

# What will energy consumers expect of an energy and water ombudsman scheme in 2020, 2025, and 2030?

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## Glossary

ACL	Australian Consumer Law
ADR	Alternative Dispute Resolution
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
ANZEWON	Australian and New Zealand Energy & Water Ombudsman Network
CDR	Consumer Dispute Resolution
CEC	Clean Energy Council
Cth	Commonwealth of Australia
DER	Distributed Energy Resources
EDR	External Dispute Resolution
EIA	Electricity Industry Act (2010) (NZ)
ESC SA	Essential Services Commission of South Australia
ESC VIC	Essential Services Commission of Victoria
EV	Electric Vehicle
EWON	Energy & Water Ombudsman NSW
EWOQ	Energy and Water Ombudsman Queensland
EWOSA	Energy and Water Ombudsman South Australia
EWOV	Energy and Water Ombudsman Victoria
NECF	National Energy Customer Framework
NEL	National Electricity Law
NERL	National Energy Retail Law
NERR	National Energy Retail Rules
NESB	Non-English speaking background
ODR	Online Dispute Resolution
OOJ	Out of Jurisdiction
Ombudsman's Schemes	Specifically, the Energy and Water Ombudsman (Victoria), the Energy & Water Ombudsman NSW, the

	Energy and Water Ombudsman Queensland, the Energy and Water Ombudsman South Australia and Utilities Disputes Ltd in New Zealand.
PPA	Power Purchase Agreement
PV	Photovoltaic Solar
The Ombudsman Service	The Ombudsman Service (UK) Ltd
Utilities Dispute	Utilities Disputes Ltd (NZ)

# 1. Executive Summary and Recommendations

The energy sector is currently experiencing its most significant transformation in 200 years. One of the challenges being faced by the sector is how to provide coherent and fit for purpose external dispute resolution services to the consumers who are adopting these new technologies, products and services, without stifling innovation. It is also critically important that the needs of the existing Energy and Water Ombudsman Scheme Members and their consumers continue to be met (see pp. 18-24 for more details). Thus, now is an apt time to consider 'what energy consumers expect of an energy and water ombudsman in 2020, 2025, and 2030?'

The Energy and Water Ombudsman Schemes across Australia and New Zealand<sup>1</sup> are to be commended for their proactive and collaborative approach to considering how best to address this issue. This Research Project represents part of that work.

Small consumers are often vulnerable in periods of market transition. As markets and the regulatory environment change, those consumers whose complaints are currently out of the jurisdiction of the Schemes are often left trying to navigate a complex maze of dispute resolution options in the event of a dispute with their energy retailer or supplier consumers. As our research shows, even with the best of intentions, **the existing alternatives to the Energy and Water Ombudsman Schemes often end up being either unable to satisfactorily resolve an individual dispute or more expensive or time-consuming** (pp.31-37). This places these consumers at a significant disadvantage and can create uncertainty and undermine trust and confidence in the energy sector, more broadly.

This Research Project draws upon an extensive desktop analysis, a survey and over 70 interviews to recommend a number of actions that can be taken to 'future-proof' the Ombudsman Schemes and ensure that they continue to be 'fit for purpose' for the next decade. This report focuses on a number of emerging issues for the Ombudsman Schemes, namely: **jurisdictional coverage, governance structures, membership, funding, operating models** and **new methods of consumer access** to the Schemes.

A key determinant in whether the Schemes will be 'fit for purpose' into the future will be mitigating the risk of inconsistent consumer protections. (See pp. 38-60) We recommend

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<sup>1</sup> The Schemes who commissioned this Research Project were: the Energy and Water Ombudsman (Victoria), the Energy & Water Ombudsman NSW, the Energy and Water Ombudsman Queensland, the Energy and Water Ombudsman South Australia and Utilities Disputes Ltd in New Zealand.

**expanding the definition of jurisdictional coverage** to *'any service relating to the sale or supply of energy, or that may otherwise interrupt the supply of energy or impact upon the sale or supply of it.'* This recommendation reflects the weight of opinion from the full range of stakeholders that we consulted including: existing Scheme Members, prospective Scheme Members, jurisdictional regulators, government entities and energy market institutions, consumer advocates and members of Scheme boards, staff and management. These stakeholders repeatedly stated that they believed that **all consumers should have the right to access a specialised Energy and Water Ombudsman Scheme as a matter of fairness and best practice.** They also acknowledged that resolving disputes through the Schemes was far faster and minimises the costs borne by all parties, relative to pursuing a claim through either a tribunal or court. Other commonly cited reasons for expanding jurisdiction is that it would reduce complexity for consumers, and thereby minimise the potential for reputational harm both to the Schemes themselves, but also their Members and the energy sector more generally. Lastly, there was a very strong belief among many stakeholders that consumers expect that an 'Energy and Water Ombudsman' will have jurisdiction to hear all cases regardless of the source of the electrons. There is compelling evidence to support this belief that consumers believe that the Schemes are 'one stop shops', with increasing numbers of out of jurisdiction complaints being managed by the Schemes.

In respect of those Schemes who do not have **universal membership for licensed water suppliers**, similar arguments were made to those outlined above with respect to energy. For those reasons, we have also recommended that any expansion of jurisdiction consider covering all water suppliers over time.

As part of this Research Project, we evaluated the **present governance structure** of the Schemes and recommended that for the majority of Schemes that this be **maintained.** (pp.61-62) However, we also emphasise the importance of considering **how new members may be incorporated into the existing governance structures without expanding the size of boards.** We have also recommended that Schemes consider having **more suitably qualified independent directors** so that there are fewer vested interests. In this way, Boards could ensure that they have a good skill mix, while also maintaining the current levels of expertise about external dispute resolution, consumer protection and familiarity with conventional and emerging technologies, products and services.

In respect of **membership** (pp.63-70), we have recommended that the Schemes learn from the experience of trying to bring embedded networks into the Schemes. In particular, we recommend that regulators make membership **mandatory** for retailers and suppliers that fall within this expanded jurisdictional coverage. A critical part of this

recommendation is the development of a new category of **umbrella membership** under a **peak body industry body**. We have also recommended that Member's first-line complaint handlers should undertake mandatory training with the Schemes to ensure adherence to a broader regulatory and compliance framework. Consumers should also have a better visibility of the Schemes' brands through **mandated use of the Scheme logo** and advertisement of Scheme membership.

Our research draws attention to the importance of finding sustainable sources of funding for the Scheme. (pp.71-82) To ensure optimal function, Schemes should **retain the current tiered funding model or introduce such a model**. To better cover the costs of an expanded jurisdiction, we have proposed that the Schemes should seek government funding for either a 3 or 5-year transitional period to help bring new members into the Schemes. This funding should be structured such that Scheme Members bear the burden of a higher proportion of Scheme funding over time as government funding declines. Moreover, the availability of **surge funding** should be considered in those jurisdictions that do not currently have the benefit of it.

New technology demands the adoption of **new operating models** to foster consumer trust in the Schemes' external dispute resolution avenues. (pp.83-91) Schemes will have to consider **enhanced technical capacity** and **trial extended operating hours** to meet the growing needs of consumers. Online Dispute Resolution, while helpful on the margins to increase efficiency, may not have the desired effect of cultivating consumer confidence that someone has truly 'listened to' their issue. As part of this plan to encourage widespread access and **raise awareness**, the Schemes should consider a **'know your rights' campaign** for consumers on a jurisdiction-by-jurisdiction basis. (pp.92-100)

In conclusion, the Energy and Water Ombudsman Schemes were initially designed with the intent that they could resolve disputes relating to energy consumers however those disputes occurred. However, if the delineations between conventional and new energy products and services, retailers and suppliers are maintained then in the medium-term the Ombudsman Schemes will rapidly become unworkable as large swathes of the industry will increasingly fall outside of jurisdiction. The transformation of the energy sector is fundamentally changing the nature of the relationship between consumers and the other agents in the market. **A 'fit for purpose' and 'future-proof' Energy and Water Ombudsman Scheme is critical to ensuring that consumers continue to have access to specialised energy and water dispute resolution services moving forward.**

## Recommendations

### Expansion of jurisdiction

1. That jurisdictional competence of the Ombudsman's Scheme with regard to energy be expanded using the following definition:  
*'Any service relating to the sale or supply of energy, or that may interrupt the supply of energy or otherwise impact upon the sale or supply of it.'*
2. That any change to jurisdiction should be made by jurisdictional regulators and require mandatory membership of the applicable Scheme.
3. That Scheme Boards or Advisory Councils be empowered to provide temporary exclusions of jurisdiction to exclude any technology or product which either is not currently commercially available in the Australian or New Zealand energy market (as applicable) and does not present a risk of harm to consumers at the present time.
4. Any temporary exclusion granted should be reviewed annually (or more frequently, as required) to ensure that it continues to remain 'fit for purpose' and that the exclusion should not be removed.
5. That jurisdictional competence of the Ombudsman Schemes with regard to water be expanded such that all licenced water suppliers, regardless of their corporate or municipal status, will be required to become over time a member of the relevant Ombudsman Scheme.
6. Consumers in the energy and water sectors should have access to a single, mandatory Ombudsman Scheme to reduce confusion and complexity and assist consumers to receive redress of their issues.

### Governance

7. With the exception of EWOQ, the current governance structures of the Schemes be maintained.

8. *Where a Board or Advisory Council contains industry representatives, consideration needs to be given as to whether one of those roles should be contestable by a large peak body holding an umbrella membership on behalf of their members.*
9. *Regular skills reviews to ensure that there is a sufficient diversity in the skills of the board directors/ council members should be maintained.*
10. *That increased use of independent directors who may have fewer vested interests be considered.*
11. *That an advisory body/forum/council for new and emerging technologies be introduced to enhance consultation with members who join under expanded jurisdiction.*

### **Membership**

12. *Membership of the Schemes should be on a mandatory basis.*
13. *That a new category of membership be introduced: that of an umbrella peak industry body membership.*
14. *In order to qualify for this membership category, the umbrella group shall establish the following, to the sole satisfaction of the Board or Advisory Council of the Scheme (though this power may be delegated to the Ombudsman):*
  - a. *That it is held in high esteem among the industry and consumer sectors, and provides training for their members;*
  - b. *That it represents more than 50 prospective individual members;*
  - c. *That it is willing to pay the annual fixed fee component;*
  - d. *That its is willing to amend its internal governing rules to require that each of its members: join the Scheme, comply with any request for dispute resolution by a customer, sign a deed of agreement agreeing to pay any variable complaints fees and agree to be bound by the resolution of disputes;*
  - e. *That it will provide facilities for EDR training to be delivered to its Members at its annual conferences or member meetings; and*
  - f. *That it will comply with the Scheme rules.*

15. *All small members (as determined by one or more of: total number of staff employed, number of customers, or income) shall be granted the option, at their sole election, to join either as an individual member or under the umbrella peak industry body.*
16. *That the variable complaint fees for any individual member who has joined under the guise of an umbrella membership shall fall due and immediately be payable upon the resolution of the dispute.*
17. *An additional mandatory requirement on Scheme membership should be imposed, that is that each Member's first line complaint handlers should be required to undertake mandatory Scheme training upon joining a Scheme, with regular refreshers offered from time to time.*
18. *All members should be required to prominently display the Scheme's logo, or the shared ANZEWON logo if one is devised, and provide a hyperlink to the Scheme's website on their own websites on either or both of the homepage and the complaints handling page.*
19. *Schemes should review their practices with regard to aggregation of multiple site holders and consider a more harmonised approach across the jurisdictions.*
20. *All Schemes should advocate for the inclusion of mandatory membership of an Ombudsman Scheme as a necessary qualification in order for a supplier to sell to or supply any consumer under all government-supported schemes.*
21. *The Schemes should strongly advocate for a change in the process adopted by regulators for the grant of exemptions such that joining the Ombudsman Scheme is a pre-condition of application for an exemption rather than a condition imposed following the grant of the exemption.*
22. *Greater oversight is required by the regulators, particularly in the area of monitoring, enforcement and compliance with the conditions imposed after the award of an exemption. Schemes should push to ensure that this happens.*

## **Sustainable funding**

23. *In the jurisdictions with an appropriately tiered funding model, this should be retained, including the separation into fixed fees and variable complaints-based fees. It is recommended that EWOQ, adopt this funding model.*
24. *The approach taken to incorporate the embedded networks is considered fair and should be retained.*
25. *Schemes should consider reviewing in what circumstances they refer back and how much they charge for refer back.*
26. *Schemes should consider providing members with the number of complaints that are deemed to be unreasonable by complaints handlers and analyse the data to ensure that the level does not vary wildly when the total number of complaints falls or increases to ensure a consistency in approach. Members should be given regular feedback in this regard.*
27. *Expansion of jurisdiction should be funded through a fixed three or five-year grant of government funding sought on a one-off basis to support the transition.*
28. *One option for calculating the government funding sought could be: Government funding sought = fixed cost associated with bringing the prospective Members into the Scheme + variable cost (average cost of complaint x the number of out of jurisdiction cases in the previous financial year that would now be within jurisdiction).*
29. *The government funding should decline over the grant period, with industry taking on an ever-increasing proportion of the integration costs.*
30. *The funding sought to expand jurisdiction should cover any additional staffing costs, technology costs, training costs, and other associated resourcing costs, while ensuring that current levels of service and the timeframes are either maintained or enhanced.*

31. *New members may also be asked to pay a small fixed fee in the short-term to ensure that they feel a sense of ownership over the Schemes.*
32. *That the voluntary fee-for service model should be strongly resisted.*
33. *That availability of surge funding should be considered in those jurisdictions that do not currently have the benefit of it.*

### **Operating Models**

34. *The ability of the Ombudsman Schemes to operate as a 'one stop shop,' with no wrong front door for complaints, ought to be continued and factored into funding models if necessary.*
35. *Further MOUs with other organisations to improve the process of warm referrals and transfers should be considered to help facilitate this process.*
36. *Schemes are likely to need enhanced technical capacity to support the introduction of new technologies; where possible the main beneficiaries of this additional technical expertise should fund it.*
37. *Schemes should trial extended operating hours, possibly one night a week. However, consideration needs to be given to the effectiveness of extending operating hours if the complaints handlers cannot offer warm transfers during these times because the Members' complaints handling areas are not also open and nor are the other organisations to which a complaint might be referred.*
38. *The adoption of entirely ODR is not recommended at present because many consumers need to feel that someone has 'listened' to their complaint.*
39. *Web bots and web chat may be an efficient and effective manner of managing initial contact out of hours and helping to carry out the initial filter process and data gathering exercise.*

40. Scheme Members should be required to display the Scheme's or an ANZEWON logo and a hyperlink to the relevant Scheme's website.
41. Smaller schemes may wish to consider the development of a contingency plan to second complaints handlers from other Schemes either to act as a 'flying squad' or to work remotely in order to handle the additional caseload in a timely fashion in the event of a one-off systemic event.
42. If they do not do so already, Schemes should initiate an 'early alert system' to notify the applicable Member when the Scheme receives an inquiry from a consumer or gives a refer back to one. This would enable enhanced service from the Member and may reduce further escalation.

### **Awareness raising**

43. The Schemes should consider a 'know your rights' campaign for consumers on a jurisdiction-by-jurisdiction basis. ANZEWON may wish to consider a national approach to the content of this to save costs, with a final piece at the end being specific to the relevant jurisdiction when consumers are told how they can seek redress.
44. At least some segments of the industry are keen to support awareness-raising efforts, and this should be harnessed.
45. The idea of requiring advice about the Ombudsman's Scheme and being able to take a deadlocked dispute there as part of the 'on-hold' or generic introductory telephone message on Member's complaints lines should be pursued further.
46. Submission and policy work is an essential part of the work of the Schemes and provides significant added value to the Members, regulators and consumers alike. This work will only become more important into the future if jurisdiction is expanded, as Schemes will have wider oversight over the issues within the energy sector.
47. Social media may be another avenue to be explored further, though given the time and risks involved in managing a sophisticated social media presence query whether it would pay off at present.

## 2. The Scope of the Research

### 2.1 What we were asked to do

The scope of the research was defined by the Schemes in the Terms of Reference as follows:

*'What will energy consumers expect of an energy and water ombudsman in 2020, 2025, and 2030?'*

Objective:

To understand the dispute resolution needs of consumers in the energy and water markets in 5-10 years and determine what changes, if any, are required to ensure that the energy and water ombudsman schemes are fit for purpose.

Taking into consideration the stated objective of this work, the researcher should consider the following and provide recommendations/options for consideration by the schemes' Boards.

1. Where do customers expect to go to resolve their energy and water disputes now, and in the future?
2. What are the alternatives for customers to meet existing and emerging unmet needs?
3. Will energy and water ombudsman schemes be needed in 5-10 years' time as the energy and water markets continue to change?
4. Will the current schemes be fit for purpose in 5-10 years? Why?
5. If not, what changes would be required to make the schemes fit for purpose?

This should include a consideration of:

- a. governance arrangements
- b. appropriate scope/jurisdiction of schemes
- c. membership and/or other options for participation in schemes
- d. sustainable funding (including analysis to demonstrate sustainability)
- e. operating models (high level discussion of possible changes required to better reflect different market and customer expectations)
- f. changing modes of accessing the schemes by consumers and strategies to encourage

consumer awareness.

The research should consider the Australian and New Zealand environment.

Any recommendations must support high quality, effective and efficient dispute resolution in accordance with the Benchmarks for Industry Based Customer Dispute Resolution schemes<sup>2</sup>.

## 2.2 What was outside of the scope of our review

The following areas were specifically excluded by the Schemes from the scope of the research:

- Comparison of ombudsman models, except to the extent that the research team forms the view that a particular funding approach may be advantageous.
- Research of technology advancements/possibilities that are not included in available literature/research reports. Accordingly, our research has focused on the scope for the schemes to meet customer expectations in the future, irrespective of the specific technology or industry developments.
- A detailed comparison of the differences between the regulatory regimes in which the schemes operate.

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<sup>2</sup> [http://Benchmarks](#) (Principles and Purposes) and [http://Benchmarks](#) (Key Practices).

### 3. Methodology

This research, which was approved by the University of Sydney Human Ethics Committee (approval number 2019/514), was conducted in three phases:

#### Phase 1: Desktop analysis

In Phase 1, the research team conducted an extensive desktop analysis of the available literature, to understand:

- (a) the existing and currently unmet needs of consumers;
- (b) how emerging technologies and changing models of consumer participation are likely to impact on the energy and water markets;
- (c) how the nature of disputes and consumer protection is likely to evolve; and
- (d) the consequential impact on the Schemes, as external dispute resolution bodies.

This research involved identifying gaps within the present Schemes and options for potential reform (including for governance arrangements, jurisdiction, and membership/participation, sustainable funding and operating models) to ensure the Schemes remain fit for purpose into the future. Throughout this research, examples of international best practice in addressing these challenges, both among the Schemes, and from overseas jurisdictions such as the members of the National Energy Ombudsmen Network, were also examined.

#### Phase 2: Issues Paper

In Phase 2, an Issues Paper was drafted drawing from desktop analysis and our preliminary discussions with representatives of the participating Ombudsman Schemes.<sup>3</sup> This Paper provided a detailed discussion of the issues identified through the desktop research and an indication of the further information/data required, including proposed questions for semi-structured interviews and focus groups with key stakeholders. Two formal written submissions were received in response to the Issues Paper, the first was from the Public Interest Advocacy Centre and the second was from Energy Queensland, representing the interests of both Ergon and Energex.

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<sup>3</sup> Specifically, the Energy and Water Ombudsman (Victoria), the Energy & Water Ombudsman NSW, the Energy and Water Ombudsman Queensland, the Energy and Water Ombudsman South Australia and Utilities Disputes Ltd in New Zealand.

## Phase 3: Stakeholder Consultation

### Online survey of the staff and key stakeholders of the Ombudsman Schemes

Following the release of the Issues Paper, a short online questionnaire using the REDCAP survey software was sent to the Ombudsman Schemes to distribute amongst their staff and key stakeholders on an opt-in basis. The questionnaire focused on gathering qualitative data in an anonymous format on a range of topics including whether the Schemes' external dispute resolution services are 'fit for purpose' in the context of a rapidly changing energy market, jurisdictional issues, changing modes of access and challenges to implementing change.

All five Ombudsman Schemes participating in this research received the online questionnaire, with 24 surveys completed. Each of the jurisdictions was represented in the returned surveys with 9 surveys received from Victorian stakeholders, 6 from NSW stakeholders, 4 from Australian (national) stakeholders, 3 from Queensland stakeholders and one each from South Australia and New Zealand. The respondents represented a range of interest groups including Scheme Members, regulators, Scheme Chairs and board directors, consumer organisations, and Scheme staff in a diverse range of areas including management, operations, policy and front line dispute resolution. The results of these surveys have been incorporated into the analysis in this Report.

### Qualitative interviews and focus groups

At the same time that the surveys were being conducted, interviews were also being conducted with key stakeholders and staff who had been identified by the Schemes as prospective interviewees. In addition to the parties identified for interview by the Schemes, an additional drop-in session was made available for any other interested staff that wished to participate in an interview or focus group with the research team. Over 70 people representing a wide range of stakeholder groups and staff were interviewed in July and August 2019. Interviews were conducted either on a face-to-face basis in Sydney, Melbourne, Adelaide, Brisbane and Wellington, or via telephone or video conference.

