily better than no competition. Consumers-as-shoppers was the necessary corollary to the regulators’ pursuit of a competitive retail market. In other words, if the regulators believed in retail competition on the supply side, then they had to believe that consumers were interested, motivated, and free to shop around on the demand side. And let me stress what I just said. This is what they *believed*. Or more accurately, this is what they *assumed*. Even after 20+ years of retail competition on the supply side, all the evidence points to the undeniable fallacy of this assumption about the demand side. And it’s not just reports from learned authorities that exposes this fallacy.⁸

⁶ Ben-David (July 2015)

⁷ Ben-David (July 2024)

⁸ For example, see ACCC (2023) *Inquiry into the National Electricity Market. December 2023 Report*. December. Available at: <https://www.accc.gov.au/about-us/publications/serial-publications/inquiry-into-the-national-electricity-market-2018-25-reports/inquiry-into-the-national-electricity-market-report-december-2023>

Think about this for a moment. For many years, the industry lobby group has also urged consumers to shop around for a better deal. Who's ever heard of an industry lobby group doing *that*? Let's face it, the industry played the regulators like a fiddle. For their part, the regulators failed entirely to recognise the unashamed cynicism motivating the industry. Instead, the regulators saw the confluence of regulatory and industrial messaging as proof that they had succeeded in creating a competitive retail energy market; and it reinforced their determination to protect what they had created. At various times, I have referred to confluence of regulatory and industrial interests as a "regulatory protection" racket and signs of a "regulatory-industrial complex".⁹

Of course, the story doesn't end there. The market is on the move.

The energy transition is upending the energy market. New technologies and new business models are presenting consumers with novel contracting options. No doubt about that. But it is also making the consumer energy market more complex for consumers to navigate as they search for the best way to contract in the market. I have previously referred to this phenomenon as the "complexification" of the consumer-facing energy market.¹⁰

The AEMC now refers to consumers as "market participants".¹¹ Consumers are no longer viewed or treated as people who just use energy, pay for it, and hope not to pay too much. The regulatory system now treats them as market participants who trade their load, their production and their storage. Consumers are now treated as "traders" – traders who will navigate the market in search of the contract that best addresses their trading preferences.

No doubt, some or many consumers will be proficient traders. But, history tells us that many or most consumers will enter dud contracts that will not be in their best interests – that is, they will be bearing risks they do not understand and/or cannot manage. The risk this presents for consumers will be like the so-called "loyalty tax" but on steroids – if not worse.

As retailers, you will not be able to resist the commercial pressure to transfer market risk to your customers if you can get away with it. In fact, you would be doing your shareholders a disservice if you did not offload that risk on to unaware customers.

As the energy market becomes more and more volatile – and therefore more risky for anyone exposed to it – including retailers – the gulf between commercial imperatives and a trustable retail energy market widens ever-further.

⁹ See Ben-David (June 2016) and Ben-David (November 2018), respectively.

¹⁰ For example, See Ben-David (July 2024)

¹¹ AEMC (September 2023) *How the national energy objectives shape our decisions*. Section 3.1.4. <https://www.aemc.gov.au/sites/default/files/2023-09/Publication2%20-%20Guide%20to%20AEMC%20decision%20making%20-%20Sep%202023.pdf>

3. Regulatory panic sets it

Over the past few years, I have watched a regulatory and policy panic slowly set in with the dawning realisation of the so-called, “energy trilemma” involved with transitioning to a state of reliable, affordable and clean energy. The problem with this trilemma is that it is about the electricity system, not the people who use it. The trilemma says nothing about consumers or how they will experience the energy transition. It just happens around them; it just happens **to** them.

For the most part, the regulators have tied themselves to the mast of efficient, cost-reflective price signals to motivate consumer behaviour and investment. That is, consumers are assumed and expected to respond to efficient, cost-reflective price signals with the same predictability as the energy system responds to, and obeys, the laws of physics.¹² But, by tying themselves to the mast of market-generated efficient price signals, the regulators snookered themselves when it come to the exploding problem of contract complexification for consumers. That’s why, over the past year-or-so, they have looked to pull a rabbit out the regulatory hat. That’s why over the past year-or-so there has been a switch in the regulatory narrative. Suddenly, regulators are talking in ways that we haven’t heard for over a decade.

4. From pillar to post and back again

It appears to me the regulatory and policy communities are now not sure what role they expect retailers to play.

As I’ve already mentioned, back in the early days of the NEM, the role of retailers was viewed as intermediating and managing market risk for consumers. During the 2010s, there was a shift in regulators’ expectations of retailers. The regulators were increasingly sending a message to retailers (and networks) that consumers needed to be exposed to price signals that reflected underlying costs. Indeed, the AEMC celebrated examples of retailers who designed ‘innovative’ tariffs that sent price signals to consumers; and it queried why more retailers weren’t doing so – in effect, the regulator was attempting to jawbone retailers into charging customers more cost-reflective price signals.

