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Dear Secretariat

Submission on consumer protections for behind the meter electricity supply - consultation on regulatory implications

We refer to the above consultation and thank you for providing the opportunity to comment. The AER recognises the challenges in regulating new and emerging energy products and services, balancing an appropriate level of protection for consumers while encouraging innovation in a rapidly changing market.

Behind the meter systems have emerged, not only as an emergency back-up or temporary electricity supply where supply can be intermittent but also as an alternative source of supply to grid supplied energy. The demand for alternative energy products and services is growing, with technology advances changing the way customers engage as they seek greater involvement in managing their energy service. As the consultation paper notes these new service delivery models and products were not specifically contemplated when the National Energy Retail Law (Retail Law) was drafted and this raises challenges and opportunities for how and when we regulate these types of products and services, including customer protections.

We consider the Energy Council's consultation on this issue is both timely and an important first step in understanding what consumer protection should apply for customers supplied behind the meter.

This submission draws on our experience regulating behind the meter supply as a supplementary source. To date we have dealt with this type of supply under the Retail Law exemptions framework. In particular, we have relied on the principles underpinning our approach to regulating exempt energy sellers under the Retail Law in the *AER Retail Exempt Selling Guideline*¹, which we consider relevant to the issues of how to regulate the sale of energy to customers through a behind the meter electricity supply.

The consultation paper of 19 August 2016, sought responses to questions on a number of topics including the most appropriate definition of this type of supply, the

¹ Information about our review of the regulation of exempt energy sellers, including our Notice of Final Approach, can be found at <http://www.aer.gov.au/retail-markets/retail-guidelines/retail-exempt-selling-guideline-march-2016>

challenges posed by different ownership models and issues around competition, asymmetry of information, transaction costs, vulnerable consumers and resolving disputes between providers of these systems and customers. Our submission provides comments on those topics and issues that relate to our role in regulating this area, particularly drawing on observations from our experience of behind the meter supply. It does not address each question or topic raised as part of this initial consultation.

The consultation paper notes any consumer protection framework should be appropriate to address consumer harm while not imposing unnecessary compliance costs or stifling innovation.² We note and agree with the consultation paper's point that, in theory, in a well-functioning market competition should drive appropriate outcomes for consumers. We consider it is likely too early to determine if the potential market failures identified by the consultation paper around the inequality of bargaining power (e.g. need for adequate information, contract length) or electricity as an essential service (e.g. the extent to which behind the meter services are a substitute for grid connection) are occurring.

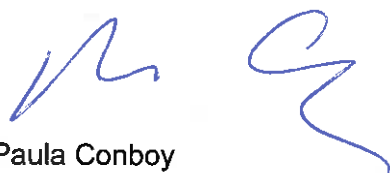
We take a principles-based approach in commenting on the issues around consumer protections for behind the meter supply and in particular whether energy specific protections should be applied to this type of supply. One of the key issues for us in addressing this question topic is whether the supply is the customer's primary supply or whether it is supplementary.

We have, in regulating new and emerging products and services to date, sought to balance customer protections with ensuring the regulatory framework does not create barriers to innovation for suppliers. We have taken the view that where the energy supply is the customer's primary source, the customer should be entitled to the full suite of energy specific protections set out in the Retail Law. Where the source of supply is supplementary (which most of the behind the meter supply has been to date) we have determined the Australian Consumer Law (ACL) and non-energy specific regulations would suffice. While we acknowledge this consultation is not about determining which mechanism should provide the relevant consumer protections, we consider it a useful guide in understanding whether further regulation is necessary.

Finally, we note our submission in response to the Energy Council's consultation on the regulatory implications of stand-alone energy systems in the electricity market. That submission comments on the need for regulation of decentralised systems to be flexible and assessed on a case by case basis. There is overlap between the comments made in both submissions as we see there being similarities in the issues raised while acknowledging the two processes and questions are distinct.

If you require any further information or assistance, we would welcome the opportunity to discuss these matters further. If you have any queries regarding this letter, please call Sarah Proudfoot, General Manager, Retail Markets on 03 9290 6965.