The purpose of the qualitative interviews was to enable the collection of rich data focusing on how the stakeholders currently engage with the Schemes and the areas that present opportunities for change to help the Schemes remain fit for purpose into the future. These interviews were based upon a series of consultation points and were also aimed at testing the preliminary recommendations that were being formed by our research team as a result of the survey results and earlier interviews.

Prospective interviewees were initially contacted by email offering them the opportunity to complete the survey and/or attend an interview. Follow-up emails and phone calls were then carried out between the research team between one and two weeks after the initial email. A list of the stakeholders interviewed is attached in Annex 2.

The results of our extensive desktop analysis, survey and qualitative interviews and focus groups have been critically analysed and informed the discussion and recommendations contained in this Report.

## 4. A Rapidly Transforming Energy Market

*'The energy sector has never been more challenging. Technological innovation, the increasing uptake of renewables and customers who are increasingly empowered in their ability to respond in the face of rising prices, continue to drive significant industry disruption. New market entrants are emerging, seeking to capitalise on these technological innovations by offering customers innovative products and services via new business models.'*

Response to the Issues Paper received from Energy Queensland

The energy market in Australia and New Zealand is currently going through a significant transformation. There has been a shift away from the traditional centralised electricity supply model, with the growth of new ways of consumers participating in, and engaging with, the energy market.

The uptake of new technologies in this context has been rapid. In 2019, Bloomberg New Energy Finance predicted that Australian demand for residential battery storage systems would account for 30% of the total global demand,<sup>4</sup> with significant gains also being made in the uptake of PV solar. The Department of Environment and Energy (Cth) has reported that as at 30 June 2019 over 20% of residential households in Australia, representing 2.15 million homes, had PV solar on their rooftops.<sup>5</sup> This is the highest per capita level of penetration in the world, and is predicted to increase further with over 51% of households expected to host PV solar systems by 2050.<sup>6</sup> These developments represent a marked shift for consumers, existing market participants and new market entrants, with one submission to the Issues Paper noting that 'over the past decade, Queensland has seen a 1000-fold increase in the number of distributed energy resources (DER).'<sup>7</sup>

New modes of participation have also been evident in the New Zealand energy market, with residential consumers in 2013 being some of the first in the world to be offered

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<sup>4</sup> Bloomberg New Energy Finance, (22 January 2019), 'Australia to Be Largest Residential Storage Market in 2019, <https://about.bnef.com/blog/australia-largest-residential-storage-market-2019/>, date accessed 29 August 2019.

<sup>5</sup> Department of Energy and Environment (Cth), (2019) 'Solar PV and batteries,' <https://www.energy.gov.au/households/solar-pv-and-batteries>, date accessed 15 August 2019.

<sup>6</sup> Australian Energy Market Commission, 'Energy innovations as solar and batteries approach socket parity,' Media Release 28 June 2019 quoting Bloomberg New Energy Finance, Annabel Wilton, 2018 Australia Behind-the-meter PV and Storage Forecast, 31 May 2018, Sydney.

<sup>7</sup> Energy Queensland, (19 August 2019), Submission in Response to the Issues Paper.

integrated PV solar, battery storage systems and control devices on lease agreements.<sup>8</sup> There have also been developments in terms of innovative product offerings, with the Electricity Authority reporting in their 2019 Report, 'Adjusting to New Zealand's Electricity Future,' that industrial and residential consumers are now being encouraged to engage in demand response through the introduction of spot price contracts.<sup>9</sup>

Other recent developments that are evident in both markets include:

- The wide and increasing prevalence of embedded networks;
- Growth in the provision of bundled services (e.g., energy and water, energy and new technology systems, and new technologies and management and control systems);
- Self-generation and consumer energy trading through the installation behind the meter of integrated residential PV solar and battery storage systems;
- The advent of solar leasing and solar power purchase agreement (PPAs);
- Increased collective action and community schemes such as micro-grids and peer-to-peer trading;
- The development of virtual power plants by existing market participants;
- The increased use of intermediaries such as commercially operated price comparison sites, demand aggregators and resellers;
- The advent of smart technologies, which integrate energy services with other household technologies, relying on the internet of things;
- The growth in stand-alone power systems and the islanding of remote communities;
- Installers, maintenance contractors and designers of new technologies and management systems, increasingly coming onto private property to conduct installations and repairs; and
- The growth in electric vehicles, which, it is predicted, will be able to be used as backup household battery systems within 3 – 4 years (this would currently breach the EV warranty).

At this juncture, it should be noted that the accelerated deployment of many of these new technologies and modes of participation has been facilitated by government support

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<sup>8</sup> Giles Parkinson, (14 June 2013) 'Culture shock: Network offers solar storage leases to customers,' <https://reneweconomy.com.au/culture-shock-network-offers-solar-storage-leases-to-customers-91569/>, date accessed 15 August 2019.

<sup>9</sup> Electricity Authority (NZ), (30 August 2019) 'Adjusting to New Zealand's Electricity Future Report,' <https://www.ea.govt.nz/dmsdocument/23140-adjusting-to-new-zealands-electricity-future>, date accessed 1 September 2019.

schemes. Table 1 below details some of the current government support schemes available to consumers within the participating Ombudsman Schemes:

**Table 1<sup>10</sup>: Selected government support schemes accelerating the uptake of new technologies and modes of participation**

Jurisdiction	Program	Date	Description
Victoria	Solar Homes Package	August 2018	<p>The Victorian Government introduced the Solar Homes Package which includes rebates of \$1.3 billion, on top of the \$74 million already provided, over the next 10 years for:</p> <ul style="list-style-type: none"> <li>• 650,000 rooftop solar systems</li> <li>• 60,000 solar hot water systems</li> <li>• 10,000 solar battery systems</li> <li>• 50,000 rental homes to install rooftop solar.</li> </ul> <p>As of July 2019 interest free loans will be available for rooftop solar installations.</p> <p>For more information see: <a href="http://www.solar.vic.gov.au/">www.solar.vic.gov.au/</a>.</p>
Queensland	Rebates and no interest loans for solar or batteries	January 2018	<p>The Queensland Government has established a \$21 million fund to provide households and small businesses with no interest loans for solar or battery installations.</p> <p>For more information see: <a href="http://www.qld.gov.au/community/costof-living-support/concessions/energy-concessions/solar-battery-rebate">www.qld.gov.au/community/costof-living-support/concessions/energy-concessions/solar-battery-rebate</a></p>

<sup>10</sup> With the exception of the New Zealand data, this table has been extracted from the Australian Energy Market Commission (28 June 2019) 2019 Retail Energy Competition Review: Final Report, 21-24, Table 2.7.

Jurisdiction	Program	Date	Description
South Australia	Solar and batteries installed on public housing	February 2018	<p>The South Australian Government has committed to stage two of the previous government's trial virtual power plant (VPP) plan. Stage two involves the installation of 1,100 solar and battery systems on housing trust properties in South Australia which then could function as a VPP.</p> <p>For more information see: <a href="http://www.sa.gov.au/topics/energy-andenvironment/energy-bills/solar-feed-in-payments/solar-panels-and-battery-scheme">www.sa.gov.au/topics/energy-andenvironment/energy-bills/solar-feed-in-payments/solar-panels-and-battery-scheme</a>.</p>
South Australia	Demand Management Trials	2019	<p>The South Australian Government is funding trials that can show how new and distributed technologies can help make the grid more efficient and reward consumers for managing their own demand. The Demand Management Trials Program is allocating \$11 million of funding towards activities aimed at advancing the use of demand response and distributed energy resources to benefit both customers and the grid.</p> <p>For more information see: <a href="http://www.energymining.sa.gov.au">www.energymining.sa.gov.au</a>.</p>
South Australia	Home Battery Scheme	October 2018	<p>From October 2018, 40,000 South Australian households can access \$100 million in State Government subsidies and \$100 million in loans to pay for the installation of home battery systems. While the subsidy is available to all South Australians, Energy Concession Holders are eligible to access a higher subsidy, ensuring low-income households are supported to access the Scheme.</p> <p>For more information see: <a href="http://www.homebatteryscheme.sa.gov.au/">www.homebatteryscheme.sa.gov.au/</a>.</p>

Jurisdiction	Program	Date	Description
New South Wales	Smart Energy for Homes and Businesses	November 2018	<p>The New South Wales Government has committed \$50 million for Homes and Businesses 2018 to create a 'distributed' power plant, of homes and businesses with smart batteries or air conditioners, with demand response capability of up to 200MW.</p> <p>For more information see: <a href="http://energy.nsw.gov.au/renewables/clean-energy-initiatives/smartenergy-homes-and-businesses">energy.nsw.gov.au/renewables/clean-energy-initiatives/smartenergy-homes-and-businesses</a>.</p>
New South Wales	Empowering Homes Program	2019	<p>The New South Wales Government made an election commitment to provide up to 300,000 households across NSW over 10 years with a no-interest loan to purchase solar, inverter and battery systems.</p> <p>For more information see: <a href="http://nsw.liberal.org.au/candidates/gladysberejiklian/news/articles/EXTRA-BILL-RELIEF-WITH-SOLAR-ENERGY">nsw.liberal.org.au/candidates/gladysberejiklian/news/articles/EXTRA-BILL-RELIEF-WITH-SOLAR-ENERGY</a>.</p>
Queensland	Solar for Rentals trial	March 2019	<p>The Queensland Government introduced the Solar for Rentals trial helping landlords and tenants in Bundaberg, Gladstone and Townsville install solar PV systems and share the financial benefits. As part of the trial around 1,000 rebates of up to \$3,500 are available for eligible landlords to install a solar system with solar monitoring technology.</p> <p>For more information see: <a href="http://www.qld.gov.au/community/costof-living-support/concessions/energy-concessions/solar-for-rentals-trial">www.qld.gov.au/community/costof-living-support/concessions/energy-concessions/solar-for-rentals-trial</a>.</p>

Jurisdiction	Program	Date	Description
Victoria	Energy Brokers for Vulnerable Households	March 2018	<p>The Victorian Government will partner with a community organisation to design and deliver an energy brokerage service for up to 10,000 vulnerable consumers.</p> <p>For more information see: <a href="http://www.premier.vic.gov.au/delivering-a-fairer-and-more-affordable-energy-market">www.premier.vic.gov.au/delivering-a-fairer-and-more-affordable-energy-market</a>.</p>
New South Wales	Solar for low income households	Late 2019	<p>The New South Wales Government will be trialling a new way to help people on low incomes with their power bills by installing free solar systems for up to 3,400 eligible households.</p> <p>For more information see: <a href="http://energysaver.nsw.gov.au/households/solar-and-batterypower/solar-low-income-households">energysaver.nsw.gov.au/households/solar-and-batterypower/solar-low-income-households</a>.</p>
New Zealand	Low Emission Vehicle Contestable Fund	January 2017 - present	<p>The Low Emission Vehicles Contestable Fund offers up to \$7 million a year of government funding to co-fund projects with private and public sector partners to accelerate the uptake of electric vehicles (EVs) and other low emissions vehicles in areas where commercial returns are not yet strong enough to justify full private investment.</p> <p>For more information see: <a href="https://www.eeca.govt.nz/funding-and-support/low-emission-vehicles-contestable-fund/">https://www.eeca.govt.nz/funding-and-support/low-emission-vehicles-contestable-fund/</a></p>

## 5. The Role of Energy and Water Ombudsman Schemes

*'Energy and Water Ombudsman Schemes add significant value to their Members, consumers and the industry as a whole.'*

*Interview with Senior Management from a large Scheme Member*

*'Existing energy schemes which already have established structures, expertise in energy related issues and expertise in fair and reasonable outcomes for energy consumers disputes should extend their jurisdiction to enable new modes of consumer participation. For consumers to have confidence in energy and water sectors, access to an Ombudsman is critical - it should not matter how or through which business structure energy or water is delivered.'*

*Survey response from a Consumer Advocate*

*'Changes must be made to include the provision of new energy technology products and services within schemes. As the provision of essential energy services are delivered through more complex arrangements, consumers must have access to expert, free and fair services to resolve increasingly complex and costly (as they may involve household investment in technology) disputes. We note that the core expertise of energy & water ombudsman schemes is dispute resolution; it is not energy and water sector expertise. While of course an understanding of industry is helpful, what the Ombudsman succeed in is being experts in dispute resolution. The core aspects of this should not change just because the nature of the energy or water supply has changed due to technology, for example.'*

*Survey response from a Consumer Advocate*

Currently, the confidence of consumers and market participants in the energy and water sectors is influenced by the fair and effective resolution of disputes in a timely manner through the use of independent external dispute resolution (EDR) schemes. For a long time, the Energy and Water Ombudsman Schemes in Australia and New Zealand have quite rightly prided themselves on their independence, accessibility, fairness, flexibility and responsiveness in providing external dispute resolution services to these sectors. In accordance with those principles, the Energy and Water Ombudsman Schemes broadly provide the following functions to their key stakeholders<sup>11</sup>:

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<sup>11</sup> For more detail on the functions of ombudsmen generally, see Ombudsman Association (UK), (2019) Principle Features of an Ombudsman Scheme, <http://www.ombudsmanassociation.org/about-principle-features-of-an-ombudsman-scheme.php>; Chris Gill and Carolyn Hirst, (15 March 2016)

1. They provide the independent and impartial resolution of disputes (within their jurisdictional competence) that arise between their Members and consumers, that their Members have been unable to otherwise resolve to the satisfaction of the consumer;
2. They provide a free, private and less complex alternative for consumers seeking dispute resolution to the use of either the Consumer and Competition Division of the relevant Civil and Administrative Claims Tribunal (or Disputes Tribunal in NZ) or the local courts;
3. Through their consideration of the applicable laws<sup>12</sup> and use of their equitable jurisdiction, which requires the Ombudsman to consider what is 'fair and reasonable' in the circumstances, they can provide additional levels of consumer protection that may not be available through other forums;
4. Through their open communication, and flexible and responsive inquisitorial processes, they can tailor their advice and assistance to consumers in respect of their disputes to their levels of comprehension and any special needs, thereby reducing the need for representation by lawyers or consumer advocates;
5. Through their expertise in dispute resolution and industry knowledge, they can help to expedite redress when a consumer has been wronged, or educate the consumer as to the reasons why a Member has handled a case correctly when the consumer has *not* been wronged;
6. They can resolve a case to a binding mediated or conciliated outcome (provided it is accepted by the consumer), with a wider range of potential remedies available including financial award, policy changes, an apology or an explanation of what went wrong;<sup>13</sup>

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Defining Consumer Ombudsmen: A Report for Ombudsmen Services, Queen Margaret University, Edinburgh, 3.

<sup>12</sup> Note that this requires a consideration of all applicable laws, and may include the Australian Consumer Law (Sch 2, *Australian Competition and Consumer Act 2010 (Cth)*) or the *Consumer Guarantees Act* (NZ), particularly in the context of situations such as unfair contract terms.

<sup>13</sup> For a discussion on the importance of the non-fiscal remedies to complainants, see Chris Gill, Naomi Creutzfeldt, Jane Williams, Sarah O'Neill, and Nial Vivian, 'Confusion, gas and overlaps: A consumer perspective on alternative dispute resolution between consumers and businesses,' Queen Margaret University Centre for Consumer Dispute Resolution, Citizens Advice, University of

7. They undertake regular analysis of the data they gather on complaints and share that information with their Members, the relevant regulators, market institutions and government departments, in an effort to effectively monitor sources of dispute within the sectors and raise industry standards;
8. They also undertake important complaints prevention work by providing information and insights, publications, case studies on (anonymised) real cases, and training to help Members avoid and better manage frequent sources of complaints and systemic issues;
9. They undertake outreach and awareness activities to both targeted segments of the community such as vulnerable, indigenous or NESB consumers, and to the general public at large, to improve their knowledge of consumer rights and understanding of how the Ombudsman Scheme can assist them;
10. They regularly analyse systemic issues affecting the energy and water sectors and review the operation of the Ombudsman Schemes themselves; and
11. Drawing upon their significant expertise in external dispute resolution, deep knowledge of the sectors and the detailed data they collect, the Ombudsman Schemes produce high quality submissions and policy advice on proposed changes to public policy affecting the energy and water sectors.

Combined, the execution of these functions in accordance with the general principles applicable to Ombudsman's Schemes, acts to foster greater trust and confidence in the energy and water sectors. This is particularly important in the context of a rapidly changing energy market. Key stakeholders echoed this view, with the Public Interest Advocacy Centre stating in their response to the Issues Paper that:

*'The overriding purpose of the Schemes is to provide protection for and confidence to household customers and small businesses so that energy and water markets are able to function fairly and efficiently, at low cost to participants. To do this, the Schemes should have a range of functions including dispute resolution, provision of advice on how to access assistance, and monitoring and*

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Westminster,'

<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf>>, 18.

*reporting.*<sup>14</sup>

The success of the Ombudsman Schemes in fostering confidence was evidenced by a number of Scheme Members in both Australia and New Zealand anecdotally reporting that when a customer takes a dispute to an Ombudsman Scheme, the Member is more likely to retain that consumer as an ongoing customer into the future.

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<sup>14</sup> Public Interest Advocacy Centre, (12 August 2019) Submission in response to the Issues Paper.

## 6. Emerging issues for the Schemes operating in a rapidly changing energy market

*'Going forward the Ombudsman Schemes will have to find the delicate balance in providing consumer protection and dispute resolution services to consumers of new and emerging technologies so that all energy consumers have equal access, while also supporting innovation in the energy market.'*

Interviewee involved in Scheme Management

The Energy and Water Ombudsman's Schemes are critical to the proper regulatory and compliance framework of the energy market. The market is prone to a large number of disputes, resolutions of which require technical expertise, speed, efficiency, low cost, and responsiveness when confronted with power asymmetry between parties. The Schemes all report in their Annual Reports that consumers hold them in high regard and place considerable trust in their ability to fairly resolve disputes with their energy and water suppliers. Indeed, in 2017/2018 the Schemes engaged in this Research Project<sup>15</sup> handled a combined total of 84706 complaints.

The operations of these Schemes are vulnerable to so-called 'regulatory ripple effects'. This occurs when a Scheme's jurisdiction to hear a consumer's complaint is linked to the relevant energy or water provider's membership of the Scheme, and, in turn, membership of the Scheme is linked to that provider being subject to statutory license or other regulation (or exemption therefrom, as the case may be). In these circumstances, the inclusion of a new technology or service within a licensing or regulatory framework, or its exclusion from the framework, becomes a critical issue, which can shape and delimit the jurisdictional coverage of an energy or water service or technology. Further, the Schemes are also faced with the challenge of proactively identifying areas in which consumers lack access to sufficient external dispute resolution arrangements and rectifying these before the detrimental effects of jurisdictional gaps are realised. Without access to the robust external dispute resolution arrangements under the Schemes, energy and water consumers could be left with only the considerably more expensive and/or complex avenues of seeking redress through the tribunal system or litigation via the court system.

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<sup>15</sup> Specifically, the Energy and Water Ombudsman (Victoria), the Energy & Water Ombudsman NSW, the Energy and Water Ombudsman Queensland, the Energy and Water Ombudsman South Australia and Utilities Disputes Ltd in New Zealand.