Over the course of this year, we’ve started hearing a message coming from regulators that is quite different from the message that has prevailed for the past 10-15 years. There has been some ‘walking back’ from the regulatory drive toward cost reflective *retail* price signals and a re-emergence of the earlier narrative that retailers should manage risk on their customers’ behalf (if that is what customers want).

Having said that, however, the regulatory narrative has not resiled from the view that retailers should be exposed to cost-reflective, dynamic wholesale and network prices.

¹² Ben-David (July 2024) outlines flaws in the idea that there is an objectively ‘true’ way to calculate reflective tariffs. This paper explains why tariffs –network and retail – are always and everywhere a subjective phenomenon involving judgements about the distribution of benefits, costs and risks.

But this creates a new set of risks and costs as those dynamic input prices become increasingly volatile and potentially harder to manage. Indeed, the ACCC has foreshadowed a thinning of the hedging market while the ECA has questioned the need for, and provenance of, network hedging products.^{13,14} At this stage of the energy transition, the concerns raised by the ACCC and ECA seem reasonable.

So let's just sum this up.

The regulators are wanting retailers to face ever-more cost reflective and dynamic input prices but they also want retailers to shield consumers from that volatility. At the same time, retailers' options for managing these risks appear to be narrowing. And at the same time, the consumer facing energy market is complexifying to the point of incomprehensibility for many or most consumers. And to top it off, there's a political expectation (or is it a political promise?) that the energy transition will deliver lower and affordable consumer energy prices for everyone.

So, where does all this leave us?

It leaves us with a total mishmash of misaligned objectives, expectations, assumptions and realities.

We are at risk of losing the community's confidence in the energy market and everyone associated with it – and, of course, retailers are on the frontline of that market. Worse still, we are at risk of losing the community's confidence in the entire energy transition, thereby opening the door to promises of seemingly simple solutions that promise to make all these problems go away.

5. Misunderstanding the role of the long-term interests of consumers

Nary a report or decision is published by the energy market regulators that doesn't seek to affirm their fealty to the "long-term interests of consumers". As you would be well aware, this term comes from the three national energy objectives which sit in the national energy laws.¹⁵ For example, the national electricity objective (NEO) states:

The objective of this law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to...

¹³ ACCC (2023) *Inquiry into the National Electricity Market. December 2023 Report*. December. Available at: <https://www.accc.gov.au/about-us/publications/serial-publications/inquiry-into-the-national-electricity-market-2018-25-reports/inquiry-into-the-national-electricity-market-report-december-2023>

¹⁴ Energy Consumers Australia (August 2024) *Analysis: Cost-reflective network tariffs aren't very cost-reflective*. <https://energyconsumersaustralia.com.au/publications/analysis-cost-reflective-network-tariffs-arent-cost-reflective>

¹⁵ The national energy objectives consist of the National Electricity Objective (NEO), National Gas Objective (NGO) and National Energy Retail Objective (NERO) – see: <https://www.aemc.gov.au/regulation/neo>

Take a closer look at the drafting of this objective and what you'll notice is that the operation of the NEO would be totally unaffected if the clause "for the long term interests of consumers" was deleted. That is, the work of the regulators would be total unaffected if the NEO was stated as:

The objective of this law is to promote efficient investment in, and efficient operation and use of, electricity services with respect to...

The NEO's reference of the "long-term interests of consumers" plays no formal role in guiding regulatory decision making. Those decisions are entirely driven by the regulators' interpretation of the term "efficient".

Alternatively stated, the preposition "for" in the NEO signifies that the subsequent reference to the long-term interests of consumers is provided merely as an explanation for *why* the law seeks to promote "efficient investment in, and efficient operation and use of..." The reference to consumers' interests is provided for contextual purposes only. The legislative reference to consumers and their interests does no work.¹⁶

It's not just me saying so. The Full Federal Court agrees.¹⁷

"The provisions proceed on the legislative premise that their long term interests are served through the promotion of efficient investments in, and efficient operation and use of, electricity and natural gas services.

This promotion is to be done "for" the long term interests of consumers. It does not involve a balance as between efficient investment, operation and use on the one hand and the long term interest of consumers on the other.

Rather, the necessary legislative premise is that the long term interests of consumers will be served by regulation that advances economic efficiency."

This is not just a trifling semantic point. It has real consequences for regulatory decision making. The regulators would breach the legislation if they supported an outcome that did not align with their understanding of the economic concept of efficiency – even if that outcome was one clearly supported by consumers.

I once put this question to the AER: If through their consultation processes on tariff structure statements the distribution networks found that consumers clearly favoured a universal flat network tariffs, would the AER approve those tariff statements? I never got an answer.

¹⁶ See Ben-David (October 2024)

¹⁷ Australian Energy Regulator v Australian Competition Tribunal (No 2) [2017] FCAFC 79 (24 May 2017), para 492 – Justices Besanko, Yates & Robertson

6. “We need to build trust”

I have been attending energy conferences for around 15 years and hearing over-and-over-and-over again about how retailers need to build trust with their customers.

