



12 November 2015

By email: AERExemption@aer.gov.au

Attention: Sarah Proudfoot
General Manager
Retail Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

Dear Ms Proudfoot,

Submission to the draft AER (Retail) Exempt Selling Guidelines

The Consumer Action Law Centre (**Consumer Action**) is pleased to provide comment on the revised AER (Retail) Exempt Selling Guideline (the **Guideline**).

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign and casework-driven policy organisation pursuing consumer litigation and advice to materially disadvantaged consumers throughout Victoria.

We work to advance fairness in consumer markets, particularly for vulnerable and disadvantaged consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

The transforming market relies on confident and informed consumer participation to deliver the benefits of competition. In delivering the 'long-term interest of consumers' it is critical that market frameworks, including those governing participants exempt from the traditional energy market rules, enable good consumer outcomes and build consumer trust. Consistency and transparency will be at the heart of this.

We define good consumer outcomes as:

- Easy and equitable access to products and services;
- Safe and fair products and services;
- Efficiency benefitting consumers;
- Clear dispute resolution processes;
- Useable information, which is simple, clear and consistent.

In the context of exempt networks, the consumer outcomes can be more clearly identified as:

- All energy providers have clear and consistent obligations to supply and protect consumers;
- All energy consumers are charged a fair market price for the purchase of energy;
- All energy providers are members of a single Ombudsman scheme;
- All energy consumers can choose their preferred suppliers in a competitive market; and
- Compliance is effectively monitored and enforced.

We have provided a response to the questions posed in the Notice of Draft Instrument below, in addition to articulating the consumer outcomes listed above.

1. Consumer protection and concessions

Adequate protection of consumer rights is pivotal in achieving market efficiency for the provision of essential services to Australian energy consumers. The guideline needs to clearly and consistently articulate energy providers' obligations in this respect. Inconsistency already exists in what protection is available to consumers based their technology choices, however, we consider that a key principle of this framework must be that protections should not unnecessarily diverge for consumers getting their energy from authorised versus exempt sellers, from the grid or from on-site generation and storage. While variations in regulation are necessary to promote competition, the level of protection covering those customers of exempt sellers must be appropriate and sufficient (and may include hardship obligations) and a customer's energy supply choices should never result in them receiving a reduced standard of consumer protection.

A significant element of this is access to government rebates and concessions. Currently, only those receiving energy from authorised sellers are assured of their rights around concessions. We support the AER's proposal to implement a positive obligation on exempt sellers by *requiring* them to claim these on behalf of customers. The Notice of Draft Instrument **6.2** only requires exempt sellers to use 'best endeavours' if their customers are unable to claim concessions themselves.

To facilitate the proposed approach, clear guidance needs to be provided to exempt sellers in relation to what customer criteria are necessary to access concessions. This should include what information the exempt seller needs to ask a customer to enable it to access relevant concessions information (for example date of birth, Centrelink number) from the Centrelink portal, which would then enable them to apply the concession.

Automatic inclusion of concessions for those exempt sellers providing energy to public housing sites would ensure guaranteed access to concessions for some of the most vulnerable consumers.

Finally, the exempt seller has an obligation to disclose information about the availability of concessions to their customers, however this needs to be provided on a regular basis,

including on bills, to ensure the customer has an awareness of their rights prior to entering into payment difficulty.

Recommendation 1.

The guideline should provide clear information to exempt sellers detailing how to access concessions on behalf of their customers.

Recommendation 2.

The AER to actively monitor and enforce all energy providers to ensure an ongoing dialogue with their customers in relation to concessions, prior to being notified of hardship. For example, exempt sellers must disclose information relating to concessions for their customers on bills.

2. Access to justice

Unprecedented levels of choice in products and services for residential electricity supply and demand will create vast opportunities for consumers to find products and services that better meet their needs and manage their bills.

However, greater choice will also increase the potential for detriment as the market—and the products and services themselves—becomes more complex. Potential detriments include hidden costs, mis-selling of products and services ill-suited to a consumer's needs, responsibility shifting between multiple parties in the event of faults, and gaps in consumer protections where products and services fall under different regulatory frameworks.