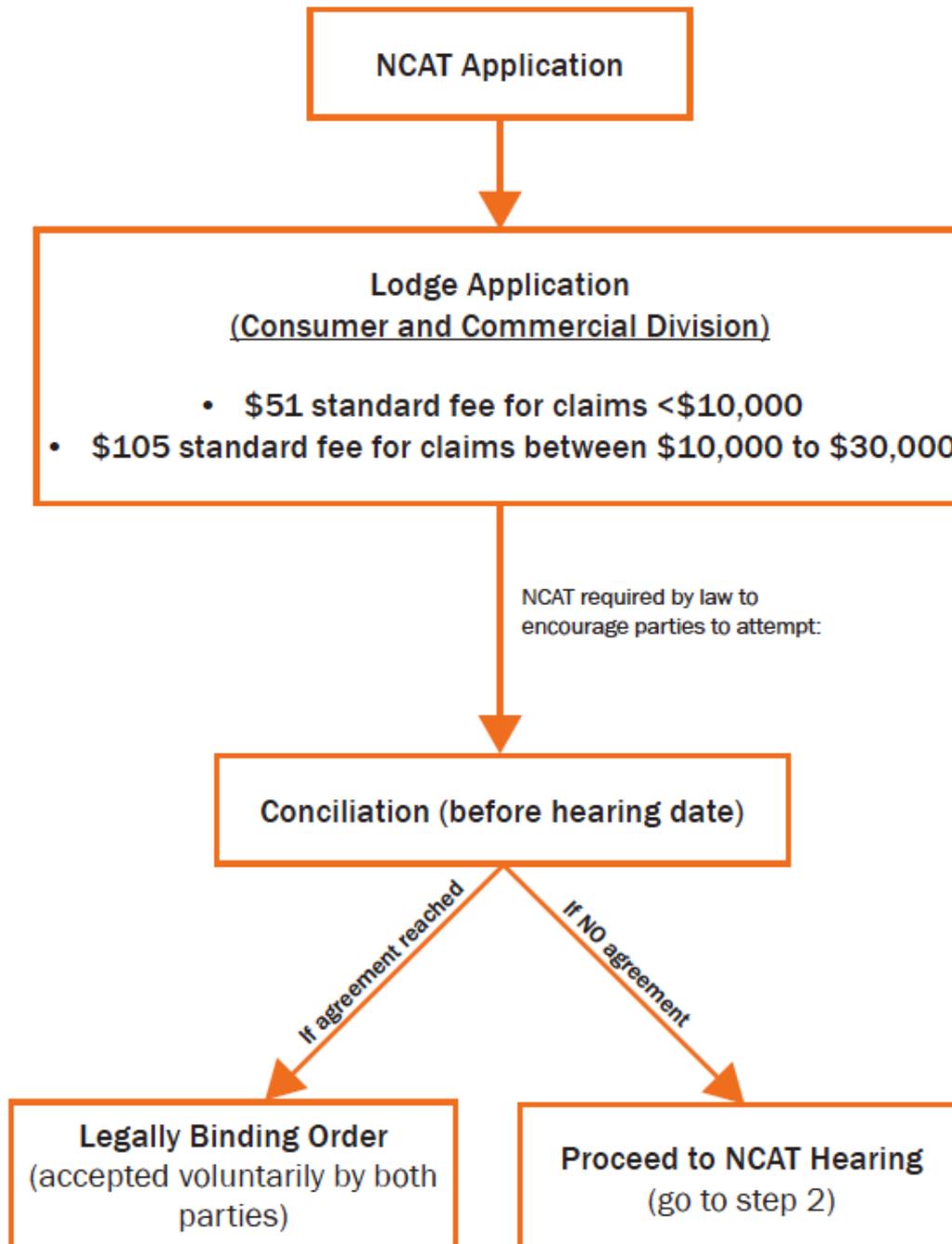
The recent market developments pose an important challenge to the Energy and Water Ombudsman Schemes: How can they incorporate new market developments within the existing Schemes in order to foster trust and confidence in a changing energy market, while simultaneously avoiding legal and regulatory fragmentation? It is critical that consumer protections and cost-effective independent dispute resolution services are available to all energy and water consumers, including those consumers of new market developments, such as parties who supply energy but who are not an authorised retailer or network business. Moreover, those protections and dispute resolution services need to be coherent with those offered to the traditional energy market consumers, with the costs of these new services fair and equitable to both the current and future Members of the Schemes. The provision of these new consumer protections and dispute resolution services would significantly reduce the complexity surrounding the rights and obligations of those new market consumers and market participants.

## 6.1 What are the existing alternatives to an Ombudsman Scheme currently available to parties to out of jurisdiction cases?

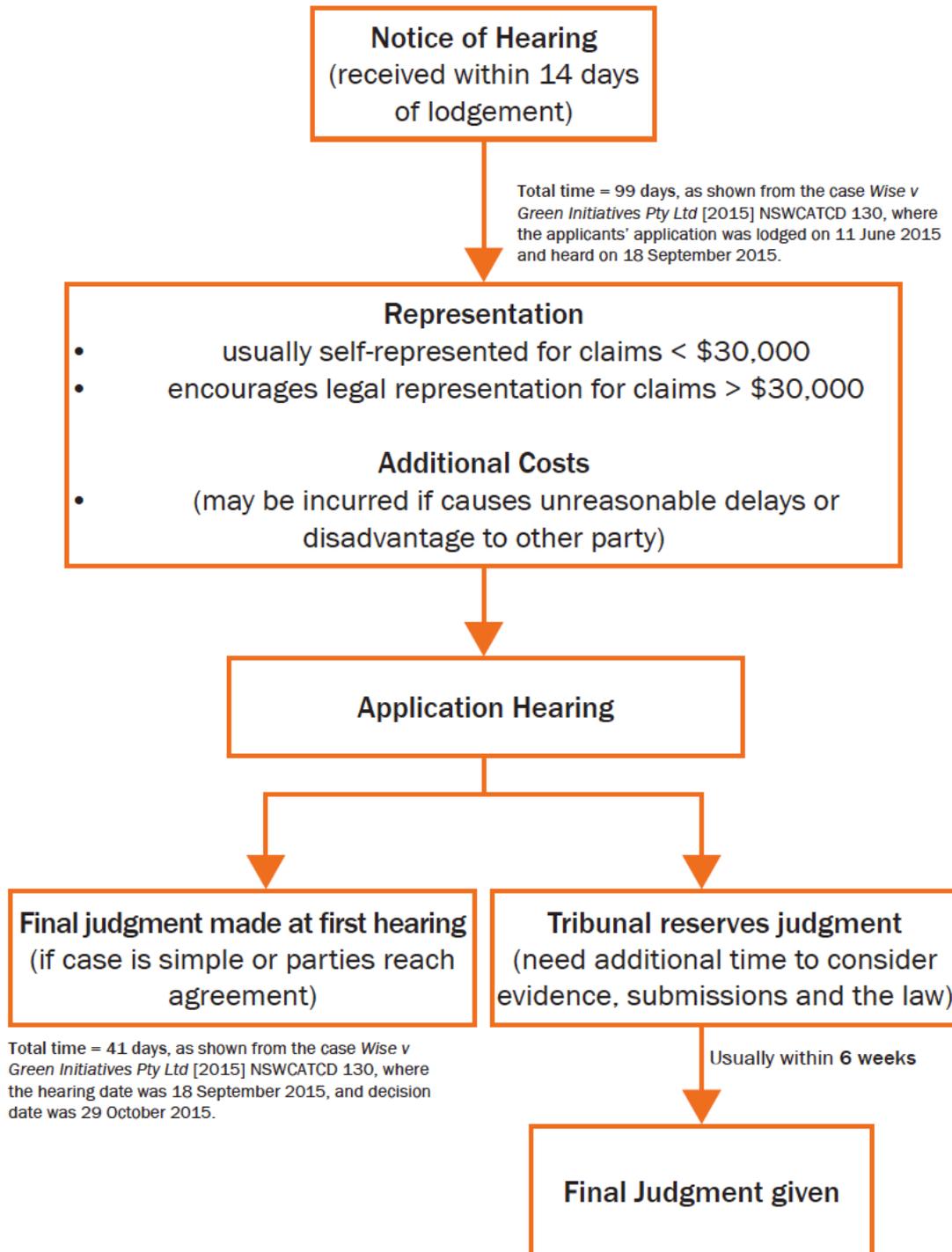
Navigating the complex legal and procedural maze that is involved in bringing a claim in either the local courts or the Civil and Administrative Claims Tribunal is often difficult for consumers, especially for those who are already vulnerable. Diagrams 1 to 4 highlight the process for a consumer seeking to bring a claim through the New South Wales Civil and Administrative Tribunal (Consumer and Commercial Division). The time periods indicated are from representative matters involving solar energy providers: *Wise v Green Initiatives Pty Ltd* [2015] NSWCATCD 130 and *Solar SG Pty Ltd/as Solar Service Group v Hufton* [2019] NSWCATAP 147.

In contrast, the diagram 5 highlights the resolution of disputes using an Energy and Water Ombudsman Scheme, with the indicative time periods for the resolution of complaints drawn from the EWON Annual Report 2017/2018.

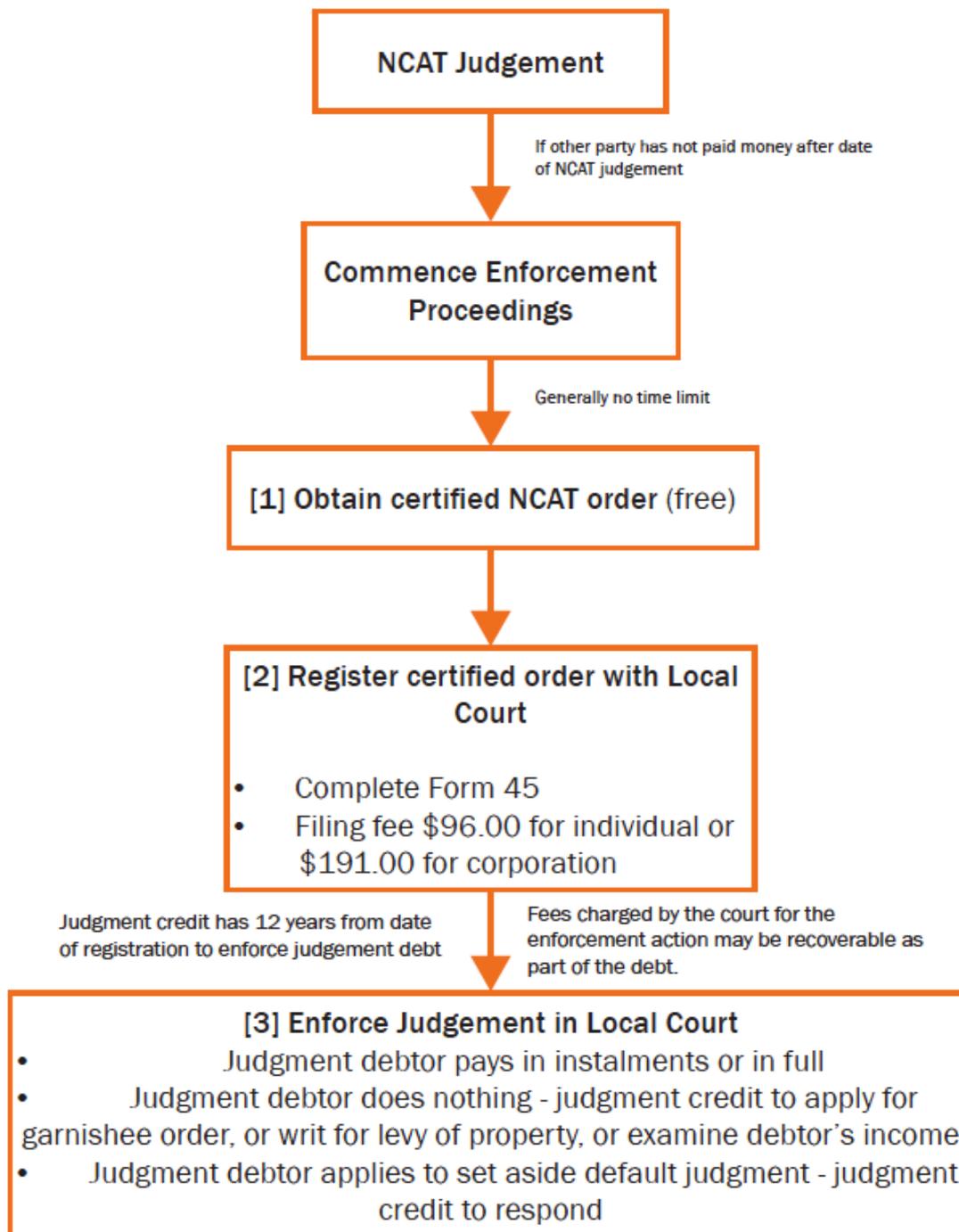
## Diagram 1 - Pre-Hearing (Step 1)



## Diagram 2 – Hearing (Step 2, if required)

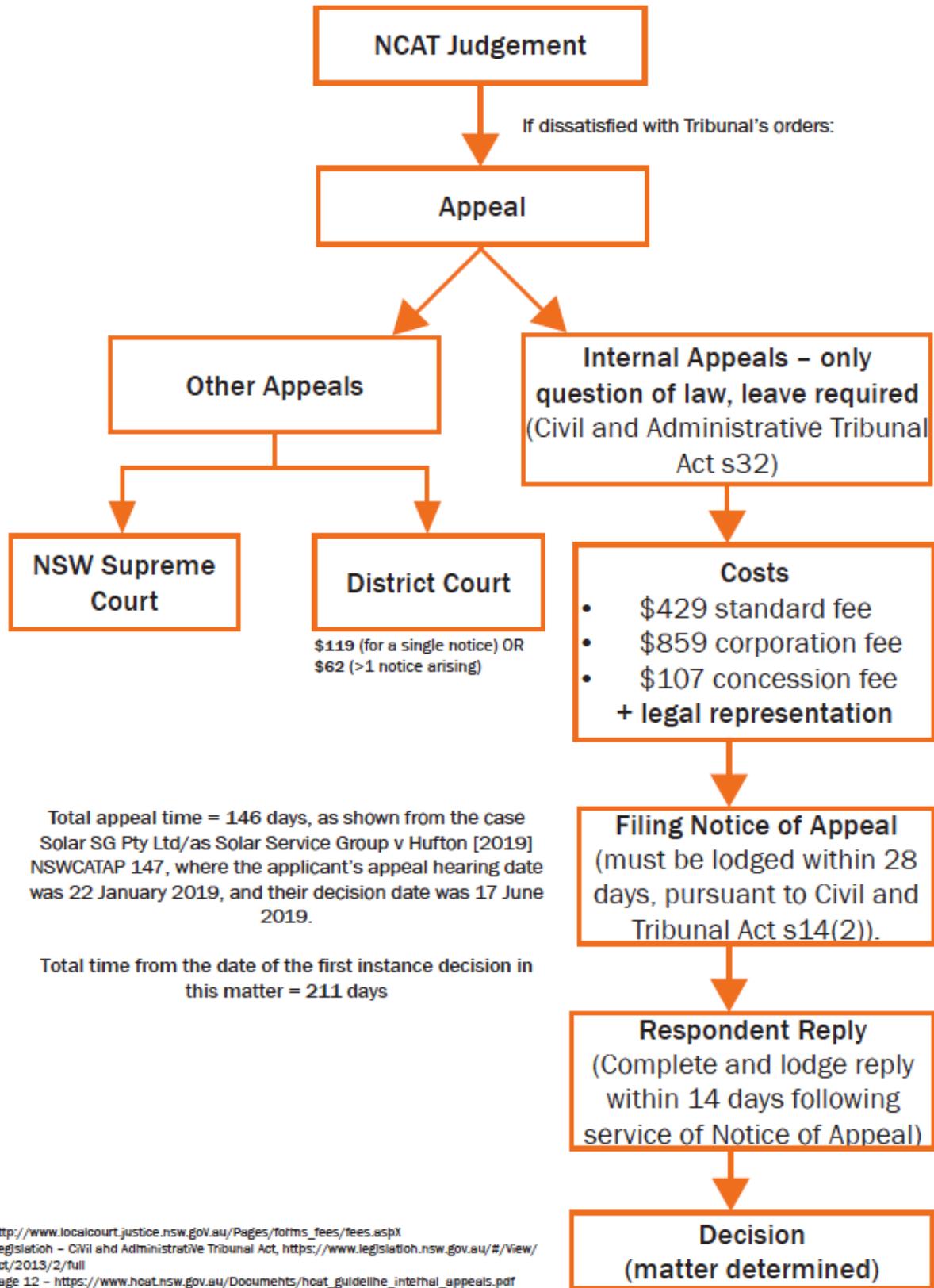


## Diagram 3 – Enforcement Proceedings for Money Orders (if required)

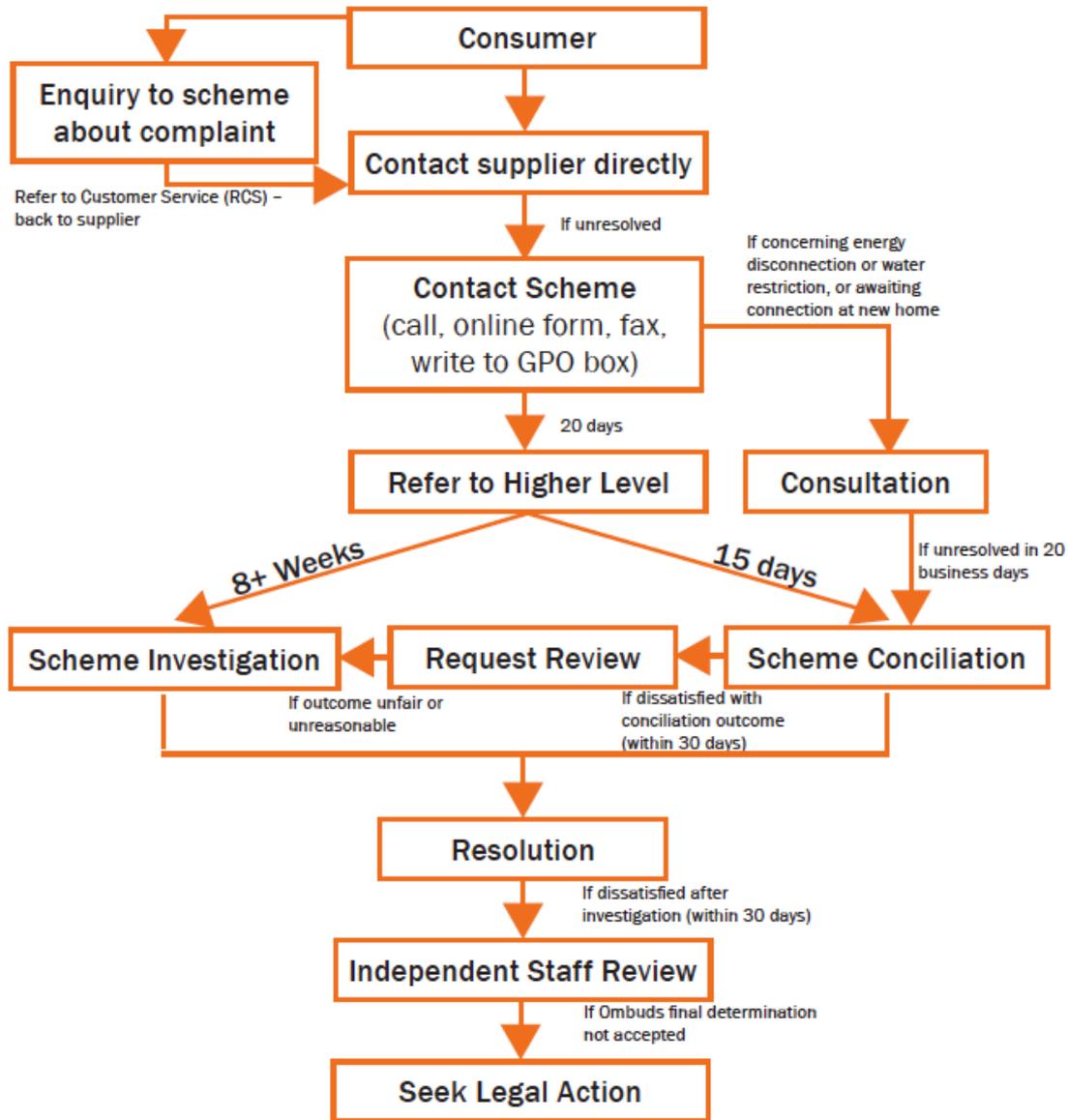


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[http://www.localcourtjustice.nsw.gov.au/Pages/forms\\_fees/fees.aspx](http://www.localcourtjustice.nsw.gov.au/Pages/forms_fees/fees.aspx)

## Diagram 4 – Appeals



## Diagram 5: Process of a consumer making a complaint to an Energy and Water Ombudsman Scheme



0 < 2 days = 60% of complaints resolved  
 2 < 14 days = 26% of complaints resolved  
 14 < 30 days = 4 % of complaints resolved  
 30 < 90 days = 6% of complaints resolved  
 90 < 180 days = 3% of complaints resolved  
 180+ days = 1% of complaints resolved



90% of all cases resolved in under a month  
 Cost to consumers = FREE

As highlighted in Diagrams 1 to 4 above, in comparison to using the Ombudsman Schemes as shown in Diagram 5, using these alternative models of redress is often expensive, time-consuming and stressful. This is especially likely to be the case when the complainant is an unrepresented litigant with no one to guide them through the process. Further, research by Schwarcz in the context of the American insurance sector found that when companies end up litigating they will often 'delay the litigation process artificially to strengthen their strategic advantage.'<sup>16</sup> As a result, because litigation is such an undesirable outcome for end consumers, the companies (who already have a stronger perceived bargaining advantage) generally 'hold an upper hand in settlement negotiations.'<sup>17</sup>

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<sup>16</sup> Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, (2009) 83 *Tulane Law Review* 735, 749

<sup>17</sup> *Ibid.*

## 7. Jurisdictional Issues

*'We welcome an extension of jurisdiction to cover new technologies. It would benefit the sector greatly to have a proper external dispute resolution process available to all customers.'*

*Interview with prospective Member under expanded jurisdiction*

*'Jurisdiction must be particularly extended for new energy products and services, such as disputes with solar retailers and installers. Our organisation has dealt with many complaints in this area where the cost of resolution is complex and the process is slow.'*

*Survey response from a Consumer Advocate*

With new entities operating either on-grid, on the fringe of grid or off-grid, the deployment of new technologies, and new modes of participating in the energy and water sectors, new forms of consumer interaction are emerging that are not being adequately captured by the current jurisdictional or regulatory arrangements. This raises the possibility of inconsistent protections existing between energy retailers or between products offered by the same supplier.<sup>18</sup> In the short term, a gap in jurisdictional coverage leaves consumers vulnerable to exploitative conduct and predatory marketing behaviour. In the longer term, these inconsistent positions may provide an unfair advantage to new entrants to the detriment of end-consumers and have the potential to distort market outcomes.<sup>19</sup>

This is not to say that a consumer with an out of jurisdiction complaint is without any avenue of redress. Rather, as shown in Section 6.1 above, where alternative avenues of address are available to consumers, those alternatives either:

- do not have the power to conciliate individual cases;<sup>20</sup>
- have dispute handlers who may lack a detailed knowledge and understanding of the energy and water sectors;
- are more time-consuming and/or expensive; and
- may require legal representation to provide individualised assistance.