Yours sincerely



Paula Conboy
Chair

² COAG Energy Council, *Consumer Protections for Behind the Meter electricity supply – consultation on regulatory implications*, 19 August 2016 p. 7

1 Introduction

- 1.1 The Retail Law and National Energy Retail Rules currently (Retail Rules) provide energy specific consumer protections to customers of a retailer and to customers of energy sellers that are exempt from holding a retailer authorisation.³
- 1.2 The Retail Law currently applies in the Australian Capital Territory, Tasmania, South Australia, New South Wales and Queensland. These protections work in conjunction with the general protections provided through the ACL. Customers who have behind the meter supply may have energy specific protections from their authorised retailer and those offered under the ACL for products and services more generally.
- 1.3 The Retail Law was drafted at a time when the supply of electricity was primarily through a grid connection and sold to customers by an authorised retailer. The suite of consumer protections provided for under the Retail Law reflects this model of retailing of electricity. Customers supplied by an authorised retailer are covered by a range of consumer protections under the Retail Law, by virtue of the obligations placed on their retailer.
- 1.4 However, as technologies advance customers are increasingly able to access supply from non-traditional or alternative energy selling arrangements including from behind the meter products and services. These include the sale of energy to customer through a solar photovoltaic (PV) system at a customer's premises where the seller retains ownership of and maintains the system, and sells the electricity it produces to the customer for a tariff over a generally long term contract. It is likely to increasingly include battery storage and other products.
- 1.5 We have, to date, regulated this type of business model and sale of energy under our exemptions framework. In March 2016 following our latest round of consultation we concluded that it was appropriate for behind the meter supply where the customer also had grid connected supply to require a level of consumer protection of any other non-energy specific product or service, that is through the ACL. We differentiated between the levels of consumer protection the supplementary and primary providers should offer to the customer because we considered the customer had the appropriate protections through their primary source of supply. This principle has been important to our assessment of the appropriate level of consumer protections to be afforded under an exemption, as distinct from those available to the customer under the ACL. We draw on these lessons to inform our comments on the issues raised by the consultation paper.

2 Regulation of behind the meter supply under the Retail Law

- 2.1 The Retail Law operates where there is a "sale of energy"⁴, regardless of where that sale takes place in relation to the physical meter.
- 2.2 While open and unrestricted competition in markets is generally viewed as the best way to allocate resources and drive efficiency, where there is a market failure or market issues broadly construed it may be the case that restrictions on competition could achieve a more efficient outcome. In the case of energy markets, policy makers have determined that specific regulation may be needed to ensure consumer protections for an essential service and the retailer obligations under the Retail Law reflect this position.

³ The Retail Law protections are achieved through the obligations placed on retailers. The obligations on exempt sellers while similar to those on retailers are often adapted to suit the nature of the particular selling arrangement and may not be as extensive as those provided to customers of an authorised retailer.

⁴ Section 88 of the Retail Law

- 2.3 We agree with the position put forward in the consultation paper that any consumer protection framework for behind the meter supply address consumer harm while not imposing unnecessary compliance costs or stifling innovation. We think it is likely too early to determine if the potential market failures identified by the consultation paper around the inequality of bargaining power or electricity as an essential service (e.g. the extent to which behind the meter services are a substitute for grid connection) are occurring.
- 2.4 We think a good starting point for considering what consumer protections should apply may be the policy principles under the Retail Law that guide the regulation of exempt sellers. The Exempt Selling Guideline sets out broad policy principles for regulating exempt sellers and guides our assessment of the appropriate consumer protections for exempt customers. The Retail Law prescribes that the AER must, in performing or exercising its exempt selling regulatory function or power, take into account the following policy principles, for example:
- regulatory arrangements for exempt sellers should not unnecessarily diverge from those applying to retailers
 - exempt customers should, as far as practicable, be afforded the right to a choice of retailer in the same way as comparable retail customers in the same jurisdiction have that right, and
 - exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under the Retail Law and Retail Rules.
- 2.5 In relation to behind the meter supply the exempt selling policy principles the current exempt selling framework and the policy principles underpinning it may provide a useful starting point for considering the extent to which specific customer protections may be needed.
- 2.6 Beyond the Retail Law, customers have access to consumer protections under the ACL, including the consumer guarantees and the unfair contract term provisions, for the majority of products and services.
- 2.7 As a way of applying the policy principles our regulation of alternative energy sellers, including those that incorporate behind the meter supply, has been guided by the distinction between a customer's primary source of supply and secondary or discretionary supply. In our view, this distinction, as well as the effect disconnection would have on a customer's ongoing energy supply, is important in terms of how and to what extent we regulate behind the meter supply and what if any energy specific consumer protections should be provided.
- 2.8 If a secondary source was disconnected the customer would still have access to network distributed energy and would therefore still be supplied. In our view primary providers should be required to provide customers with the full suite of energy retail protections and, as such, should be authorised. Where a customer is supplied by an energy source that is secondary to grid-distributed energy the customer does not need the same level of protection for that service as for the primary source of electricity.
- 2.9 If a customer's behind the meter supply occurs as the secondary supply we consider, as we have with other instances of alternative energy selling, that the level of protections provided by the ACL are likely to be appropriate. It is our view that regulation should be fit for purpose, flexible and not duplicate other legislation. Where customers have access to energy specific protections through a primary provider, we do not think further energy specific protections should be applied to a supplementary supply source.