There is currently a different relationship with energy specific consumer protections for a consumer who's primary source of energy is from the grid, compared to those who are drawing their primary source of energy from off-grid solutions. All consumers, however, regardless of source of supply, must have easy access to justice. Unfortunately, this is currently not the case, creating complex dispute resolution processes, with at times, no obvious outcome.

The current approach to licensing and exemptions has led to the situation where some consumers are able to access the ombudsman schemes, while others are required to go through the more expensive, confusing and time-consuming dispute resolution process, such as the Victorian Civil and Administrative Tribunal (VCAT) process.

As an example, in Victoria;

- Consumers in embedded networks must rely on VCAT to resolve disputes, while grid-connected consumers resolve similar disputes through EWOV; and
- Consumers entering into a Solar PPA do not have access to EWOV, while consumers entering into a solar lease or credit arrangement generally have access to financial services ombudsmana.¹

¹ Note that there is a specific problem with Certegy which has a large market share in solar financing. Currently, its business model is exempt from credit regulation meaning consumers lack important consumer protections and access to the ombudsman scheme.

We consider that it is essential to broaden the jurisdiction of energy ombudsman. This would include requiring all market participants providing energy services to consumers that relates to primary or secondary energy supply, being members of a single ombudsman scheme. This would ensure that access to dispute resolution remains simple, free, equitable and consistent across the market.

It may be suggested that broadening the scope of the energy ombudsman services will be costly, involve new and different staffing skills, and create cross-subsidies around who bears the cost of disputes. We reject these concerns.

All consumer disputes create costs for the parties; the question should be who is best placed to bear those cost where the objective is access to justice. In our view, the bearing of these costs by industry means that overall costs will be reduced—this is because industry has an incentive to reduce the likelihood of disputes. This has been the experience of industry ombudsman scheme generally.

Secondly, it is sometimes suggested that industry ombudsman schemes require deep skills in the specific industry that they cover. While some industry knowledge is important, what is far more important is skills around dispute resolution and achieving good customer (and market) outcomes. There is no doubt that existing energy ombudsman schemes would have the necessary skills to manage complaints around new energy services.

Finally, on the question of cross-subsidies, we note that ombudsman charging schemes deal with this issue. For the most part, the cost of the ombudsman schemes is recovered from the participant that caused the dispute. While there is some shared costs, the model is one that does not create large cross-subsidies. For this reason, traditional energy suppliers will not be cross-subsidising the new energy services companies to any great extent. We also note that in many cases, the companies will be the same ones—many of the traditional retailers for example are now establishing divisions to offer new energy services.

Recommendation 3.

A requirement for exempt sellers to be a member of an ombudsman scheme to be included as an activity-specific condition in the guidelines.

3. Fair and Reasonable Prices and Payment Methods

The price cap outlined in Condition 7.1 of the guideline seeks to provide protection to consumers. However, in those jurisdictions with deregulated pricing, the effect of this condition is unfair. Currently, exempt sellers are subject to a capped tariff requiring them to sell at or below the standing offer tariff. In those jurisdictions such as South Australia and New South Wales, which, like Victoria, have deregulated energy prices, the reference to the standing offer tariff has little relevance. Retail prices in those jurisdictions are set by retailers and published on their websites – as such, an exempt seller price matching to a retailer's standing offer is problematic, for there is no transparency or accountability in their price setting and it is consistently high. In the context of authorised sellers, retailers tend to offer discounts to their individual customers, competing with other retailers, theoretically placing downward pressure on energy prices. However in the context of exempt sellers, competition in relation to energy

prices is unlikely, and price matching with an energy retailer's standing offer will ensure those consumers are consistently paying more than if they could access full retail competition.

On this basis we consider that 'fair and reasonable pricing' remains an important principle, to ensure that customers of exempt sellers receive competitive prices. We further recommend a benchmark charging formula (based on, for example, best market offer in that distribution area) be instated, along with, for example, yearly reporting by the exempt sellers to the AER. This would have the effect of keeping prices at a reasonable level, whilst having the added benefit of providing the AER with essential market information regarding the exempt sellers' profit margins and further, whether or not such sellers need to apply for more suitable licences.