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<sup>18</sup> Energy Working Group, New Products and Services in the Electricity Market: Advice to the COAG Energy Council, July 2015, 3. <<http://www.coagenergycouncil.gov.au/publications/new-products-and-services-electricity-market-advice-ministers-july-2015>>.

<sup>19</sup> New Products and Services in the Electricity Market: Advice to the COAG Energy Council, July 2015, 3.

<sup>20</sup> See for example, the Office of Fair Trading NSW, Consumer Affairs Victoria, Consumer and Business Services SA, Office of Fair Trading Qld, and the Commerce Commission NZ.

The key finding here is that any alternative avenue is unlikely to be as satisfactory for the consumer when compared to going directly to an Energy and Water Ombudsman Scheme.

## 7.1 The Jurisdictional Gap

*There must be mandatory membership for all energy sources and all water providers so that all consumers are treated equally.*

Survey response from an anonymous respondent

The gap in jurisdictional coverage is already evident:

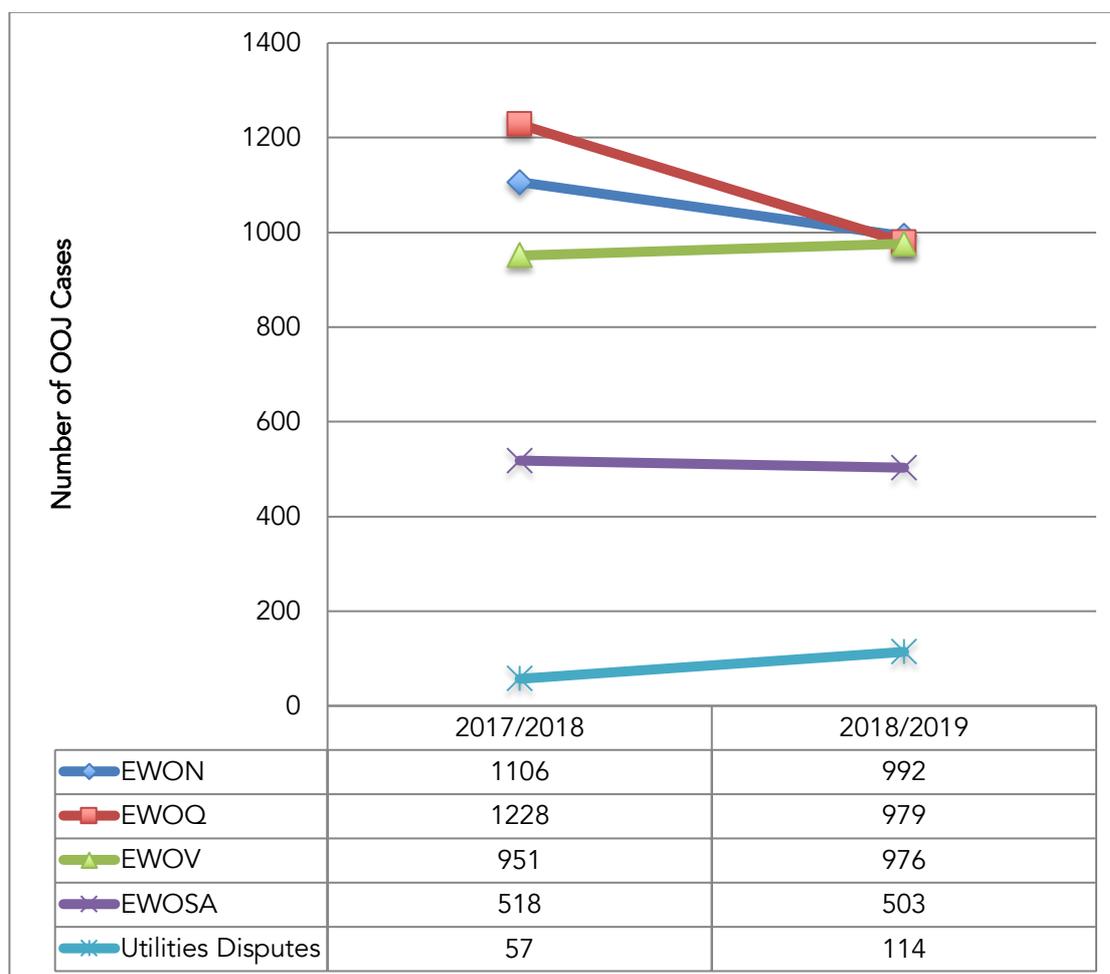
- In particular, 22% of EWOV's 976 out of jurisdiction matters in 2018/2019 related to the conduct of solar installers who were not members of EWOV, while out of jurisdiction cases about third party providers nearly doubled.
- Similar issues were evident in Queensland, with a third of the 1224 out of jurisdiction cases received by EWOQ over the same period relating to non-member solar installers or out of jurisdiction bottled gas.
- In NSW, 178 out of jurisdiction cases were registered with EWON with respect to the provision of solar, issues with inverters, metering, battery storage systems and third party energy management providers.
- In South Australia, a jurisdiction that has had numerous government support programs facilitating massive uptake of solar and battery storage systems, nearly 30% of their 503 out of jurisdiction cases related to either solar or battery related issues.
- In New Zealand, the total number of out of jurisdiction cases received by Utilities Disputes has doubled over the past two years.

Further, this all arose in an environment in which the 2019 Retail Energy Competition Review produced by the Australian Energy Market Commission found that 'levels of residential and small business consumer satisfaction and confidence with the retail energy market had declined significantly [in the previous 12 months].'<sup>21</sup>

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<sup>21</sup> Australian Energy Market Commission, 2019 Retail Energy Competition Review: Final Report, 28 June 2019, 1.

**Figure 1: The total number of out of jurisdiction cases received by the Ombudsman Schemes in 2017/2018 as compared to 2018/2019<sup>22</sup>**



Between the period of 2017/2018 and the 2018/2019, all of the Schemes, with the exception of EWOQ, expanded their jurisdictions bringing a sizeable number of new embedded networks (also called secondary networks in NZ) within their jurisdiction for the first time. As highlighted in Figure 1 above, out of jurisdiction cases make up a substantial number of initial enquiries to the Schemes. Indeed, over 10% of the 10318 total cases received by EWOQ in 2017/2018 were not within its current jurisdiction. That said, the very existence of these cases suggests that many consumers view the Schemes as a “one stop shop”<sup>23</sup> for resolving complaints relating to the energy and water sectors.

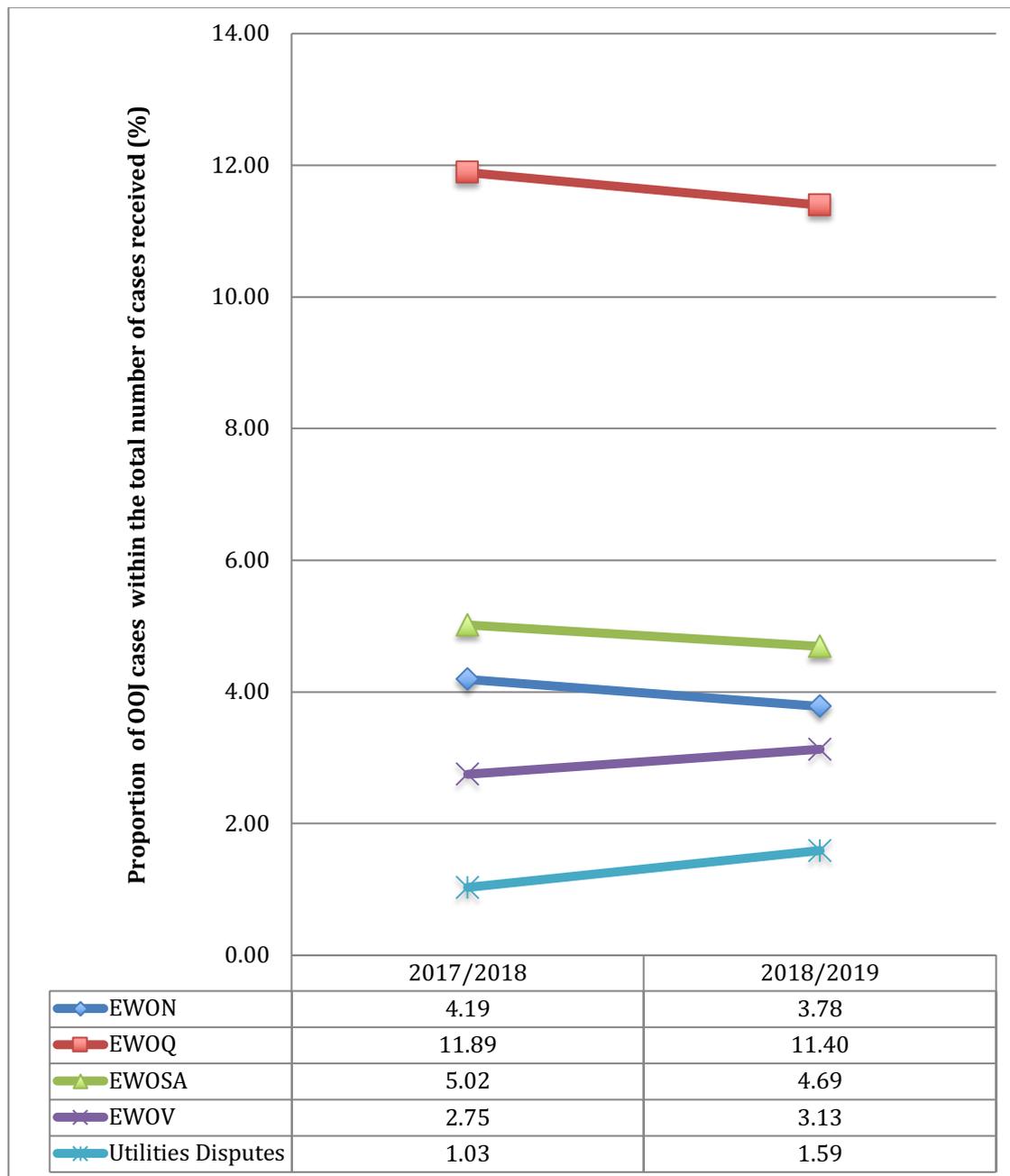
<sup>22</sup> The OOJ data used for these calculations were either directly received from the Ombudsman Schemes or were gleaned from publicly available data on the Scheme’s websites including from Annual Reports, the Quarterly Complaints Insights, and other statistical reports.

<sup>23</sup> Christopher Hodges, ‘Current discussions on consumer redress: collective redress and ADR’, ERA Forum (2012), 22.

It was anticipated that with the advent of expanded jurisdiction to cover embedded networks that the total number of out of jurisdiction cases would decline markedly. In most jurisdictions this did not occur, rather two phenomena may explain this trend. First, as discussed in more detail below, a number of embedded networks received complaints prior to them joining the Schemes thus rendering them out of jurisdiction. It is anticipated that there should be a significant drop in these complaints in the next period, as these embedded networks become Scheme Members. Secondly, in most jurisdictions the total number of out of jurisdiction complaints about solar energy increased, with the ever-increasing rollout of residential PV solar systems.

In this context, it then becomes important to consider the proportion of out of jurisdiction cases when compared to the total number of cases received, i.e., can the lack of a drop-off be explained by an increase in the total number of complaints the Schemes received?

**Figure 2: The proportion of out of jurisdiction cases compared to the total number of cases received by the Schemes in 2017/2018 and 2018/2019**



In analysing Figure 2, while some Schemes such as EWON and EWOSA experienced a drop-off in the proportion of their total number of cases being made up by out of jurisdiction cases since the inclusion of embedded networks within their jurisdiction, EWOV experienced an increase in their proportion of out of jurisdiction cases. Indeed, the total number of out of jurisdiction embedded network cases received by EWOV increased from 150 cases in 2017/2018, to 236 in 2018/2019. While you would have expected the total number of complaints to drop, EWOV reported that this increase occurred because customers became aware of the obligation of embedded networks to

join EWOV before many of these entities had become members, so the complaints made over this period remained outside jurisdiction. As more and more embedded networks join EWOV, the total number of out of jurisdiction embedded network complaints is anticipated to decline sharply in the forthcoming period.

Interestingly, the current order of the Schemes from highest to lowest proportion of their total cases being out of jurisdiction, mirrors exactly the order of those States and NZ in terms of their overall percentage of residential rooftop solar penetration.<sup>24</sup> This suggests that, as states experience an increase in the penetration of residential PV solar, both the total number of out of jurisdiction cases and the proportion of those cases in the context of the total number of complaints received is set to climb year on year. This phenomenon is already evident in South Australia, even in the very earliest stages of the residential battery storage roll-out. In Q1 2018/2019, South Australia recorded zero out of jurisdiction cases relating to battery storage, in Q2 one case was recorded, in Q3 two new cases were recorded and by Q4, there were three new cases recorded. This means that in the absence of jurisdictional reform, that every year an ever-increasing proportion of consumers with real disputes are likely to have their interactions with the energy market move outside of the scope of the Ombudsman's Schemes current jurisdiction. Thus, this jurisdictional gap must urgently be addressed to ensure that these energy consumers who secure their electrons from new technologies or modes of market participation have access to the same levels of consumer protection and EDR as the consumers of traditional market participants. With that in mind, how should jurisdiction be expanded to best meet the changing needs of energy consumers?

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<sup>24</sup> Climate Council (2018), 'Powering Progress: States Renewable Energy Race,' <https://www.climatecouncil.org.au/wp-content/uploads/2018/10/States-renewable-energy-report-1.pdf>

## 7.2 The proposed expansion of jurisdiction within the energy sector

Throughout our consultation, there was near universal support for the principle of expanding jurisdiction of the Schemes to encompass new and emerging energy technologies, and new modes of market participation. It was felt that such an expansion of jurisdiction was needed both from a practical perspective, but also as a matter of principle, to enable the Schemes to remain true to the original intention in setting them up. In the latter respect, Indeed, Andrew Dillon CEO of Electricity Networks Australia noted during the consultation process that:

*'The Energy Ombudsman's schemes were set up with the intent that the energy ombudsman would be able to sort out disputes however they arise in the energy sector.'*<sup>25</sup>

A number of existing Scheme Members also highlighted the importance to the energy sector that jurisdiction be expanded to cover these new market entrants noting that Scheme Members derive considerable benefit from the consumer trust and confidence created by the Ombudsman's Schemes. This trust and confidence comes from the many consumers' perception that, in the event that a consumer reaches a deadlock with their energy provider or a related entity, that the Ombudsman's Schemes are able to fairly and impartially resolve those disputes.

Some existing Members expressed a further concern: that, in the context of a more disaggregated market, where the level of consumer protections and access to an external dispute resolution service depend on the source of the electrons generated or the technology used, a failure to expand jurisdiction could be injurious to their existing businesses. In these Members' view, if jurisdiction is not expanded then the resultant complexity is likely to create both reputational risk for the Ombudsman Schemes, and uncertainty and confusion across the market as a whole. Some Scheme Members felt that this ran the risk of breeding mistrust in existing energy market participants and could harm their future plans to introduce new technologies or product innovations.

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<sup>25</sup> Interview with Andrew Dillon, CEO of Energy Networks Australia, 26 July 2019, Melbourne: Victoria.

### 7.3 The proposed new definition of jurisdictional competence within the energy sector

In our interview with Mark Henley, the Advocacy Manager for Uniting Communities, he proposed that each jurisdictional energy regulator introduce a new definition of jurisdictional competence. This would create mandatory Scheme membership for any entity engaged in the provision of:

***'Any service relating to the sale or supply of energy, or that may interrupt the supply of energy or otherwise impact upon the sale or supply of it.'***

It was envisaged that this would mean that all issues relating to the sale or supply of energy that are outside the scope of the Australian Consumer Law or and do not involve a dispute about price setting, could now be resolved by the Ombudsman Schemes. This would mean that any issue experienced by a consumer with either a PV solar system acquired under a solar lease, battery storage system, energy management software, third party aggregator or on-seller, or any consumer who utilised a comparison website and/or switching service, would now be able to approach the Ombudsman Scheme to seek redress. This non-exhaustive list highlights that many of the current out of jurisdiction issues would now be within scope for the Ombudsman Schemes to resolve.

This proposed revised scope of jurisdictional competence received strong and indeed, very nearly universal support among the existing Scheme Members, the energy consumer advocates, government officials, the Ombudsmen and their staff. It was felt that while this proposal would substantially broaden the jurisdiction of the Schemes, this was necessary to create coherence in terms of the consumer protections available to consumers of new and existing market (and non-market) participants, particularly in light of the pace of change and innovation within the energy sector. Interviewees also felt that a broad proactive change to jurisdiction based on a principled approach was eminently preferable to a piecemeal approach to expanding jurisdictional coverage on a case-by-case basis. As one peak industry body representative stated in their interview:

*'The market has moved on but the legislation governing the sector and approach to consumer protection has been designed for monopolistic market participants. The AER needs to rethink their approach and ask what outcome are we seeking for the consumer and how can we best achieve that outcome? The current structure, which prevents solar customers from getting a conciliated outcome and*

*instead pushes them into the tribunal or court system is by any measure a poor consumer outcome.'*

It must be noted that to broaden jurisdiction in this manner would mean that the membership of the Schemes would no longer strictly follow regulation, and/or licensing or exemptions thereto. Yet there was also strong support for the need for membership to be mandatory. Some stakeholders identified the forthcoming state-based licensing regime for Stand Alone Power Systems as providing the opportunity to expand jurisdiction. However, many other stakeholders felt that the drafting and implementation of that licensing scheme would take a lengthy period of time and still would not produce the desired outcome of a reasonably harmonised and mandatory membership scheme for all participants operating in the energy sector. As a result, the majority view was that the jurisdictional energy regulator would need to enact a requirement mandating membership of the Ombudsman Scheme for all entities captured by the above definition.

#### 7.4 The interaction with the Australian Consumer Law

While the Energy and Water Ombudsman Schemes have to consider the Australian Consumer Law among the body of relevant legislation when conciliating a case, it is important to note that we are not proposing that the Schemes take over responsibility for general claims under the ACL. This means that product warranty disputes, general product liability claims or unfair contracts claims would remain outside of jurisdiction. These matters are not specific to the energy sector, and thus do not require the specialist knowledge and understanding that the Energy and Water Schemes hold. As such, these consumers would continue to be directed to the relevant government fair trading department for assistance.

#### 7.5 Temporary carve-outs for non-commercialised technologies that do not presently pose a risk of harm to consumers

It was felt that, if necessary, once the relevant regulator had enacted the new jurisdictional competence, the Scheme Boards or Advisory Council could then elect to issue a temporary exclusion from jurisdiction of any new technology or product. While the basis on which any criteria to temporarily carve-out jurisdiction would be a matter for the Scheme Boards or Advisory Council, one approach might be to exclude any technology or product which is not currently commercially available in the Australian or New Zealand energy market (as applicable) and which does not currently present a risk

of harm to consumers. In the event that the technology, service or product was then commercialised, or the Schemes became aware of a risk of harm, the carve-out could then be quickly removed and jurisdiction over these areas restored. The adoption of a broad jurisdictional competence, coupled with the ability to temporarily carve-out jurisdiction when needed, would therefore avoid a significant regulatory lag and better enable the Schemes to respond dynamically to new market innovations.

### **Example of a potential carve-out: peer-to peer energy trading**

One area that the Schemes might choose temporarily to carve out of jurisdiction is peer-to-peer energy trading. Peer-to-peer energy trading, or consumer-to-consumer contracts,<sup>26</sup> create a particular challenge in terms of the appropriateness of the scope of jurisdiction. European Union research has indicated that over 50% of people who engaged in peer-to-peer trading in Europe in the past 12 months have experienced a dispute, which needed to be resolved. Currently, these consumers are unable to avail themselves of Ombudsman Schemes and thus have to rely on the court system to receive redress for any wrong suffered. Peer-to-peer energy trading has been facilitated by significant advances in technology including the advent of new digital platforms and new modes of participation in the market. Our research has highlighted that while conventional energy retailers operating on a business to consumer model provide significant consumer protections to end consumers, there are far fewer protections available for the buyers of peer-to-peer or consumer-to-consumer contracts.

The peer-to-peer energy trading market in Australia is currently very small, and therefore jurisdictional change may not be required at this time. However, it is an area in which the Schemes may want to conduct market surveillance and consider the re-instatement of jurisdiction in the future. The challenge for Ombudsman Schemes will be how to address the needs of the consumer as a purchaser of services, while not imposing an undue regulatory burden on the consumer who is acting as the seller. Relevant factors to examine, as part of any such market surveillance would include:

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<sup>26</sup> For greater discussion of this point, please see Chartered Trading Standards Institute, Chartered Trading Standards Institute Response to 'Modernising Consumer Markets: Green Paper,' (July 2018), < <https://www.tradingstandards.uk/media/documents/news--policy/consultation-responses/modernising-consumer-markets---ctsi-full-response.pdf>>.,11-12; Peter Cartwright, Sam Dunleavy and Richard Hyde, 'Modernising Consumer Markets: a Response to the Consumer Green Paper, University of Nottingham (4 June 2018) <http://eprints.nottingham.ac.uk/52757/1/Modernising%20Consumer%20Markets%20Nottingham%20Response.pdf>

- When will a consumer be deemed to become a trader or a seller? Will it be based on the number of transactions they enter into with unrelated entities or will it be triggered by the repeated sale of the same product or source of energy?
- In the absence of regulation, what would be the threshold before a Scheme requires a consumer or prosumer engaged in peer-to-peer energy trading, and thus engaged in the sale of electricity, to become a member of a Scheme?
- Are there other procedures that can be put in place such as the provision of better information to consumers considering entering into this type of arrangement that might negate the need for consumer-to-consumer sellers to be covered by an Ombudsman Scheme?
- Who should be responsible for holding accurate details of the participants in any peer-to-peer energy trading scheme, such as their legal name, address, trading volumes, number of customers and income generated?