2.10 We recognise there may be issues that arise in relation to the secondary supply that interact with but are not able to be resolved through the provider of the primary supply. In these circumstances, if the distinction we consider useful is adopted, the ACL's consumer guarantee regime and other protections would apply to the customer. However as we discuss below it may be that protections could be optimised for example in relation to having a consistent and single dispute resolution forum.

3 Observations from our regulation of alternative energy selling

3.1 The changing energy market landscape has brought with it a number of new and additional regulatory issues for both customers and energy sellers. Our experience in regulating the entry of new sellers to the retail market has shown an ever increasing number of alternative offerings, many of which have involved supplementary supply as customers have maintained a connection to the grid through a retailer. In assessing these alternative models, our approach under the exemptions framework has been principles based.

3.2 One such example of an alternative model regulated under the Retail Law is Power Purchasing Agreements (PPAs). PPAs are regulated under the Retail Law because they involve the sale of energy. However, PPAs are almost indistinguishable from the lease of energy generation equipment. It may assist the Energy Council to consider whether the energy supply is supplementary and therefore whether there is any need for energy specific protections. Our experience in regulating the exemption framework is that consumer protections appropriate for this type of arrangement can be provided by the ACL and other broad consumer protection legislation.

3.3 Our approach to customer protections for PPA customers has been to impose only minimal conditions on the seller. In terms of consumer protections these conditions provide only that the seller explain to the customer that the contract is:

- covered by Australian consumer protection laws and
- separate to the customer's contract with their retailer and distributor which are covered under the Retail Law.

Through these conditions the obligations placed upon PPA providers under an exemption are essentially the same as the consumer protections given to customers under a leasing arrangement.

3.4 We agree the appropriate regulatory approach should allow for, not hinder, market innovation. We see the level of regulation to be applied to a new energy seller could usefully be examined by looking at:

- whether the energy is sold as part of the supplementary behind the meter supply and
- who the intended customer is.

4 Provision of information

4.1 Given the new technologies being introduced, it is important the information is communicated using plain language and provides for various groups of consumers, including those for whom English is a second language or have limited literacy capacity, who may require behind the meter supply.

4.2 We agree that consumers need adequate information to make informed choices. The information communicated we suggest should focus on targeted, timely and clear messages over volume. Too much (rather than quality) information can confuse or lead customers to disengage from the decision making process.

5 Access to an external dispute resolution service

- 5.1 The consultation paper notes it may be appropriate for an independent dispute resolution arrangement to apply to providers of new electricity systems (such as disputes relating to PVs supplied through a PPA). It recognises that balanced against this is the issue of the cost of providing such a service.
- 5.2 We agree with the principle that providing all customers with access to a free, independent dispute resolution service for disputes relating to energy products and services could prevent disputes from escalating to litigation and reduce the number of forums a customer may have to raise their dispute in depending on the source of supply.
- 5.3 While we also agree that behind the meter supply customers would benefit from having access to an independent dispute resolution scheme we query whether the access should be to a state or territory energy and water ombudsman scheme or a new independent body. A key question is whether the supply is primary or supplementary. It would also be a matter for each ombudsman scheme to determine who can access their services.
- 5.4 However, we do recognise the benefits to customers having access to a single dispute resolution forum for all energy related disputes, an issue raised by the consultation paper. We consider it is a question for others, including existing ombudsman schemes, as to whether a new body is established to deal with these types of disputes or whether ombudsman schemes expand to become the independent dispute resolution body for customers where the behind the meter supply *is not* the primary source of a customer's energy.
- 5.5 We are currently exploring options, in partnership with ombudsmen schemes, for customers of exempt sellers to access ombudsmen dispute resolution services. Recognising the changing energy market landscape enables us to consider the trade-off between resourcing limitations within schemes and adequate consumer protection.