We firmly support the AER's decision to include a minimum of two payment methods for exempt customers and consider there to be no barriers to exempt sellers providing this service. We consider that further guidance may be necessary in relation to payment options for customers to ensure that consumers have the option of paying electronically or manually. Not all consumers have access to online facilities and others may not be able to reasonably commit to direct debit arrangements without regular defaults.

Recommendation 4.

That the guideline retain the principle of *fair and reasonable* pricing in recognition that a principle can apply over and above operational commitments.

Recommendation 5.

The guideline remove the reference to standing offer and introduce a benchmark charging formula (based, for example, on best available market offer).

Recommendation 6.

Require exempt sellers to report annually on energy profit margins.

4. Retrofitting

Consumer choice is a defining feature of the free market and hindering this choice by either preventing or prioritising property retrofit is problematic. We support a flexible arrangement that enables consumers to choose whether they want to be part of an embedded network or not, thereby enabling them to access and freely choose an energy product that suits their needs.

The threshold for acceptance of the retrofit places a complex dynamic on the body corporate/ landlord/tenant relationship, for example, where pressure is placed on those property owners who do not want to retrofit. In addition, as exempt sellers will be solely required to obtain the property owner's consent to pursue a retrofit, this poses problems where the occupant of the property is a tenant.² The tenant is unlikely to have much input into the process, but it is the

² We note that under **4.1** of the Notice of Draft Instrument for the Guidelines, there are multiple references to complete agreements of 'all affected residents'. However, the guidelines mention 'customers' numerous times when referring to consent. This causes some confusion in determining

tenant that will need to end its relationship with their energy retailer including any specific hardship arrangements.

The complexity of the arrangements relating to retrofit will make it difficult for consumers (assuming owner occupiers) to fully comprehend the weight of their decision (for example, potential removal of the child meter), this is critical as the decision to retrofit must be based upon their explicit informed consent. Further, in our view, consumer protections would be reduced (with those under the embedded network no longer having access to energy specific consumer protections of the National Energy Customer Framework), and the removal of their ability to access an energy ombudsman to resolve any disputes. This in particular increases the complexity of dispute resolution at a time when customers may need it the most. We consider this to be a poor outcome for consumers. Consumers must be able to exercise the ability to access either the competitive market or the exempt seller's services, with a full understanding of the implications of either option, as they choose. An optimal outcome is one where the consumer is genuinely fully informed and makes a decision that provides them the benefit that they are seeking.

Recommendation 7. The guideline should outline the minimum information requirements to a customer approached to retrofit a property, including implications for tenants.

5. Power Purchase Agreements (PPA)

PPAs are becoming a more prominent feature of the energy market. The proposed exemption of PPA providers where the length of the contract is less than 10 years and is accompanied by early termination clauses needs to ensure that consumers are not worse off as a result.

We are concerned with the length of the PPA contracts proposed as the basis for exemption. Ten years for a consumer contract remains a very long period of time. There are very few consumer contracts in the market that extend beyond 10 years, outside of mortgages. We query whether 10 years is a reasonable time to recover the useful life of solar panels (or batteries should the guideline need to extend to them) and whether a shorter term, that is subject to renewal, would provide more flexibility to consumers.

Transparency for both the PAA provider and the customer in relation to exit costs that are provided in upfront material (not hidden in the terms and conditions) is important. The early termination obligation as proposed by the AER is not sufficient to provide consumers adequate protection in relation to a PPA contract. There needs to be additional consideration given to the *fairness* of the early termination provision to ensure it is not applied as a penalty (such as requiring a customer to pay the full amount due, under the remaining period.)

where the consent needs to originate in order to authorise retrofitting (for example if the customer is a tenant or a landlord).

While PPAs are perceived to provide benefits for consumers who do not have the upfront capital to purchase solar systems, we maintain that there is a need to ensure that the total cost of the PPA is available to consumers prior to purchase.