## 7.6 The approach of other international Ombudsman Schemes

Similar to Australia and New Zealand, the question of expansion of jurisdiction to include renewable and distributed energy resources has recently been raised in both the United Kingdom and in France.

### **The United Kingdom – The Ombudsman Service Ltd**

In the United Kingdom, the competent authority, Ofgem, expanded the jurisdiction of the Energy Ombudsman, to also act as the sole redress scheme for the consumer renewable sector under the "Green New Deal" programme. This has given the Energy Ombudsman in the UK the scope to **'handle cases across the entire energy sector,'** (with the exception of LPG)<sup>27</sup> including all matters related to:

- 'Gas and electricity bills.
- Problems that arise as a result of switching energy supplier.
- The way an energy product or service has been sold, including doorstep sales.
- The supply of energy to a home.
- Micro generation and Feed-in-Tariffs.
- Problems relating to the provision of services under the Green Deal.
  - (This includes Renewable energy generation, such as solar panels or heat pumps; insulation, such as solid wall, cavity wall or loft insulation; heating; draught-proofing and double-glazing).
- Problems relating to District Heating suppliers who are part of the Heat Trust Scheme.
- Network Providers when there is a loss of supply or a problem with a connection or repair.'<sup>28</sup>

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<sup>27</sup> The Ombudsman Service Limited (UK), (2019) **'We're the Energy Ombudsman,'** <  
<https://www.ombudsman-services.org/sectors/energy>>.

<sup>28</sup>

## **France - La Médiateur National de L'Energie**

Meanwhile in France, the French Energy Ombudsman, Jean Gaubert, has stated that given the technical and legal expertise held by his office, that it would be:

'...logical if we handled these cases [relating to renewable energy, distributed energy resources and self-generation] in order to simplify their procedures.'<sup>29</sup>

This would ensure that all French energy consumers have access to adequate consumer protection, and external dispute resolution services. Indeed, a question about the expansion of jurisdiction to extend the coverage of the existing French scheme to new market entrants, particularly in the context of renewable energy, was asked by Senator Courteau in the French Senate on 8 March 2018. In his question, Senator Courteau suggested that legislative measures would be required to broaden the scope of jurisdiction of the French Energy Ombudsman in order to strengthen consumer confidence in emerging energy technologies.

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<sup>29</sup> La médiateur national de l'énergie (France), 'The National Energy Ombudsman,' Activity Report 2018 (14 May 2019) < <https://www.energie-mediateur.fr/publication/rapport-annuel-2018/>>78.

## 7.7 The proposed expansion of jurisdiction within the water sector

*'Water disputes represent a drop in the ocean when compared to the total number of complaints dealt with by the Schemes, but when complaints are received they are invariably serious problems and complex to resolve.'*

Interview with a Scheme Complaints Team Leader

In those jurisdictions that do not have universal mandatory membership within the water sector,<sup>30</sup> there were strong views expressed as to the unfairness of this situation. Many stakeholders within the sector identified that there were significant benefits that accrued to the consumers of monopoly water services who were able to access an independent and impartial external source of redress through an Energy and Water Ombudsman Scheme in the event of a dispute.

While the Parliamentary Ombudsman is able to investigate councils in respect of systemic issues, and dissatisfied consumers are able to vote the relevant council out, Stakeholders viewed the protections provided to out of jurisdiction water consumers as grossly inadequate. First, the Parliamentary Ombudsman Schemes have a very broad remit and limited resources, and are unable to provide consumers with individual redress. Secondly, council elections only occur every four years, limiting their effectiveness to facilitate change for consumers suffering issues with their water supplier. Thus for those consumers who are out of jurisdiction suffering from, for example, serious billing or metering issues, they are unable to achieve a satisfactory resolution to their dispute through external dispute resolution unless they file a legal claim. In contrast, when an Energy and Water Ombudsman Scheme gets involved in a dispute, they can draw upon their detailed knowledge of the water sector and to achieve the timely and fair resolution of that individual dispute. Furthermore, the absence of jurisdiction for water cases tends to be focused in rural and remote local government areas, which tend to have a higher proportion of vulnerable consumers and those on hardship.

In the context of the water sector, our proposed expansion to jurisdictional competence would mean that means that:

***all licenced water suppliers, regardless of their corporate or municipal status, would over time be required to become a mandatory member of the relevant Ombudsman Scheme***

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<sup>30</sup> The relevant jurisdictions are New South Wales and Queensland. We have written separately to EWON and EWOQ in relation to this issue.



## 7.8 Should there be a single Ombudsman scheme appointed to provide external dispute resolution services to consumers or are consumers and business better served by having multiple voluntary redress schemes operating within the energy and water sectors?

In 2013, the European Parliament passed the EU Directive on Consumer ADR 2013/11/EU in 2015, which required that all EU Member States ensure that there is an ADR scheme available for all consumer-business disputes across all sectors of the economy (with very limited exceptions). When the Consumer ADR Directive was implemented in July 2015, the numbers of ADR schemes in the UK have rapidly expanded both in number and in operating models.<sup>31</sup> Despite this, the Competent Authority regulating the energy sector, Ofgem, has only ever approved the Energy Ombudsman to act as their scheme provider, noting the significant benefits that can be achieved by having a single dispute resolution body within a regulated sector. However, in many other sectors overlaps and gaps exist due to the voluntary and competing natures of many of these redress schemes.

The lived experience in the UK with multiple ADR scheme providers operating within the same sector means that there is a significant body of international research available that evaluates the outcome of having competition within the market for consumer redress schemes. This research<sup>32</sup> highlights that where there are multiple sources of redress

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<sup>31</sup> Chris Gill, Naomi Creutzfeldt, Jane Williams, Sarah O'Neill, and Nial Vivian, 'Confusion, gas and overlaps: A consumer perspective on alternative dispute resolution between consumers and businesses,' Queen Margaret University Centre for Consumer Dispute Resolution, Citizens Advice, University of Westminster, <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf>. 15

<sup>32</sup> See e.g., Chris Gill, Naomi Creutzfeldt, Jane Williams, Sarah O'Neill, and Nial Vivian, 'Confusion, gas and overlaps: A consumer perspective on alternative dispute resolution between consumers and businesses,' Queen Margaret University Centre for Consumer Dispute Resolution, Citizens Advice, University of Westminster, <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf>; Martin Lewis, Will Barnes and Kirsty Good, (November 2017) 'Sharper Teeth: The Consumer Need For Ombudsman Reform,' A MoneySavingExpert report for the All-Party Parliamentary Group on Consumer Protection, MoneySavingExpert.com, [https://images6.moneysavingexpert.com/images/documents/MSE-Sharper\\_teeth\\_interactive.pdf](https://images6.moneysavingexpert.com/images/documents/MSE-Sharper_teeth_interactive.pdf); Gambling Commission (March 2017), 'Complaints processes in the gambling industry: A review one year after the introduction of the Alternative Dispute Resolution (ADR) scheme,' [www.gamblingcommission.gov.uk/PDF/Complaints-processes-in-the-gambling-industry.pdf](http://www.gamblingcommission.gov.uk/PDF/Complaints-processes-in-the-gambling-industry.pdf);

available within a sector this acts as a source of uncertainty and confusion for consumers, 'without any clear evidence of [...] benefits'<sup>33</sup> for either consumers or businesses. Indeed, the Ombudsman Association (UK) has stated that the lack of a simple and straightforward process to access redress often acts as a barrier to consumers making complaints,<sup>34</sup> with it not being clear 'how, or who, to raise a complaint with.'<sup>35</sup> Further, as each redress scheme adopts its own rules and has different jurisdictional scope, this invariably leads to inconsistencies in the:

- coverage of the schemes leading to restrictions on access or even gaps in coverage;<sup>36</sup>
- procedures adopted by each Scheme in their case management and complaint handling;
- interpretation of the relevant laws, regulations and standards; and
- the ultimate decisions made.

These problems not only exacerbate the difficulties faced by vulnerable consumers but also make it harder for consumer advocates to assist them by increasing the time and cost taken to help each individual client.

Where multiple ADR schemes operate in a competitive environment within a sector, there have been concerns expressed that no single Scheme has effective oversight of the issues and problems that are arising in the sector. This means that the significant value-add role played by an Ombudsman in identifying systemic issues and working to address

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Ministry of Housing, Communities & Local Government, (January 2019) Strengthening Consumer Redress in the Housing Market - Summary of responses to the consultation and the Government's response,

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/682203/Strengthening\\_Consumer\\_Redress\\_in\\_the\\_Housing\\_Market\\_Consultation.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/682203/Strengthening_Consumer_Redress_in_the_Housing_Market_Consultation.pdf);

<sup>33</sup> Ombudsman Association (UK), (19 February 2018) Submission to [Ofgem - Utilities ADR's application for certification as an alternative dispute resolution provider in the energy sector](#)

<sup>34</sup> Ibid.

<sup>35</sup> Ombudsman Association (UK), (4 July 2018) Submission to [Department for Business, Energy & Industrial Strategy - Modernising Consumer Markets: Consumer Green Paper](#)

<sup>36</sup> Chris Gill, Naomi Creutzfeldt, Jane Williams, Sarah O'Neill, and Nial Vivian, 'Confusion, gas and overlaps: A consumer perspective on alternative dispute resolution between consumers and businesses,' Queen Margaret University Centre for Consumer Dispute Resolution, Citizens Advice, University of Westminster,'

<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf>>; 41-2; Brooker, S (2008) 'Lessons from Ombudsmania,' London: National Consumer Council 28; Causton P., (2016) The ADR Directive - Airline complaints and the Civil Aviation Authority - Journey to nowhere, 2016 ' 29

them with Scheme Members and the relevant regulators becomes less effective as no one scheme has the full picture of complaints activity across the sector.<sup>37</sup>

A further area of concern is the perception among consumers of ‘Ombudsman-shopping’ on the part of businesses, i.e., the perception that ‘as the business chooses which independent redress scheme to work with, the redress provider is not truly independent and may side with the organisation complained about to retain their business.’<sup>38</sup> While this perception may be unfounded, any outcome that alters the perception of the Ombudsman Scheme in the eyes of the general public, particularly in regard to its independence and impartiality, ought to be resisted.

As a result, the Ombudsman Association (UK) has stated that

*‘it is in the interests of consumers that they have access to an ombudsman in all areas of consumer markets. Access to redress should be simplified for consumers with a single, mandatory, ombudsman covering each sector.’<sup>39</sup>*

This position has also been adopted by the United Kingdom, Office of Gas and Electricity Market (Ofgem)<sup>40</sup> and the Ministry for Housing, Communities and Local Government (UK), with the latter recently consulting on a proposal to reduce the number of ombudsman schemes operating within the housing sector in the United Kingdom from four to one.<sup>41</sup>

Gill et al. have argued that where a government is seeking to encourage innovation, efficiency, least cost and best practice in ADR schemes, an alternative approach to multiple redress schemes that would still facilitate competition would be to regularly

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ombudsman Association (UK), Strategic position statement on ombudsman schemes, <<https://www.ombudsmanassociation.org/docs/Strategic%20Position%20Statement%20May%202017.pdf>>, 1; Ombudsman Association (UK), Submission to [Department for Business, Energy & Industrial Strategy - Modernising Consumer Markets: Consumer Green Paper](#) 4 Jul 2018

<sup>40</sup> Ofgem, (22 January 2018), Open letter: Utilities ADR’s application for certification as an alternative dispute resolution provider in the energy sector; See also, Ofgem, (22 January 2018) Response summary, Open Letter: Utilities ADR’s application for certification as an alternative dispute resolution provider in the energy sector, 22 January 2018.

<sup>41</sup> Consumer Redress in the Housing Market - Summary of responses to the consultation and the Government’s response, [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/682203/Strengthening\\_Consumer\\_Redress\\_in\\_the\\_Housing\\_Market\\_Consultation.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/682203/Strengthening_Consumer_Redress_in_the_Housing_Market_Consultation.pdf);

invite tenders for the contract to provide the ADR scheme.<sup>42</sup> Thus, *competition for the market* may be a better alternative to *competition within the market*.

A further suggestion that has been made in the United Kingdom is that in the event that membership of the Schemes remains voluntary, the Schemes should proactively advertise the names of those Members who have elected to join the Scheme and also draw attention to those who have not.<sup>43</sup> In particular, there has been use of the consumer protection-focused press to place pressure on large firms to join voluntary schemes. This research has found that 'where there is greater consumer awareness there is a better opportunity to impose market pressure. Firms will be more likely to sign up if there's a benefit in doing so and a detriment to their not doing so.'<sup>44</sup> In particular, it ought to be highlighted to prospective members the benefits that exist in joining a Scheme in respect of their ability to retain disaffected customers in the long run, manage their customer expectations, and successfully resolve their disputes at least cost. In particular, our research has highlighted that in the long run, the cost of being engaged in an external dispute resolution scheme is often far less than that incurred if the same customer were to take the prospective Member to small claims court or a Civil and Administrative Claims Tribunal instead.

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<sup>42</sup> Chris Gill, Naomi Creutzfeldt, Jane Williams, Sarah O'Neill, and Nial Vivian, 'Confusion, gas and overlaps: A consumer perspective on alternative dispute resolution between consumers and businesses,' Queen Margaret University Centre for Consumer Dispute Resolution, Citizens Advice, University of Westminster, <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf>.

<sup>43</sup> Peter Cartwright, Sam Dunleavy and Richard Hyde, 'Modernising Consumer Markets: a Response to the Consumer Green Paper, University of Nottingham (4 June 2018) <http://eprints.nottingham.ac.uk/52757/1/Modernising%20Consumer%20Markets%20Nottingham%20Response.pdf>.

<sup>44</sup> Ibid.

## The reasons why Stakeholders think that jurisdiction *must* be expanded

Throughout our consultation, it was apparent that there was near universal support for expanding the jurisdiction of the Schemes. Stakeholders, ranging from existing Scheme Members, to prospective Scheme Members, government agencies, consumer advocates and Scheme management, all had very strong rationales for why they believed the Schemes should take on a larger remit to cover emerging energy technologies. These rationales can broadly be categorised into eight key categories:

### *Fairness*

As a matter of basic fairness, all consumers of energy and water should be entitled to access the same free expert dispute resolution services. The availability of these services to a given consumer ought not to be depend on arbitrary factors such as the generation technology employed by the relevant provider or the consumer's postcode.

### *Consumer expectations*

Consumers expect that an entity calling itself the 'Energy and Water Ombudsman' or 'Utilities Disputes' will be empowered to deal with disputes of a nature that commonly arise in those two spheres. This expectation is clearly evidenced by the large numbers of out of jurisdiction matters received annually by all of the Schemes.

### *Specialised skills*

The Energy and Water Ombudsman Schemes provide specialised services, of a nature that no other body is equipped to provide. Consumers of energy or water whose out of jurisdiction complaints must currently be 'turned away' are much less likely to have their disputes resolved in a timely and cost-effective way, if at all.

### ***Reputational harm***

When large numbers of consumer disputes must be 'turned away' as being out of jurisdiction, reputational damage is inevitable not only for the Schemes themselves but for the energy or water providers involved. The providers lose the benefits that would otherwise flow to them as a result of the timely, amicable and cost-effective resolution of consumer disputes, and anecdotally are less likely to retain a consumer with a serious complaint.

### ***Cost***

No money is 'saved' by government or industry by confining the Schemes' jurisdiction – much more likely the reverse, since consumers' complaints must still be dealt with somehow, either by another government-funded entity (such as an Office of Fair Trading, or a court) and/or by the energy or water provider itself

### ***Simplicity and transparency***

The status quo is complex and confusing for all involved – in particular, consumers should not be expected to 'navigate' the current jurisdictional intricacies, and nor should the Schemes should not be expected to expend substantial resources on referring many consumers elsewhere when they know that the case is unlikely to be resolved.

### ***Weight of opinion***

Virtually all relevant actors – consumer advocacy groups, industry bodies, regulators, Scheme employees at all levels of seniority – consider that the proposed expansion of jurisdiction is necessary and desirable.

### ***Best practice***

Overseas case studies (e.g., the United Kingdom, France) suggest that the proposed expansion of jurisdiction would represent international best practice.

## **7.9 Recommendations**

1. *That jurisdictional competence of the Ombudsman Schemes with regard to energy be expanded using the following definition:  
  
'Any service relating to the sale or supply of energy, or that may interrupt the supply of energy or otherwise impact upon the sale or supply of it.'*
2. *That any change to jurisdiction should be made by jurisdictional regulators and require mandatory membership of the applicable Scheme.*
3. *That Scheme Boards or Advisory Councils be empowered to declare temporary exclusions of jurisdiction so as to exclude any technology or product which either is not currently commercially available in the Australian or New Zealand energy market (as applicable) and does not currently present a risk of harm to consumers.*
4. *Any temporary exclusions granted should be reviewed annually (or more frequently, as required) to ensure they continue to remain 'fit for purpose' and that the exclusion should not be removed.*
5. *That jurisdictional competence of the Ombudsman Schemes with regard to water be expanded such that all licenced water suppliers, regardless of their corporate or municipal status, will be required to become over time a member of the relevant Ombudsman Scheme.*
6. *Consumers in the energy and water sectors should have access to a single, mandatory Ombudsman Scheme on a jurisdiction by jurisdiction basis to reduce confusion and complexity and assist consumers to receive redress of their issues.*

## 8. Governance Structures

The Schemes are all currently subject to a Board (or, in the case of EWOQ, an Advisory Council<sup>45</sup>), which oversees their strategic governance. While the composition and appointment of these Boards varies slightly by Scheme, the Boards all ensure that the Schemes operate to provide procedural fairness, independent dispute resolution services, accessibility, flexibility and responsiveness.

Throughout the stakeholder consultation process, there was strong support for the maintenance of the existing board structures among the Schemes. While the board composition varies across the schemes in terms of the skills mix, number of independent members, and the size of the Board, there was broad support for the notion that the Boards provided meaningful oversight of the governance of the Ombudsman Schemes. That said, some Boards may benefit from reviewing the Australian Institute for Company Directors guidance on the size of Boards, with some Boards appearing to be disproportionate to the relative size of the organisation.<sup>46</sup> Large Boards can become unwieldy and less effective and thus in the context of expanding jurisdiction, it is critical that the size of these Boards does not expand further.

If the jurisdiction of the Schemes is to be expanded to include smaller retailers and emerging market participants, a key question will become how this expansion is funded and the implications for the governance structure of each Scheme with regard to Board representation and Members voting rights. In terms of bringing a large number of smaller Members into the Schemes, the broad consensus seemed to be that, where a peak industry body exists that is of a sufficiently large size, that body ought to be encouraged to nominate a representative to run for the Board. This would necessitate changing some of the 'traditional industry seats' on some of the Boards. However, there was also a view expressed in some jurisdictions that the existing split on their Boards between industry and consumer representatives may not necessarily be in the long-term best interests of the organisation, and that a greater role for independent directors ought to be considered.

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<sup>45</sup> EWOQ's governance structure is unique and we have addressed the associated issues in a separate letter to EWOQ.

<sup>46</sup> Australian Institute of Company Directors, 'Director Tools: Governance Relations – Number of Directors – Board Size,' [https://aicd.companydirectors.com.au/~media/cd2/resources/director-resources/director-tools/pdf/05446-3-1-mem-director-tools-gr-number-of-directors\\_a4-web.ashx](https://aicd.companydirectors.com.au/~media/cd2/resources/director-resources/director-tools/pdf/05446-3-1-mem-director-tools-gr-number-of-directors_a4-web.ashx).

Thus, the changes proposed to jurisdiction are unlikely to necessitate a change to the voting rights or governance structures utilised by the schemes. One suggestion, which may prove valuable, was the introduction of a specific advisory body for emerging technologies. All members should also be invited to consultative council meetings held on a regular basis.

## 8.1 Recommendations

1. *With the exception of EWOQ, the current governance structures of the Schemes be maintained.*
2. *Where a Board or Advisory Council contains industry representatives, consideration needs to be given as to whether one or more of those roles should be contestable by a large peak body holding an umbrella membership on behalf of their members.*
3. *Regular skills reviews to ensure that there is a sufficient diversity in the skills of the board directors/ council members should be maintained.*
4. *That increased use of independent directors who may have fewer vested interests be considered.*
5. *That an advisory body/forum/council for new and emerging technologies be introduced to enhance consultation with members who join under expanded jurisdiction.*

## 9. Membership

With the proposed expansion of jurisdiction, now is an apt time to consider whether the current membership model utilised by the Schemes is still 'fit for purpose.' It appears based upon our desktop research, and throughout our stakeholder consultation process that the current membership model remains 'fit for purpose' for the *existing* Members. However, trying to bring the embedded networks into the Schemes and the emergence of a large and ever-growing segment of the energy sector that do not currently qualify for membership remain significant issues.