How can that be? How can it be that after a quarter-of-a-century since the advent of the retail energy market, the industry has failed to win or generate the trust it desires – or at least it says it desires?

In my heretical paper almost ten years ago, I questioned something that the industry lobbyist and regulator (the AEMC) held up as the symbol of successful retail competition. Switching rates. In those years, Victoria, Australia’s most ‘competitive’ market, had the highest switching rates in the world. For years, the industry and regulator proudly waved around this statistic as a measure of successful reform. Then I came along with the question: If after 15 years of competition, switching rates haven’t declined then isn’t the market failing to match consumer preferences with the offers available from retailers? Isn’t that precisely what a market is meant to do? I postulated that something was structurally wrong with the retail market.

The 3-4 functions fulfilled by retailers I mentioned earlier simply did not provide enough opportunity for the retailers to compete on delivering genuine value to consumers – so, under the umbrella of regulatory protection, the retailers concocted different retail plans in an attempt to differentiate themselves. They flooded the market with offers that did little more than confuse most consumers and led most customers to signing up to ‘dud’ contracts that saw, and still sees them paying too much for their energy.

Competition was not doing what competition was meant to do. Retailers were not doing what competitive retailers were meant to be doing. Retailers were penalising, rather than rewarding so-called, “loyal customers”. Retailers were penalising trust.

Now the market is complexifying and the likelihood of customer bamboozlement is increasing by orders of magnitude. We are about to see the problem of the loyalty tax move to a whole new scale. Let’s not kid ourselves that the retail energy market can be any more trustworthy in the years ahead than in the years gone by. Penalising trust will still be the easiest way for retailers to make a buck.

It might sound like I am accusing the retailers of doing something wrong. In fact, I am not.

Market conduct is unavoidably the product of the market’s design and its regulation. What the market rules and regulations enable and permit, will determine how the market operates and how consumers experience it.

The retailers have been doing, and will continue to do, what the regulatory framework enables and permits (and even encourages) them to do – and the result of that conduct is an industry that is stuck with a chronically low level of trust.

And now, the rules are permitting whole new levels of complexity into the consumer-facing energy market. Why would anyone think trust has any hope of recovering?

7. The future of retail energy. Or not?

These days, it seems there is growing scepticism about whether retailers will even be needed in the future. I suppose it will depend on many factors. Just to name a few:

- Will retailers find a way to create, offer and deliver *genuine* value for consumers – that is, something over and above the 3-4 core functions I mentioned earlier?
- Will technology be able to replace retailers with a black box sitting on a customer’s wall or an algorithm sitting somewhere in cyberspace?
- Will we see new trading platforms that enable off-market transactions, including peer-to-peer trading?
- Will some new form of distribution (and distributed) system manager emerge to provide a whole-of-service offering?

But to my way of thinking the most important factor is what happens to the market rules and regulatory requirements overseen by the AEMC and AER, respectively.

At the moment, the regulators are very focussed on enabling more stuff to happen: CER/DER, EVs, electrification, smart appliances, metering reform, data access and orchestration. That’s all fine and good to do. But, those things do not provide the necessary scaffolding for the energy transition – especially from a consumer perspective.

Contracts are the scaffolding on which the energy transition will succeed or fail.

If the energy transition is to succeed and sustain ongoing community support, then the real challenge for regulators (and policy-makers) lies in the design of consumer-facing contracts.

- What even constitutes an energy consumer and an energy service?
- What are the rights and obligations of the parties to the contract?

And most fundamentally:

- Given the increasing uncertainties and volatilities that lie ahead, which risks will it be reasonable – and socially and politically acceptable – to expect unwary or ill-equipped consumers to manage or underwrite?

We know for a fact that consumers have not been very good at understanding, managing or pricing risk – that is, navigating the retail market – for the past 20+ years. So, why on earth does anyone now expect them to suddenly become proficient “traders” of their load, supply and storage? Why does anyone think consumers will suddenly become proficient at navigating the ever-increasing forest of contracts on offer?

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We have created, and continue to pursue, an energy system managed through multiple markets and regulatory arrangements all of which are producing an array of complicated and/or volatile price signals. In doing so, we are encouraging investors who thrive on volatility to enter the market. At the same time, we have retailers who, for the most part, will be risk averse – at least with regards to their exposure to that volatility. And finally, we have unwary and unsophisticated energy consumers thrust into the most complicated consumer-facing market in the economy; with nowhere to go given the very considerable barriers to exit they face.

We can't just keep pretending – or as economists like to say, “assuming” – that if we just enable more-and-more ‘stuff’ to happen in the energy market then the “invisible hand” will produce a glorious outcome. Twenty-plus years of history does not support such faith. Common sense does not support such faith. The experience of your own grandmother does not support such faith.

We need to ‘get real’. We need to recognise the optimism bias that colours market and regulatory design. We need to deal with the future realistically.

Where that leaves energy retailers is, I'm afraid, anyone's guess.

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A paper I wrote earlier this year was titled, *What if the consumer energy market were based on reality rather than assumptions?* I commend that paper to you.

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— END —

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