6 The operation of a price comparator

- 6.1 One of the issues raised by the consultation paper is whether the transaction costs for customers of behind the meter supply could be addressed by requiring providers of these services to supply information to a price comparator website or some other form of transparent mechanism allowing for cost comparisons to be made.
- 6.2 While we acknowledge customers of these types of products may have transaction costs such as search and information costs when seeking to enter into a contract for behind the meter supply, we do not consider there is a need at this stage to address these through a price comparator website. Our experience in managing the EnergyMadeEasy (EME) comparator website informs this view.
- 6.3 EME is a price comparator website we are required to develop and maintain under the Retail Law. Retailers must submit information and data to us relating to generally available standing and market offers. The purpose of EME is to assist a small customer to compare the standing offer price available to that customer and market offer prices that are generally available to classes of small customers in this jurisdiction.
- 6.4 Based on our experience managing EME, we consider the creation of a price comparator site for behind the meter supply would present significant challenges. Further we do not consider there is a need to regulate to address the costs associated with entering into a contract for this type of supply where supply is supplementary. We also question whether any comparisons would be

meaningful given the number of variables that can impact the nature of a behind the meter supply.

- 6.5 From a practical perspective we note managing EME has presented difficulties in facilitating easy comparisons between products from retailers operating in the National Energy Market. New offerings challenge the way retailers provide and we present information about offers on the website. Inclusion of new product and service offerings on EME has required us to redevelop the site to accommodate these kinds of offerings. An interesting issue is also that the more varied and complex the product offering the more likely it is that presentation of these offers will impact the ability to present customers with standard and easily understood information that allows customers to easily compare products.
- 6.6 We would anticipate that these challenges would be amplified for a comparison service that aimed to include offers for products and services that have in common only that they provide behind the meter supply.
- 6.7 It may be that a market failure emerges that requires regulation through a comparator site for behind the meter supply. However at this stage and given the framework through which we have assessed this type of supply to date we do not see the need to develop a website to address this. The rapidly evolving nature of behind the meter supply technology and the introduction of new participants would, in our experience, require relatively frequent redevelopment of any price comparator site.

7 Vulnerable and hardship customers

- 7.1 The consultation paper notes that installation of behind the meter technology can result in particular risks for vulnerable customers. In this context we note the findings of the Australian Energy Market Commission's 2016 Retail Competition Review in relation to vulnerable customers being particularly at risk in relation to emerging products and services.
- 7.2 A customer's degree of vulnerability varies over time, depending on their financial, social and personal circumstances.⁵ We recognise that vulnerable customers may be particularly affected by long contract terms or exit fees for products and services like PPAs. While vulnerable customers have access to the unfair contract provisions of the ACL they may not be able to take action that would allow them to access the remedies available under the ACL. The Energy Council may wish to make further enquiries with the Australian Competition and Consumer Commission about how these provisions will operate in practice and whether they meet the needs of the most vulnerable customers.
- 7.3 We acknowledge the ACL and the Retail Law provide customers with a suite of customer protections. However there may be circumstances where a customer's behind the meter supply arrangement such as a leasing agreement may not be covered by these two pieces of legislation. There is a question about whether such arrangements would be considered financial instruments or not. It is unclear precisely what protections would apply to that type of arrangement and whether customers would have only private law remedies available to them.
- 7.4 The Energy Council may wish to consider these issues in more detail and consult with the necessary bodies and industry participants to understand how the existing customer protections regimes may apply to vulnerable customers and also to arrangements that may be seen as financial instruments.

⁵ AEMC, 2016 Retail Competition Review, p. 45

- 7.5 The other issue identified for this customer segment by the consultation paper is the risks around disconnection. We note above that we have adapted our approach to regulating alternative energy sellers to not only look at primary versus supplementary supply that also incorporates the disconnection outcomes and risks for customers – see paragraphs 2.7 and 2.8 above.
- 7.6 Further, we recognise the work being done by many of the state jurisdictions in relation to reviewing concession regimes, including energy concession eligibility.