Any Scheme considering expanding their jurisdiction would benefit from learning from the difficulties that the Schemes experienced in 'on-boarding' their new members under the most recent expansion of jurisdiction to cover embedded networks. Due to significant issues outside of their control, such as incomplete or inaccurate records and the process used to impose the condition of membership on exempt entities, many potential members have either not yet joined the Schemes or not paid their membership fee. All of the Schemes that acquired expanded jurisdiction over embedded networks, have had to employ additional staff to try and identify potential members and bring them into the Schemes. This has been time-consuming and has diverted resources. This has proven a particular problem in places other than Victoria (due to EWOV being given additional assistance by the Essential Services Commission of Victoria to identify and bring new Members into the Scheme). This means that despite expanded jurisdiction, there still remain instances where vulnerable customers residing in caravan parks and retirement villages cannot currently avail themselves of a free independent dispute resolution service in respect of their energy and water services. It is critical that these issues be avoided in the event that jurisdiction is expanded in the future.

### 9.1 Should an expansion of jurisdiction be on a voluntary or mandatory membership basis?

Based on research from overseas that considered the willingness of companies to join or to participate in the resolution of disputes on a fee for service basis, it is apparent that unless membership is mandated, the integrity of the Scheme is likely to suffer. This is because consumers expect that, when they contact an Energy and Water Ombudsman Scheme with respect to a complaint about either their energy or water services, the matter will automatically be within the jurisdiction of those Schemes. As a result, it has become an urgent issue as to how to introduce a large volume of small to medium enterprises, who provide many of the emerging energy technologies, with membership

to the Schemes. Throughout the consultation process, many different models were canvassed. However, it appears that the model which offers the most promise and the one that had the widest stakeholder acceptance, was a model based upon mandatory membership of a Scheme.

## 9.2 Two pathways to membership: the individual membership and the Umbrella group model

Once a potential Member qualifies to join the scheme by falling within the expanded jurisdiction, the potential member would then have two different pathways to join the scheme. The first pathway is the current approach used to bring embedded networks into the Schemes. That is, the potential member would join the scheme on an individual basis. The second approach is that of an umbrella group or peak body membership of the Scheme. This approach, the use of which should be at the sole election of the potential member, would enable large numbers of smaller solar retailers, battery management companies, and third-party aggregators, to join a Scheme under the guise of a peak trading body or industry group.

The introduction of a new category of membership that of an “umbrella membership” through peak industry bodies is a solution not without its merits in addressing coverage gaps. There is immediate benefit to be found in such a proposal, with Scheme data suggesting that a substantial number of complaints that fall out of jurisdiction relate to entities that are not Scheme participants.

The peak industry body, as the umbrella member, would be required to pay a fixed membership fee on behalf of all of its relevant members (e.g., the Clean Energy Council on behalf of all members of their Accredited Solar Retailers Scheme.) The peak industry body would also have to incorporate into its membership rules a mandatory condition requiring that all members of their organisation sign a deed agreeing to individually submit to external dispute resolution by the relevant Ombudsman Scheme and to pay any associated variable compliance fees. Given the history of rapid turnover among companies in some of these new technology areas, in the event that a dispute arose, and variable complaints fees were incurred, these fees will fall payable immediately upon resolution of the dispute to reduce the risk of bad debt.

The creation of umbrella body memberships in the form proposed above would enable the Ombudsman Schemes to directly initiate and resolve complaints with the individual members of the umbrella organisations. This membership model will also help the peak

industry body to get a better sense of the complaints that are being generated which are relevant to its industry segment, enabling them to improve the levels of consumer protection and thereby increase their own reputation within the broader community. The peak body will also have the opportunity to develop some internal in-house expertise by potentially assisting their members with disputes that have been referred to the Ombudsman Scheme. This would be a significant additional benefit for their members. Such a model is also likely to make it easier to force rogue traders out of the industry, who might otherwise undermine trust and confidence in areas of emerging energy technology.

### 9.3 An additional condition of membership: mandatory Scheme training

A further requirement that should become a mandatory part of membership of a Scheme, in addition to agreeing to the Scheme Rules and the Scheme Charter and Constitution or the statute, as relevant, is that each Member's first line complaint handlers should be required to undertake Scheme training. This would enable all Members to develop a better understanding of the internal processes used at Ombudsman Schemes. It has been shown that Members whose complaint handlers have undergone Scheme training benefit from the faster resolution of external disputes through the reduction of escalated disputes and a reduction in the overall number of complaints against the Member. During the consultation process, this idea received widespread support. Given the small commitment of time that it would require of the Scheme Members versus the potential pay-off, this should be introduced as a matter of priority.

### 9.4 An additional condition of membership: prominent display of the Ombudsman Scheme's logo

A further condition that the Schemes may consider making mandatory is a requirement that each Member prominently place the logo of the applicable Scheme (or alternatively, in the event that a shared ANZEWON logo is devised, the shared logo) and a link to the Scheme's website on the Member's own website, preferably on either or both of the Member's complaints handling page or its homepage. This will have the advantage of not only raising awareness of the Schemes, but also publicising the individual Member's membership of the relevant Scheme/s.

### 9.5 The aggregation of memberships for multiple site holders

A further consideration for each Scheme is whether companies that operate over multiple sites or that have the same ultimate parent company should be aggregated into a single membership. There is significant divergence in practise in this area across the Ombudsman Schemes. Some Schemes aggregate membership if the Member has the same ABN, or CAN, while others will aggregate if the companies share a parent company. However, given that the exemptions are granted on a site-by-site basis, other Schemes have decided that this is not an appropriate model to be adopted. With the expansion of jurisdiction, this is an area in which the development of a single unified practise may be of benefit.

### 9.6 Membership of an approved Scheme must be a qualifying condition to provide goods or services under a government supported subsidy or rebate scheme

As with the Victorian Solar Homes rebate, there are significant benefits that accrue to governments who elect to make it mandatory for any company seeking to provide services under a government-supported scheme to join the relevant Ombudsman Scheme. This reduces the risk of a 'pink batts' home insulation scenario in which rogue traders were allowed to continue to operate with little opportunity for consumers who received poor quality goods or services to receive speedy redress. A further example of where this approach has been highly successful is in the United Kingdom, whereby the UK government mandated within the support program for the consumer renewable energy market, commonly referred to as the 'New Green Deal', that companies join the Energy Ombudsman Scheme.

### 9.7 The need for effective monitoring and compliance of the membership condition imposed on the embedded networks

One issue that has emerged, and which is likely to present problems for the Schemes into the future, is the lack of active monitoring by some regulators with respect to compliance with the condition of membership on the part of embedded or secondary networks. It is undeniable that this is a highly resource-constrained environment for the regulators and that they are trying to minimise regulatory red-tape and adopt a risk-based approach to regulating. However, if regulators do not intend to pursue operators of embedded networks who fail to:

- join the applicable Scheme/s
- pay their membership fees

- submit to the Scheme Rules and otherwise meet the requirements of membership, or
- agree to a conciliated outcome

this could create a real source of reputational risk for the Ombudsman Schemes who run the risk of being viewed as 'toothless tigers'. One low-cost way of reducing the risk of these events could be achieved by changing the stage in the process at which embedded networks must join a Scheme from after the grant of the exemption to during the application process.

### 9.8 A strategy to reduce the cost associated with bringing in additional license holders or exemption holders as Scheme Members

With the expansion of jurisdiction to incorporate the embedded networks, all of the Schemes have experienced difficulties in correctly identifying potential new members and then bringing those entities into the Schemes. For as long as the operator of an embedded network is not officially a Scheme Member, the Scheme is unable to provide consumers with the level of consumer protection that the consumers rightly expect, because the Scheme Rules do not enable the Schemes to address complaints about non-members. Many of these difficulties seem to have arisen because the requirement to join an Ombudsman Scheme arises as a condition imposed *after* an entity has been granted their licence or exemption, rather than being a *pre-condition* imposed during the application process, when the relevant entity is seeking a license or exemption from the regulator.

As a result of this, all of the Schemes have had to employ at least one additional person to try and locate the embedded networks that were meant to have joined the Ombudsman Schemes but are yet to do so. This additional cost burden could be avoided in future by imposing a requirement to join a Scheme in the earlier application stage when a license or exemption is being sought. For example, jurisdictional regulators could require that an applicant seeking a license or exemption contact the relevant Ombudsman Scheme *prior* to submitting its application. The Scheme could then provide conditional pre-approval of the applicant's Scheme Membership, and provide the applicant with a unique identifying number that must be furnished to the relevant regulator to indicate that contact has been made. If a conditional pre-approval were to be instituted, it is envisaged that the joining fee and other funds paid to the Scheme would be held in escrow and the requirement for the Members dispute handlers to attend mandatory Scheme Training temporarily waived, until the appropriate regulator decides that the embedded network or other entity engaged in the market has met the

requirements for the grant of an exemption. When this idea was tested with key stakeholders during our consultation process, it received near unanimous support. In particular, licensed entities expressed the view that it would streamline the application process, making it more efficient while also reducing the monitoring, enforcement and compliance burden that would otherwise be placed on regulators. It is also unlikely to cause undue delay with respect to a licence or exemption application, as the member services areas of the Ombudsman Schemes appear to be highly efficient.

## 9.9 Recommendations

1. *Membership of the Schemes should be on a mandatory basis.*
2. *That a new category of membership be considered: that of an umbrella peak industry body membership.*
3. *In order to qualify for this category of membership, the umbrella group may establish the following, to the sole satisfaction of the Board or Advisory Council of the Scheme (though this power may be delegated to the Ombudsman):*
  - (a) That it is held in high esteem among the industry and consumer sectors, and provide training for their members;*
  - (b) That it represents more than 50 prospective individual members;*
  - (c) That it is willing to pay the annual fixed fee component;*
  - (d) That it is willing to amend its internal governing rules so as to require that each of its members join the Scheme, comply with any request for dispute resolution by a customer, sign a deed of agreement agreeing to pay any variable complaints fees, and agree to be bound by the resolution of disputes;*
  - (e) That it will provide facilities for EDR training to be delivered to its Members at its annual conferences or member meetings, and*
  - (f) That it will comply with the Scheme rules.*
4. *All small members (as determined by one or more of: total number of staff employed, number of customers, or income) shall be granted the option, at their sole election, to join either as an individual member or under the umbrella peak industry body.*
5. *That the variable complaint fees for any individual member who has joined under the guise of an umbrella membership shall fall due and immediately be payable upon the resolution of the dispute.*
6. *An additional mandatory requirement on Scheme membership should be imposed, that is that each Member's first line complaint handlers should be required to undertake mandatory Scheme training upon joining a Scheme, with regular refreshers offered from time to time.*

7. *All members should be required to prominently display the Scheme's logo, or the shared ANZEWON logo if one is devised, and provide a hyperlink to the Scheme's website on their own websites on either or both of the homepage and the complaints handling page.*
8. *Schemes should review their practices with regard to aggregation of multiple site holders and consider a more harmonised approach across the jurisdictions.*
9. *All Schemes should advocate for the inclusion of mandatory membership of an Ombudsman Scheme as a necessary qualification in order for a supplier to sell to or supply any consumer under a government-supported scheme.*
10. *The Schemes should strongly advocate for a change in the process adopted by regulators for the grant of exemptions such that joining the Ombudsman Scheme is a pre-condition of application for an exemption rather than a condition imposed following the grant of the exemption.*
11. *Greater oversight is required by the regulators, particularly in the area of monitoring, enforcement and compliance with the conditions imposed after the award of an exemption. Schemes should push to ensure that this happens.*

## 10. Sustainable Funding

*'An Ombudsman's high reputation and ongoing effectiveness will depend on the office's ability to evolve, adapt and re-model itself. [...] The office must have a clear philosophy of its role, powers and work methods. Any new function must align with the essential principles of the Ombudsman model – independence, expertise, impartiality, procedural fairness and effectiveness. The Ombudsman must always be ready to question whether a proposed new function is an appropriate Ombudsman role. Equally, the office must resist (publicly if necessary) any suggestion that it discharge a new function without additional funding.'*<sup>47</sup>

Quote from John McMillan, former Commonwealth Ombudsman

As is conventional in other ombudsman schemes, use of the service by consumers is free and fees are levied on the scheme participants in order to fund the Schemes. In the case of the energy and water suppliers, costs are apportioned between suppliers that are Members of the scheme.<sup>48</sup> Naturally, the cost apportionment system needs to be fair and functional without being so one-sided so as to incentivise companies to find ways to exclude themselves from the jurisdiction of the ombudsman.<sup>49</sup> Currently, membership fees are 'tiered' - a fixed annual fee is combined with a 'complaints-based' fee, which is calculated by reference to the number of complaints received against a given member and the time taken to resolve each of those complaints.

The introduction of third-party agents into these formerly simple consumer-supplier arrangements further complicates the question of how costs should be determined in these disputes.

During our consultation, four key issues were raised with respect to fees:

1. The efficacy and fairness of the current tiered system;
2. How any expansion of jurisdiction would be funded;

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<sup>47</sup> McMillan, J. (2018). The ombudsman in Australia: flourishing, expanding, diversifying, innovating. In *Research Handbook on the Ombudsman*, Cheltenham, UK: Edward Elgar Publishing. Available From: Elgar Online: The online content platform for Edward Elgar Publishing <<https://doi.org/10.4337/9781786431257.00034>> [Accessed 28 August 2019].

<sup>48</sup> Ian Ramsay, Julie Abramson, and Alan Kirkland, 'Review of the Financial System External Dispute Resolution and Complaints Framework: Final Report', University of Melbourne Legal Studies Research Paper No. 773, 16 May 2018, 232

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3095081&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095081&download=yes).

<sup>49</sup> Christopher Hodges, 'Current discussions on consumer redress: collective redress and ADR', ERA Forum (2012), 31.

3. The development of a sinking fund for large-scale one-off operational expenses;  
and
4. The availability of 'surge' funding.

## 10.1 The efficacy and fairness of the current tiered funding system

In order for a funding model to be sustainable, it ought to be:

- easily understood by Members and prospective Members;
- efficient in terms of the fixed fee representing the true operational cost of the business (i.e., all of those costs not associated with providing the complaints handling services) and the variable fee properly representing a user-pays basis in order to provide 'behavioural nudges' and an incentive for good performance to Members.

Such a funding model needs to be reflective of the costs involved in the initial enquiries, and the escalation of disputes as they arise, yet also provide a level of certainty so that Ombudsman Schemes are able to budget effectively and manage any volatility in complaint volumes.<sup>50</sup>

With one exception,<sup>51</sup> there was strong support for each of the Schemes' current tiered funding systems. This was despite significant differences between the various Schemes in allocating proportions of funding between the fixed and variable complaints-based fees. In particular, it was felt that, thus far, the approach taken to incorporate the embedded networks into the Schemes had been fair. Though, this view appeared to be somewhat more prevalent among the staff and key stakeholders of the Scheme which had been provided with at least some (albeit limited) funding to help cover the cost associated with the most recent expansion of jurisdiction.

There was no support for the introduction of a minimum financial threshold for complaints, with stakeholders, especially those working in consumer advocacy, repeatedly stating that the ability to make a complaint regardless of any prospect of a financial award was a central tenet of the Schemes. This view was echoed in a recent Report entitled, 'Confusion, Gaps and Overlaps,' commissioned by Citizens Advice in the UK, which concluded that:

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<sup>50</sup> Cameron Ralph Khoury, (August 2017) Telecommunications Industry Ombudsman: Independent Review Report

<sup>51</sup> EWOQ does not currently enjoy the benefits that flow from a sufficiently tiered funding model. We have addressed this issue in a separate letter to EWOQ.

*'The government should adopt the principle that participation in ADR should be mandatory across all consumer sectors, regardless of the sector involved or the value of the claims consumers are making.'*<sup>52</sup>

That said, the view was expressed by a number of Scheme Members that some Schemes could more effectively filter initial enquiries and might consider not charging for an initial refer back. As it stands, for 2019/20 EWOV has adopted the approach of not separately charging for refer backs where the customer has not complained about the issue to the company.

A small number of Members also expressed a concern that Schemes needed to devise better strategies for managing serial complainants who can quickly rack up costs for the Members concerned. There was a view expressed that some serial complainants complain frequently in an attempt to receive a financial award. Realigning consumer expectations when the consumer is being unreasonable or is a serial complainer is undoubtedly challenging for complaints handlers. Nevertheless, some Scheme Members speculated that in an environment in which complaints, and hence the associated variable complaints fees, are falling, there may be less of a desire on the part of complaints handlers to tell a consumer that they are being unreasonable. There is no evidence available to support this view. However, Schemes ought to monitor this issue closely and provide feedback to Members to reassure them that this is in fact not the case.

## 10.2 How would any expansion of jurisdiction be funded?

If jurisdiction of the Schemes is to be expanded, then there exists a very real question about how any such expansion will be funded. It appears that there are currently five options available:

1. Government funding to support the transition towards expanded jurisdiction on a one-off basis;
2. A consumer levy imposed on all energy customers;
3. The expansion be funded by the existing Members;
4. The expansion be funded by the new member entrants who join under the expansion of jurisdiction; or
5. A voluntary fee-for-service basis.

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<sup>52</sup> Chris Gill, Naomi Creutzfeldt, Jane Williams, Sarah O'Neill, and Nial Vivian, 'Confusion, gas and overlaps: A consumer perspective on alternative dispute resolution between consumers and businesses,' Queen Margaret University Centre for Consumer Dispute Resolution, Citizens Advice, University of Westminster,  
<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf>>

### 10.2.1. Government funding on a one-off basis

Given the significant number of enquiries already reaching the Schemes regarding issues that would now be covered by the expansion of jurisdiction, it appears that there would be a significant benefit in seeking government funding for a three- or five-year period to support the transition to expanded jurisdiction. It is envisaged that any application for government funding would be based on the following formula:

***Government funding sought = fixed cost associated with bringing the prospective Members into the Scheme + variable cost (average cost of complaint x the number of out of jurisdiction cases in the previous financial year that would now be within jurisdiction)***

The idea behind seeking government funding is that many consumers who now utilise these emerging technologies such as PV solar or battery storage systems have acquired those systems under the guise of government schemes or grants. In addition, the uptake has been very significant, with 2.15 million households in Australia currently hosting PV solar systems on their rooftops.<sup>53</sup> This means that any levy on new solar systems would not provide an adequate level of funding in the short term to meet the needs of those existing customers who have already got those systems in place. Further, the significant additional burden that this would place on the Schemes means that external funding is needed to ensure that all energy consumers have equal access to the Schemes.

It is critically important, when any transitional funding is sought, that it be made clear to the relevant government or government entity that this funding is being sought on a *once-off* basis. Thus the funding sought needs to be designed to be staged in such a way that the external funding levels decrease over time. The idea behind this approach is that it places a growing onus on industry to pick up the additional costs, and also signals to government that no further funds will be sought at the end of the three to five-year period. It is hoped that this approach means that the relevant government or government entity will be more likely to fund the transition.

A further consideration with respect to government funding is whether the source of the funds will be from central revenue, the respective government department tasked with

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<sup>53</sup> Australian Energy Market Commission, 'Energy innovations as solar and batteries approach socket parity,' Media Release 28 June 2019 quoting Bloomberg New Energy Finance, Annabel Wilton, 2018 Australia Behind-the-meter PV and Storage Forecast, 31 May 2018, Sydney.

consumer affairs, or through the relevant department tasked with managing the energy sector. In New Zealand, the view was expressed that a portion of the existing consumer levy held by the Electricity Authority could be used to fund the transition to expanded jurisdiction. In Victoria, the view was expressed that the funding may come from the Essential Services Commission. Regardless of the source of government funds, which is likely to vary from jurisdiction to jurisdiction due to the current budgetary constraints imposed on some government departments, concern needs to be had about ensuring that the funds provided to the Schemes are provided in such a way that the independence of the Ombudsman is maintained, and there is no perception on the part of consumers that the Ombudsman Scheme will be biased in any way. One way in which these issues might be managed is through ensuring that the total amount of government funding is fixed for the life of the term of the grant from the outset of the grant and not subject to annual budgetary volatility.

Government funding presents a number of benefits to the government, to the Members, and to the ultimate consumers. It seems anomalous that in most jurisdictions where a government has funded consumers to adopt new technologies, the government has not also imposed a requirement upon the providers of those subsidised goods or services that they join an approved Ombudsman Scheme. In the event that the governments were to impose a mandatory external dispute resolution service in the form of an approved Ombudsman Scheme, this is likely to reduce the perceived risk of investing in new technologies and increase trust and consumer confidence in the context of a rapidly changing and often at times uncertain energy sector. The net effect of this is that it is likely to support the uptake of emerging technologies thereby enabling the governments to meet their policy ambitions. In addition, by staging the funding, this will enable the industry to take a greater ownership over time of the expanded jurisdiction of the Schemes. This will enable the industry to feel a sense of ownership over the organisation and will encourage the new Scheme Members to engage with the Ombudsman Schemes, including resolving any systemic issues identified and education and training processes.

### **10.2.2. A consumer levy imposed on all energy customers**

The consumer levy model is designed to socialise the cost of expanding jurisdiction across all energy consumers. This would enable the households who have already acquired residential PV, solar and/or battery storage systems to assist with paying the cost of expanding jurisdiction. However, this model presents grave inequities to lower-income consumers who have thus far been unable to afford the high upfront costs

associated with adopting emerging energy technologies and who have no real prospect of affording them in the foreseeable future. In particular, it seems unfair that these lower-income customers will have to bear an even higher price for their electricity to pay for this consumer levy to expand jurisdiction when they cannot afford to participate in the uptake of these new technologies, which may otherwise act to reduce their own power bills. For this reason, this model is not supported.

### **10.2.3. Funded by the existing Members**

A small number of Scheme Members indicated a willingness to help provide seed funding to expand jurisdiction. This view was noticeably far more prominent among the members of Utilities Disputes than any other Scheme. Further, the Scheme Members who were more likely to be supportive were those who had already developed businesses utilising these emerging technologies and thus any expansion in jurisdiction would also benefit their businesses.

Other stakeholders expressed the view that, where an existing Scheme Member already had an emerging technology business/es that would be covered by the expanded jurisdiction, their fees should be reviewed accordingly. On the other hand, many Scheme Members and peak industry bodies were not supportive of the existing Members being required to fund an expanded jurisdiction of the Schemes. Indeed, a not infrequent refrain asked why should other Scheme Members have to pay to bring new Members into the Scheme? This was because there was a view that the existing Members had already borne the price for their own entry into the Scheme, and they would not receive significant benefits from paying a higher cost for the expansion of jurisdiction.

There was also a concern expressed that any expansion of the Schemes needed to be funded and resourced properly. This was to ensure that the time periods currently taken to resolve cases and escalated complaints did not blow out and that the current levels of service that Scheme Members receive from the Ombudsman Schemes were not reduced due to the expansion of jurisdiction. Accordingly, the funding committed to enable the expansion of jurisdiction to cover new Members ought to be cost reflective and not involve cross-subsidies from other sectors or providers. It was thought that the payment of a small annual fee would remind the new members that they were indeed part of an Ombudsman Scheme, even in the absence of any complaints against them. It would also enable funding of any additional costs that would be required to bring in the new Members and support new technologies such as, new software management systems, additional technology, increased staffing levels, and capacity building of existing staff. The payment of a small fixed fee would encourage new Members to utilise the important

awareness raising, outreach, education, and prevention work that the Schemes provide to their existing Members. A number of stakeholders expressed concerns that, in the event that new Members were not required in the short-term to pay a price to join the Schemes, the new Members, might not feel that they had adequate 'ownership' of the Scheme. Moreover, a small fixed fee could impose a sufficient behavioural nudge to reduce complaints amongst individual Scheme Members.

The Members also expressed the view that they have a strong vested interest in the Schemes and that they need the Ombudsman Schemes to have the ability to right-size the organisation to meet those new challenges and to adequately resource themselves.

#### **10.2.4. Funded solely by new Member entrants**

A number of Scheme Members expressed the view that the cost of expanding jurisdiction should be borne solely by the new Member entrants. However, a significant portion of Scheme Members also identified that given the cost of joining the scheme, that there may be "sticker-shock" if a small-business was asked to fund a significant fixed fee cost in order to join the scheme. This could pose a significant impediment to acceptance of the Schemes by prospective new Members. Throughout our consultation, it became evident that the vast majority of stakeholders conceived that the new Members joining the Schemes would be likely to have fees levied on a similar basis to that used for embedded networks.

#### **10.2.5. Voluntary fee-for-service approach**

An alternative view, raised by an industry regulator, was that rather than having new entrants join the Scheme as formal members that they ought to utilise the services provided by the Schemes on a fee-for-service basis. While this option may initially appear attractive because it would not necessitate a substantial increase to the number of individual members that each Scheme has, research has indicated that it is highly unlikely to deliver the desired outcome to consumers.<sup>54</sup> This is because when a similar voluntary fee-for-service model was adopted by the Consumer Ombudsman in the UK, of the 5660 complaints received by the Ombudsman in 2017, fewer than 6% of businesses were

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<sup>54</sup> Martin Lewis, Will Barnes and Kirsty Good, (November 2017) 'Sharper Teeth: The Consumer Need For Ombudsman Reform,' A MoneySavingExpert report for the All-Party Parliamentary Group on Consumer Protection, MoneySavingExpert.com, [https://images6.moneysavingexpert.com/images/documents/MSE-Sharper\\_teeth\\_interactive.pdf](https://images6.moneysavingexpert.com/images/documents/MSE-Sharper_teeth_interactive.pdf).

willing to engage in the process and utilise the Ombudsman's expertise in resolving their disputes.<sup>55</sup>

Research by Kirkham also supports the view that many businesses will not voluntarily join a redress scheme. This is because the 'cost of participation will look significant in the short-term and may not outweigh the potential costs of judicial dispute resolution or an alternative investment in enhanced internal systems of customer service.'<sup>56</sup> It is argued that this highlights an information asymmetry on the part of business, with the cost of judicial dispute resolution often far outweighing the cost of using the compliance handling procedures through an Ombudsman Scheme. Further, the public nature of both decisions of administrative and civil appeals tribunals and the court system means that there is also an additional reputational risk that is not present when a Member participates in an Ombudsman Scheme.

Other stakeholders resoundingly rejected this approach, with one stakeholder commenting in their survey response:

*'Expansion of the jurisdiction based on voluntary engagement only would constitute a risk to the sustainability and the reputation of the Ombudsman's office. Given that the scheme is fully funded by its members, it is critical that any consideration of widening the jurisdiction to accommodate new modes of consumer participation is approached with the understanding that additional Scheme Members are essential to ensure a fair and equitable funding model for all.'*

For these reasons, the adoption of a voluntary fee-for-service approach is not recommended.

### 10.3 The availability of 'surge' funding

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<sup>55</sup> Ombudsman Association (UK), Submission to [Department for Business, Energy & Industrial Strategy - Modernising Consumer Markets: Consumer Green Paper](#) 4 Jul 2018.

<sup>56</sup> Kirkham, Richard. "Regulating ADR: Lessons from the UK." *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford University Press, 2016, doi:10.1093/acprof:oso/9780198766353.003.0015.

One of the issues that arose in our consultations with the management of the Schemes was the availability of 'surge funding.' That is, if an individual Member is responsible for a disproportionate spike in cases within a financial year due to a widespread systemic issue or one-off event, should that Member be required to make an additional lump sum financial contribution within that financial year to pay for the additional resources required to meet the increased volume of complaints? While many of the Schemes already have surge funding available to them, a number of Schemes do not and this appears to be on the basis that they lack the legal authority to call up emergency funds or a mistaken belief that those costs should be smeared across all Members. This latter view, which was only raised by one respondent, was particularly concerning. To smear these costs, even temporarily, would effectively undermine the important 'behavioural nudge' that surge funding and variable complaints based fees provides to Members for poor performance, while removing an incentive for Members with excellence performance. One Scheme expressed the view that because any surge funding would be in addition to an increased variable complaints cost, that it effectively acts as a penalty. However, this view appears to be based on a misunderstanding of the operation or surge funding.

If administered correctly, with an appropriately material threshold imposed before the surge funding is triggered, the adoption of a surge funding model would appear to be a very efficient means of ensuring that the Ombudsman Schemes' external dispute resolution services can be appropriately resourced to cover widespread systemic or one-off events. In particular, the view that surge funding is effectively a penalty appears to be erroneous. This is because, in the event that the additional money received exceeds the requirements of the Scheme to meet the additional resourcing burden, the additional funds can be returned to the Member in question as part of an acquittal process at the end of the Scheme's financial year. A further advantage of surge funding is that it provides an appropriate behavioural nudge to ensure that the Member places additional resources into resolving the disputes to prevent further escalation.

## 10.4 Recommendations

1. *The current tiered funding model should be retained, with the retention of the fixed and variable complaints based fees.*
2. *The approach taken to incorporate the embedded networks is considered fair and should be retained.*
3. *Schemes should consider reviewing in what circumstances they refer back and how much they charge for refer back.*
4. *Schemes should consider providing members with the number of complaints that are deemed to be unreasonable by complaints handlers analyse the data to ensure that the level does not vary wildly when the total number of complaints falls or increases to ensure a consistency in approach. Members should be given regular feedback in this regard.*
5. *Expansion of jurisdiction should be funded through a fixed three or five-year grant of government funding sought on a one-off basis to support the transition.*
6. *One option for calculating the government funding sought could be: Government funding sought = fixed cost associated with bringing the prospective Members into the Scheme + variable cost (average cost of complaint x the number of out of jurisdiction cases in the previous financial year that would now be within jurisdiction).*
7. *The government funding should decline over the grant period, with industry taking on an ever-increasing proportion of the integration costs.*
8. *The funding sought to expand jurisdiction should cover any additional staffing costs, technology costs, training costs, and other associated resourcing costs, while ensuring that current levels of service and the timeframes are either maintained or enhanced.*
9. *New members may also be asked to pay a small fixed fee in the short-term to ensure that they feel a sense of ownership over the Schemes.*
10. *That the voluntary fee-for service model should be strongly resisted.*

11. *That availability of surge funding should be considered in those jurisdictions that do not currently have the benefit of it.*

## 11. Operating Models

### 11.1 The Ombudsman Schemes as a 'One Stop Shop'

*'Ideally all ADR would be fronted with a single gateway that would explain the process, ensure the complaint was suitable for ADR, explain the necessary pre-ADR steps and assist in identifying an ADR body...Clear and appropriate signposting would greatly improve the experience for many consumers.'*<sup>57</sup>

Quote from the Chartered Trading Standards Institute

*'There should be no wrong front door for a consumer with a complaint. Warm transfers are an essential element of the service we want the Ombudsman Schemes to provide for our customers. A good warm transfer provides value-add because it helps our customers avoid "complaint fatigue" making disputes easier to resolve in the long-run.'*

Interview with Energy Industry Representative

There was significant evidence available that many consumers already view the Ombudsman Schemes as a 'one stop shop' for dispute resolution. For example, the following Table 2<sup>58</sup> highlights the referrals and transfers made in 2018/2019 by EWON in respect of the cases that were outside of their current jurisdiction. It shows that over the 12 month period EWON complaints handlers made a total of 1235 referrals and warm transfers to 69 different organisations including: the Office of Fair Trading, NCAT, the local courts, Housing NSW, local councils, the NSW Ombudsman and the NSW Tenants Union.

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<sup>57</sup> Chartered Trading Standards Institute, Chartered Trading Standards Institute Response to 'Modernising Consumer Markets: Green Paper,' (July 2018), <<https://www.tradingstandards.uk/media/documents/news--policy/consultation-responses/modernising-consumer-markets----ctsi-full-response.pdf>>., 16-17.

<sup>58</sup> This table has been provided by the Quality Assurance team at EWON based on 2018/2019 data.

Table 2: Destinations of referrals made by EWON in 2018/2019 by number

Category	Entity referred to	Number of cases	Total
Federal Government energy agencies	<ul style="list-style-type: none"> <li>• AER</li> <li>• ACCC</li> <li>• Aged Care Quality and Safety Commission</li> <li>• Energy Made Easy</li> </ul>	<p style="text-align: right;">7</p> <p style="text-align: right;">6</p> <p style="text-align: right;">1</p> <p style="text-align: right;">8</p>	22
State Government referral	<ul style="list-style-type: none"> <li>• Energy NSW</li> <li>• NSW Office of Environment &amp; Heritage</li> <li>• IPART</li> <li>• NSW Housing Appeals Committee</li> <li>• NSW Police</li> <li>• NSW Small Business Commissioner</li> <li>• NSW Environment Protection Authority</li> <li>• Housing NSW</li> <li>• NSW Health</li> <li>• Natural Resources Access Regulator</li> <li>• Service NSW</li> <li>• Public Service</li> </ul>	<p style="text-align: right;">1</p> <p style="text-align: right;">2</p> <p style="text-align: right;">3</p> <p style="text-align: right;">12</p> <p style="text-align: right;">10</p> <p style="text-align: right;">13</p> <p style="text-align: right;">2</p> <p style="text-align: right;">10</p> <p style="text-align: right;">1</p> <p style="text-align: right;">2</p> <p style="text-align: right;">5</p>	51
Local Government	<ul style="list-style-type: none"> <li>• Local Councils</li> </ul>	15	15
Energy and Water Agencies	<ul style="list-style-type: none"> <li>• Clean Energy Council</li> <li>• Murrumbidgee Irrigation</li> </ul>	<p style="text-align: right;">2</p> <p style="text-align: right;">1</p>	3
Community Agencies	<ul style="list-style-type: none"> <li>• Financial Counselling Australia</li> </ul>	2	2
Other Ombudsman	<ul style="list-style-type: none"> <li>• Telecommunications Industry Ombudsman</li> <li>• EWOV</li> <li>• EWOSA</li> <li>• ACAT ACT Civil and Admin Tribunal</li> <li>• AFCA (CIO &amp; FOS)</li> <li>• Commonwealth Ombudsman</li> <li>• Fair Work Ombudsman</li> <li>• Utilities Commission NT</li> <li>• NSW Ombudsman</li> </ul>	<p style="text-align: right;">27</p> <p style="text-align: right;">7</p> <p style="text-align: right;">1</p> <p style="text-align: right;">1</p> <p style="text-align: right;">5</p> <p style="text-align: right;">1</p> <p style="text-align: right;">4</p> <p style="text-align: right;">1</p> <p style="text-align: right;">96</p>	143

Category	Entity referred to	Number of cases	Total
Legal/tenancy advisor	<ul style="list-style-type: none"> <li>• Legal Aid</li> <li>• Tenants NSW</li> <li>• Tenants Advocacy Service</li> <li>• East Area Tenancy Service</li> <li>• Northern Sydney Area Tenants Service</li> <li>• South West Sydney Tenants Advice &amp; Advocacy Service</li> <li>• Central Coast Tenancy Advice &amp; Advocacy</li> <li>• Community Justice Centre</li> </ul>	5 43     5	53
Fair trading / NCAT	<ul style="list-style-type: none"> <li>• Fair Trading NSW</li> <li>• NCAT</li> <li>• Fair Trading QLD</li> <li>• Fair Trading Lismore</li> </ul>	253 15 1 1	270
Private contractor	<ul style="list-style-type: none"> <li>• Plumber</li> <li>• Electrician</li> </ul>	4 3	7
OOJ EWON member referrals	<ul style="list-style-type: none"> <li>• Cases outside NSW, Member services not in Jurisdiction i.e. Solar Installations, LPG, Large Business Customers</li> <li>• 36 organisations</li> </ul>		613
Other	<ul style="list-style-type: none"> <li>• Park Operator</li> <li>• Landlord</li> <li>• Real Estate</li> <li>• Stoneink (Jackgreen Debit Collection)</li> </ul>	2 23 24 1	50
Other government	<ul style="list-style-type: none"> <li>• ACMA</li> <li>• Age Care Quality &amp; Safety Commission</li> <li>• Dept of Industry Innovation and Science</li> </ul>	2 1 3	6

Indeed, the existing processes that exist to provide warm referrals to the appropriate body to assist a consumer with their complaint were strongly supported by industry. There was also strong support for Schemes reviewing their existing warm referral processes so that they can be strengthened and formalised, where this does not already exist. One solution could be the development of a centralised platform for energy and water complaints (broadly defined to capture many of the out of jurisdiction matters) that allocates the complaint to the correct agency, rather than expecting the consumer to navigate the intricacies of the present energy governance framework. One of the challenges associated with any such move would be how to fund it. It is possible that Scheme Members would be willing to facilitate this as a value-add service to help prevent customers from getting 'complaint fatigue.'

While the proposed expansion of jurisdiction will better reflect the perceptions of energy consumers as to the ability of the Ombudsman Schemes to resolve their disputes, or if necessary provide a conciliated outcome, it will still be necessary on occasion to transfer some consumers to another organisation due to the nature of their complaint. For example, as stated above in the section about jurisdictional issues, at present there is no intention that matters under the Australian Consumer Law be transferred to the Ombudsman Schemes. Rather, there was a widely supported view that dealing with product liability or warranty issues is probably better managed through the existing processes of a referral to the appropriate consumer protection government body and then, if necessary, the consumer being required to take that matter either to an administrative and civil appeals tribunal or the local court.

## 11.2 Expansion of the internal technical capacity within Schemes

In the event of an expansion of jurisdiction, it is likely that the Ombudsman Schemes will require a greater technical resource capacity in order to adequately support Members and consumers using new technologies. This technical resource may take the form of an expansion of the expert advice panels to incorporate new technologies and modes of participation. In particular, it is envisaged that they would assist the complaint handling teams make difficult decisions to determine which Member/s is responsible for a complex issue or understand new technologies as they enter the market. Any expansion of technical capacity will come at a price, and it is important that the main beneficiaries of these services pay for them accordingly. In particular, there was a view expressed that Scheme Members who do not offer these new technologies or modes of participation ought not have to cross-subsidise the expansion of jurisdiction.

### 11.3 Extension of operating hours

A number of interviewees and survey respondents expressed the view that the operation of the Schemes only within standard business hours may be limiting the access to some consumers who may struggle to make a complaint in that time frame. That said, many of the complaints handlers within the Members also only work within standard business hours meaning that in the event that the Schemes expand their operating hours, they may not be able to make the warm referrals over to the Members or other organisations that might be required. There are several potential solutions to this issue, including that Schemes may wish to trial a late-night opening one night a week in order to provide services to those consumers who might not otherwise be able to benefit. This would have a lesser impact on staff working hours and would be less likely to necessitate far higher operating costs than expanding the operating hours of the Schemes every day. This issue could then be reviewed once Schemes have been able to assess the level of demand for non-standard operating hours.

### 11.4 Online Dispute Resolution

Given the digital transformation, which is facilitating the adoption of many of the new technologies and modes of participation within the energy sector, it is not surprising that calls have been raised for the increased adoption of online dispute resolution (ODR). The advantages associated with ODR are that consumers may prefer to have a less personal form of interaction with their complaints handler if the matter is particularly sensitive or if they are time-poor.<sup>59</sup> In our focus groups, the stakeholders who most commonly sought the increased provision of ODR facilities tended to be millennials or younger energy consumers. These stakeholders reported that they already extensively use web chat in particular when engaging with other services, including when raising disputes with their utilities.

Greater use of online resolution – at least in respect of new technologies – could also incentivise consumers to come forward and engage in the dispute process without having to miss work during business hours. EWOQ and EWOV data shows that complaints made using email and the website have remained stable at 20-30% in the past three years. The possibility to utilise purely online EDR for small complaints would likely move some of the telephone complaints into a longer-term administrative convenience of an online

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<sup>59</sup> Julinda Beqiraj, Sabina Garahan and Kelly Shuttleworth, Ombudsman schemes and effective access to justice: A study of international practices and trends, International Bar Association (23 October 2018), 44-48.

format. This would have the added benefit of facilitating complaints from younger and low-income demographics that are more familiar with online services and often work in more time-intensive industries such as shift work or multiple jobs. As Hodges writes, the advantages of ODR in the energy sector are not limited purely to cost or efficiency, but include features 'such as a desire for confidentiality, greater informality, and other outcomes such as restoring peaceful relationships through a process that is not adversarial or bipolar (one side wins, the other loses).'<sup>60</sup> This is especially true in an age of rapidly developing technology, where online platforms are often viewed as a means of ensuring confidentiality and anonymity. That said, ODR is currently expensive and relies also on uptake by the Members for many of the efficiency gains to materialise. Moreover, for the foreseeable future, it is likely that most complaints by customers in the traditional energy and water markets will still need to be dealt with orally, via email or in written hardcopy form.

## 11.5 Other digital developments to improve access

### 11.5.1 Members to display the Scheme logo with a hyperlink through to the relevant Scheme website

Rather than online dispute resolution per se, an alternative could be to encourage or mandate all Scheme Members include on the front page of their website, and also on their complaints page, the relevant Ombudsman Scheme's logo and a direct link to that Scheme's website. The use of the Scheme logo in this way would be used as both a marker of quality for the Scheme Members, but will also serve a dual function and increase awareness of the Schemes.

### 11.5.2 The use of digital technologies such as bots and web chat out of hours to manage initial out of hours contact

Another potential strategy to manage the need for greater flexibility to support increased access to the Schemes would involve using a bot to provide an initial contact point, which the Schemes could follow up during standard business hours. It is envisaged that this bot would not engage in active complaint handling. Rather, the bot would be used to take consumers through the standard initial contact process such as providing clear information on the role of the Ombudsman Schemes such that the consumers' expectations are appropriately managed or enquiring about whether the consumer has

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<sup>60</sup> Christopher Hodges, 'Current discussions on consumer redress: collective redress and ADR', ERA Forum (2012), 20.

previously raised their complaint with the Member. In the event that this had not yet occurred, the bot could then provide the consumer with a refer back by providing the necessary contact information to enable the consumer to contact that Member's complaints handling department directly. It is envisaged that once a consumer has stated that they have already raised their complaint with a Scheme Member, the bot could then provide the consumer with a link to the online database to enable the consumer to register their details for follow up when the Scheme re-opens.

The increased use of technology such as web bots or web chat would need to be closely monitored. Some Ombudsman Schemes indicated that they possess data highlighting that consumers who have chosen to interact with the Ombudsman Scheme entirely over email or online often express lower levels of satisfaction with the service than consumers who have had oral engagement with their complaints handler over the phone. It appears that consumers receive great benefit from knowing that they have been listened to and an individual complaints handler has heard their complaint. This same benefit is not achieved if a dispute is handled entirely through online written correspondence.

Web chat was frequently mooted as another potential alternative to increase accessibility, particularly among millennials and Generation Y stakeholders. However, other stakeholders who are often less comfortable using the technology raised legitimate concerns about the use of web chat to resolve consumer complaints, given the complex nature of the complaints involved, which may mean that it is not the best tool to use. That said, there was a view expressed that for hardship or vulnerable consumers the ability to raise a complaint in a more anonymous filling format might make it easier for them to raise a complaint at all.

There are benefits attached to using oral communication because it enables the complaints handler to quickly understand the level of comprehension on the part of the consumer. This enables more effective communication and enables the explanation of the proposed resolution and the giving of advice to be better tailored to the individual consumer's needs.

### 11.6 The ability of the Ombudsman Schemes to rapidly scale up in the event of a one-off event

A number of the smaller Schemes expressed concern about their ability to scale-up their processes and resources in the event of a one-off sector event. In particular, there was a concern expressed that their existing complaints handlers might not be able to handle the volume of cases coming in in a timely fashion. One solution proposed to resolve this

issue was the identification of appropriately trained complaints handlers with experience working within the energy and water sectors that may be interested in either working remotely using the available technology or operating as a 'flying squad' in the event of such a situation. This may include recently retired complaints handlers or people seeking a more flexible approach to their work-life. Given how rarely these events occur, this may not be cost effective. However, it is something that the smaller Schemes may wish to consider. Another alternative could be that the Schemes temporarily borrow employees from another Scheme on a one-off short-term secondment basis.

### 11.7 Innovations in operating models to ensure more efficient outcomes

There was a request from a Scheme Member for the provision of an 'early alert system' that would ensure that the Member is notified when a consumer has been in contact with an Ombudsman Scheme to make an inquiry or when a refer back has been made. This would enable Scheme Members to place additional resources into assisting the consumer at an earlier stage. Specifically, it would enable Members to follow up consumers to ensure that their issue has been resolved to the consumer's satisfaction. There was a concern raised that in some jurisdictions that because the Schemes are precluded for privacy reasons from sharing customer details, Member's contact centres do not become aware of a refer back until the Member receives their regular reporting or receive their final bill from the Ombudsman Scheme. In cases where consumers contact the Ombudsman prior to raising their concern with the Member, this complaint may be ameliorated by Member's improving consumer awareness of their own internal dispute resolution schemes.

## 11.8 Recommendations

1. *The ability of the Ombudsman Schemes to operate as a 'one stop shop,' with no wrong front door for complaints, ought to be continued and factored into funding models if necessary.*
2. *Further MOUs with other organisations to improve the process of arm referrals and transfer should be considered to help facilitate this process.*
3. *Schemes are likely to need enhanced technical capacity to support the introduction of new technologies; where possible the main beneficiaries of this additional technical expertise should fund it.*
4. *Schemes should trial extended operating hours, possibly one night a week. However, consideration needs to be given to the effectiveness of extending operating hours if the complaints handlers cannot offer warm transfers during these times because the Members' complaints handling areas are not also open and nor are the other organisations to which a complaint might be referred.*
5. *The adoption of entirely ODR is not recommended at present because many consumers need to feel that someone has 'listened' to their complaint.*
6. *Web bots and web chat may be an efficient and effective manner of managing initial contact out of hours and helping to carry out the initial filter process and data gathering exercise.*
7. *Scheme Members should be required to display the Scheme's logo and a hyperlink to the Scheme' website.*
8. *Smaller schemes may wish to consider the development of a contingency plan to second complaints handlers from other Schemes either to act as a 'flying squad' or to work remotely in order to handle the additional caseload in a timely fashion in the event of a one-off systemic event.*
9. *Schemes should initiate an early alert system to notify the applicable Member when they receive an inquiry from or give a refer back to customer if they do not already do so. This would enable enhanced service from the Member and may reduce further escalation.*

## 12. Changing modes of accessing the schemes by consumers and strategies to encourage consumer awareness

*'More awareness raising is clearly required...There is a role for a government- style advertising campaign to raise awareness of the rights of consumers and where they can seek redress.'*

Interview with Senior Management of a large Scheme Member

*'Awareness raising initiatives are not 'an optional extra' but rather this work is a core function of a modern effective ombudsman service.'*<sup>61</sup>

Independent Review of the Telecommunications Industry Ombudsman

*'Consumers are more likely to use an Ombudsman if they are already aware of the Ombudsman before something goes wrong.'*<sup>62</sup>

Dr Richard Kirkham

*'Awareness is a 'perennial concern' for most ombuds in the world.'*<sup>63</sup> Repeated surveys have shown that the ombudsman institution is not well known or understood particularly by younger consumers.<sup>64</sup> That said, there are also low levels of awareness reported by consumers of other alternative redress mechanisms including the civil and administrative tribunals and the courts.<sup>65</sup>

All of the Schemes carry out different outreach activities and awareness raising initiatives, with each Scheme providing examples of innovation and indicating that much thought is currently going into how to perform better in this area into the future. As Diagram 6 (below) indicates, the outreach and awareness raising initiatives of the Ombudsman Schemes occur throughout a consumer's interaction with the energy and water sector, providing protections before, during and after the sale or supply of energy and water. This should provide positive reassurance to consumers and Members alike, that there is

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<sup>61</sup> Cameron Ralph Khoury, Telecommunications Industry Ombudsman: Independent Review Report (August 2017), 33-34.

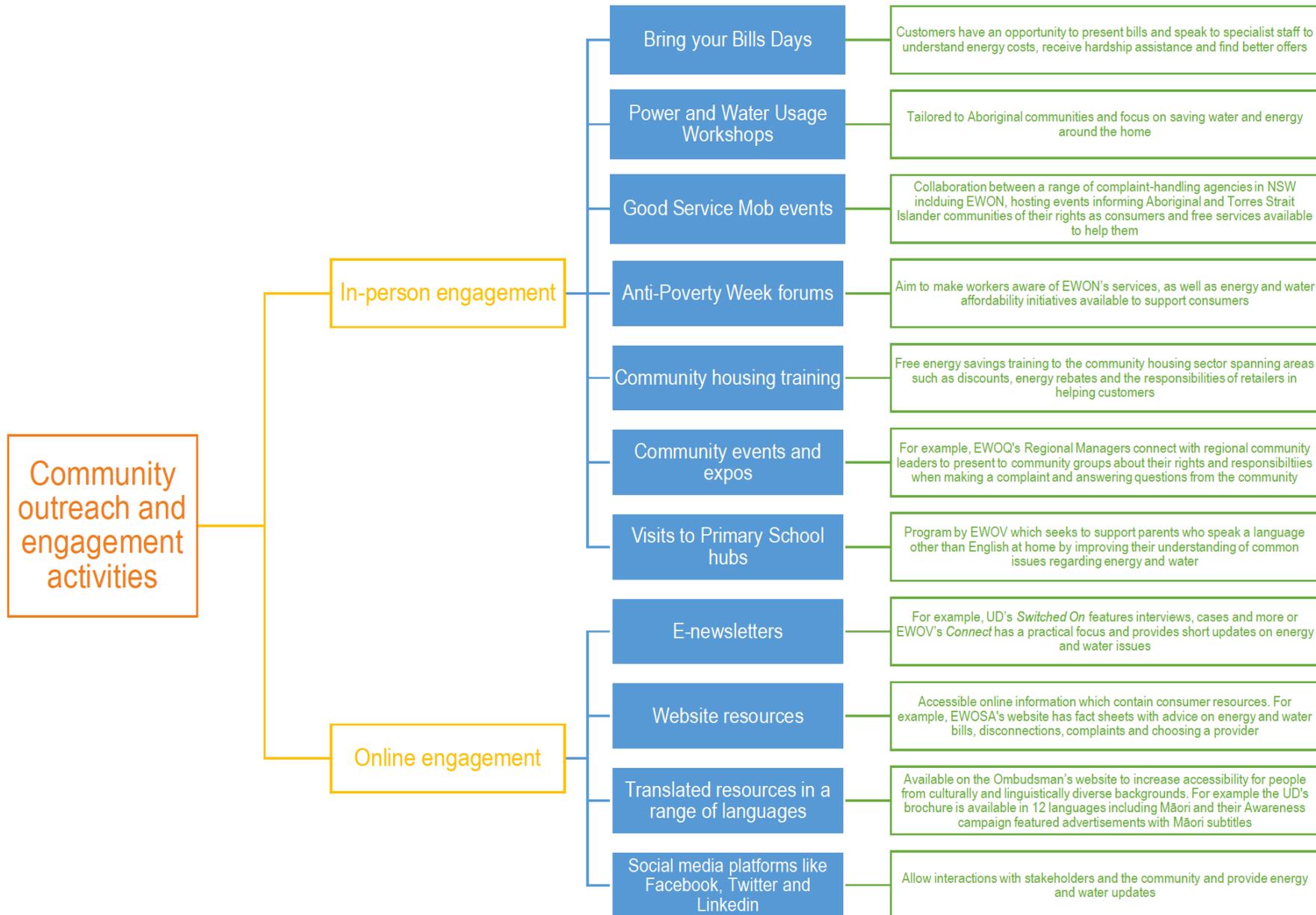
<sup>62</sup> Kirkham, Richard. (2016) 'Regulating ADR: Lessons from the UK.' *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford University Press, 2016, doi:10.1093/acprof:oso/9780198766353.003.0015.

<sup>63</sup> Bondy, V., and Doyle, M. (2018). What's in a name? A discussion paper on ombud terminology. In *Research Handbook on the Ombudsman*, Cheltenham, UK: Edward Elgar Publishing. Available From: Elgar Online: The online content platform for Edward Elgar Publishing, 485, <<https://doi.org/10.4337/9781786431257.00037>> [Accessed 28 August 2019]

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

an independent and impartial body acting to prevent complaints, listen to issues as they arise, educate both parties as needed and ultimately resolve disputes.



## 12.1 There is strong support from stakeholders for further awareness- raising activities

There was strong support throughout our research, especially from industry and consumer advocacy groups, for further efforts to raise awareness of the Schemes. It was felt that awareness raising was critical in maintaining the high regard in which the Schemes are currently viewed, in promoting the independence and impartiality of the Schemes, and in helping the Schemes reach a broader audience. Bondy and Doyle have indicated that 'in the context of ombuds, the 'brand being promoted is associated with reliability, expertise, authority and a number of other features presumed to be desirable.'<sup>66</sup> As a result, it is critical that the Schemes consider methods of increasing consumer engagement and brand awareness as a primary means to increase their efficacy.

## 12.2 There are differing views on the form that any awareness-raising campaign should take and who should fund it

The view of industry seemed to be that any awareness raising campaign should be a general government-style awareness campaign, which focuses on making consumers more aware of their rights and the sources of consumer protection and dispute resolution. The awareness-raising work of ServiceNSW was cited as an exemplar by several of the NSW interviewees though they also acknowledged the substantial budget that ServiceNSW had to carry out this work. Some research participants believed that an Ombudsman Scheme awareness raising campaign should be funded by either the national or state governments. Those same participants also acknowledged, though, that this approach could lead to confusion about the role of the Schemes among some consumers and could imperil the perception of the Schemes as being independent. Other research participants believed that awareness-raising ought to be funded by the regulators, though similar concerns were raised about what that would mean for the independence of the Schemes. There was also disagreement expressed about whether this campaign should be national or jurisdiction based, with industry peak bodies and Members expressing a preference for a national campaign. In contrast, the consumer advocates, government officials, jurisdictional regulators and Scheme management and staff, all expressed a preference for jurisdictional campaigns noting that there were significant differences in both the legal frameworks governing the sectors (e.g. derogations from the NEL). A jurisdictional approach would also allow Schemes to

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<sup>66</sup> Bondy, V., and Doyle, M. (2018). What's in a name? A discussion paper on ombud terminology. In *Research Handbook on the Ombudsman*, Cheltenham, UK: Edward Elgar Publishing. Available From: Elgar Online: The online content platform for Edward Elgar Publishing, 485, <<https://doi.org/10.4337/9781786431257.00037>> [Accessed 28 August 2019]

provide tailored information to their consumer demographics and vulnerable communities and would better reflect the differences between the Schemes.

### 12.3 Case study: Raising the profile of the French Energy Ombudsman Scheme

Awareness raising is an enduring issue for Ombudsman and EDR schemes around the world. However, this provides ample opportunity to extract real-world evidence from case studies in similar energy and water markets. In particular, France provides a highly informative case study on how a national energy ombudsman was able to increase brand awareness through a deliberate publicity campaign. Part of this may be driven by exigencies of context; French fuel prices and associated issues of poverty and energy access have become an international story in light of the 'gilet jaunes' protests.<sup>67</sup> However, the French Energy Ombudsman also employed a number of distinct advertising strategies to raise brand profile.

One notable example involves the use of traditional media, providing a news agency with weekly content providing "factual and impartial" information on energy-related issues. The outcome was noticeable – in 2019, 41% of French people had heard of the Energy Ombudsmen, compared to 35% in 2018.<sup>68</sup> The Ombudsman also partnered with a national consumer affairs institute to create five short television campaigns which formed part of larger consumer-focused shows on the four public TV channels known as 'ConsoMag'. In the winter of 2018, 2.7 million people in France watched each of these programmes on French television.<sup>69</sup> This has had a clear positive impact on brand recognition and could be an example of a possible approach the Ombudsman Schemes may consider adopting.

### 12.4 The industry is keen to help with awareness raising

One surprising response was received from an industry peak body that stated in their interview

*'we really want to help – just tell us what you need us and our members to do. We could put the logo and links on our websites, make reference to the Schemes in our on-hold messages and more prominently display the logo.'*

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<sup>67</sup> See, eg, [https://www.washingtonpost.com/business/how-yellow-vest-protests-swelled-into-risk-for-macron/2019/04/03/9ac223a0-565c-11e9-aa83-504f086bf5d6\\_story.html?noredirect=on](https://www.washingtonpost.com/business/how-yellow-vest-protests-swelled-into-risk-for-macron/2019/04/03/9ac223a0-565c-11e9-aa83-504f086bf5d6_story.html?noredirect=on)

<sup>68</sup> La médiateur national de l'énergie (France), 'The National Energy Ombudsman,' Activity Report 2018 (14 May 2019), 14 <<https://www.energie-mediateur.fr/publication/rapport-annuel-2018/>>.

<sup>69</sup> La médiateur national de l'énergie (France), 'The National Energy Ombudsman,' Activity Report 2018 (14 May 2019), 16 <<https://www.energie-mediateur.fr/publication/rapport-annuel-2018/>>.

Schemes should make sure that they are availing themselves of all such opportunities as they arise, with a number of industry peak bodies expressing support for these activities and a willingness to promote the Schemes to consumers. In the context of the limited budgets currently available for such activities, now could be the time for the Schemes to push their Members for a greater budget for these tasks. Schemes should also consider whether it is appropriate to mandate that Members undertake some awareness-raising activities on their behalf, such having to display the logo and provide a hyperlink to the Ombudsman Schemes on the platforms by which they sell their products to consumers. These links would be especially effective at point of sale for building brand awareness.<sup>70</sup> More prominent use of the logo as a mark of quality would serve to reassure customers that high standards of consumer protection exist and that the customer is valued. Moreover, all Members of a Scheme should be required to mention the availability of the Scheme while its consumers are on hold on the telephone. This would be especially effective and important if the on-hold message was made available to consumers calling a Member's complaint and/or information phone lines.

### 12.5 Concerns still exist about awareness-raising activities among a very small minority of interviewees

A very small minority of interviewees raised concerns that any awareness-raising or outreach activities were 'tantamount to touting for complaints' or 'empire-building activities.' Schemes need to be more forceful in challenging these perceptions when they are raised so they are not repeated in industry forums, which could be damaging for the reputation of the Schemes. Members and some peak industry groups should be regularly reminded that, even if there is an initial spike following an awareness-raising campaign, that Schemes cannot and do not, 'make up' complaints that do not exist. It should be emphasised that awareness-raising campaigns are designed to target *unmet need* and that interactions by Members with their customers are an opportunity to engage in customer retention work. It is worth noting again that a number of Members anecdotally reported that they were more likely to retain a customer who had successfully resolved a dispute via an Ombudsman Scheme. This could take the form of a 'myth-busting' session at Scheme training or even via other communications issued to Members and the general public. The French Energy Ombudsman has done this with some success, providing mainstream and social media material to bust one piece of industry 'fake news.'

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<sup>70</sup> Chartered Trading Standards Institute, Chartered Trading Standards Institute Response to 'Modernising Consumer Markets: Green Paper,' (July 2018), <<https://www.tradingstandards.uk/media/documents/news--policy/consultation-responses/modernising-consumer-markets---ctsi-full-response.pdf>>.,

## 12.6 Accessibility

Research has concluded that in order for an ombudsman scheme to be fully effective, ‘citizens from all backgrounds and with differing needs must be both aware of, and comfortable using, ombudsman services.’<sup>71</sup> The Schemes that were the subject of this Report have all gone to great lengths to make themselves accessible to a wide range of consumers. That said, there will always be more work to do in this regard and (as stated in the section above on Operating Models) more use of digital technologies and trialling longer operating hours could achieve positive results. The Schemes should be commended for how they work with consumer advocates and encouraged to undertake further outreach to communities partnering with local organisations already operating within those communities on the ground. This type of outreach activity, which often also involves other industry EDR schemes, local councils and essential service providers also helps to build the reputation of the Schemes as a ‘one stop shop.’ Regular internal reviews to ensure that accessibility needs are met and to identify areas of improvement, were evident in a number of Schemes, should also be commended.

## 12.7 Submission and policy work

As a centralised source of data on industry complaints and how they were successfully resolved, the Schemes can play an important role in information sharing. Through their policy and communication work Schemes help educate consumers and Members, help Members improve their provision of services and complaints handling processes and help regulators monitor the sectors and identify when greater regulation or compliance activity may be needed. This is a core aspect of the work of the Schemes and reflects the general principles of Ombudsman Schemes that they should be transparent, effective and responsive.

## 12.8 Social media

Social media usage is at its most effective when it is targeted and empirical. For instance, if the Schemes identified a particular demographic that they felt were under-represented in raising complaints, social media could be a useful and cost-effective method to raise the profile of the Ombudsman as an effective redress mechanism to a specific sub-set of consumers.<sup>72</sup>

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<sup>71</sup> See, eg, Julinda Beqiraj, Sabina Garahan and Kelly Shuttleworth, *Ombudsman schemes and effective access to justice: A study of international practices and trends*, International Bar Association (23 October 2018).

<sup>72</sup> Cameron Ralph Houry, *Telecommunications Industry Ombudsman: Independent Review Report* (August 2017), 33-34.



## 12.9 Recommendations

1. *The Schemes should consider a 'know your rights' campaign for consumers on a jurisdiction-by-jurisdiction basis. ANZEWON may wish to consider a national approach to the content of this to save costs, with a final piece at the end being specific to the relevant jurisdiction when consumers are told how they can seek redress.*
2. *At least some segments of the industry are keen to support awareness-raising efforts, and this should be harnessed.*
3. *The idea of requiring advice about the Ombudsman Scheme and being able to take a deadlocked dispute there as part of the 'on-hold' or generic introductory telephone message on Member's complaints lines should be pursued further.*
4. *Submission and policy work is an essential part of the work of the Schemes and provides significant added value to the Members, regulators and consumers alike. This work will only become more important into the future if jurisdiction is expanded as Schemes will have wider oversight over the issues within the energy sector.*
5. *Social media may be another avenue to be explored further, though given the time and risks involved in managing a sophisticated social media presence query whether it would pay off at present.*

## Annex 1: List of organisations who participated in the research project

Australian Energy Market Commission

Australian Energy Regulator

AGL

Clean Energy Council

Consumer Action Law Centre

Consumer and Business Services (SA)

Consumer NZ

Consumer Policy Research Centre

Department of Environment and Energy (NSW)

Department of Justice and Attorney-General (Qld)

Department of Natural Resources, Mines and Energy (Qld)

Electricity Retailers of New Zealand

Energex

Ergon Energy Networks

Energy Australia

Energy Consumers Australia (ECA)

Energy Networks Australia

Energy Networks Association (NZ)

Energy Queensland

Energy Retailers Association (NZ)

Essential Services Commission (Vic)

Essential Services Commission (SA)

EWON

EWOQ

EWOSA

EWOV

Office of Fair Trading (Qld)

Lumo Energy  
Meridian Energy  
PowerCo  
Public Interest Advocacy Centre  
Red Energy  
SA Water  
Salvation Army NZ  
Simply Energy  
St Vincent de Paul  
Sydney Water  
The Lines Company  
Uniting Communities  
Utilities Disputes  
Victorian Water Industry Association  
NSW Department of Finance

## Annex 2: The Sydney Law School Research Team

The Sydney Law School Team has over 30 years of combined experience and has developed a strong reputation for providing rigorous analysis on complex legal, commercial and governance issues. We have extensive experience in key areas relevant to this project including:

- Consumer protection law and practice;
- Emerging energy technologies and changing models of consumer participation;
- Dispute management; and
- Governance and reform review of boards, self-funded institutions, and energy market institutions.



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