A condition should be applied to the guideline which requires the exempt seller to disclose the cost of credit of the payment arrangement. These products are highly complex and currently do not make it clear to the consumer what the real price of the system may be over the payment period. Specifically, there is currently no disclosure around the cost of credit, i.e. how much the business charging in terms of interest rates. We consider that only once this information is provided could they be compared with other potential forms of purchasing, i.e. buying the panels outright, obtaining a personal loan, extending the cost of a mortgage.

Currently the PPA model appears to shroud the actual cost of the system and the charges imposed by the provider. This does not foster a transparent market where consumer trust and engagement is prioritised, and introduces the potential for a consumer to experience financial detriment. We note that the [Clean Energy Council's Solar PV Retailer Code of Conduct](#) has recognised the upfront notification of cost as best practice, as it is included as a requirement for code signatories.

Recommendation 8.

The AER to consider whether there is a shorter term, with renewal options, for PPA contract periods, relating to residential contracts where a PPA provider is granted exempt seller status.

Recommendation 9.

The AER to develop clear guidelines around early termination, in relation to PPAs.

Recommendation 10.

The AER to provide clear guidelines around disclosure of cost, including the cost of credit, in relation to PPAs.

6. Reconnection and supply

We consider that Condition 11 - Reconnection of supply does not sufficiently consider the issue of energy as an essential service, in a situation where the exempt seller is providing the customer with their primary source of energy.

Currently under the exempt seller framework, where a customer has been disconnected for non-payment or dispute, the customer does not have access to an ombudsman service to provide reconnection while the dispute is being addressed. On this basis, there is little timely recourse for a customer who has been disconnected.

Extended time off supply is unacceptable in our society. On this basis, we support the removal of 'as soon as possible' and consider that exempt sellers must follow the disconnection and reconnection obligations as per the National Energy Customer Framework obligations.

Recommendation 11.

The AER to ensure the guidelines include a requirement where exempt sellers are to meet the disconnection and reconnection obligations of the National Energy Customer Framework.

Finally, we support a review of all exemptions after two years to ensure that exemption is still the most appropriate approach to specific business or business models would give the AER the flexibility to change their approach in a transparent and predictable manner. This would also ensure that consumers remain adequately protected regardless of their energy supply choices.

Summary of Recommendations

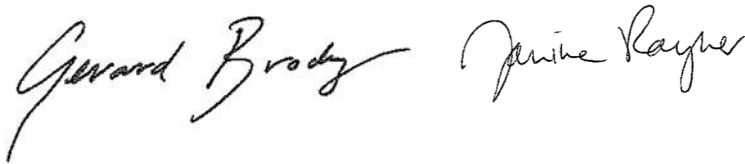
1. The guideline should provide clear information to exempt sellers detailing how to access concessions on behalf of their customers.
2. The AER to actively monitor and enforce all energy providers to ensure an ongoing dialogue with their customers in relation to concessions, prior to being notified of hardship. For example, exempt sellers must disclose information relating to concessions for their customers on bills.
3. A requirement for exempt sellers to be a member of an ombudsman scheme to be included as an activity-specific condition in the guidelines.
4. That the guideline retain the principle of *fair and reasonable* pricing in recognition that a principle can apply over and above operational commitments.
5. The guideline remove the reference to standing offer and introduce a benchmark charging formula (based, for example, on best available market offer).
6. Require exempt sellers to report annually on energy profit margins.
7. The guideline should outline the minimum information requirements to a customer approached to retrofit a property, including implications for tenants.
8. The AER to consider whether there is a shorter term, with renewal options, for PPA contract periods, relating to residential contracts where a PPA provider is granted exempt seller status.
9. The AER to develop clear guidelines around early termination, in relation to PPAs.

10. The AER to provide clear guidelines around disclosure of cost, including the cost of credit, in relation to PPAs.
11. The AER to ensure the guidelines include a requirement where exempt sellers are to meet the disconnection and reconnection obligations of the National Energy Customer Framework.

If you have any further enquiries in relation to this submission, please do not hesitate to contact Janine Rayner, Senior Energy Policy Officer, directly at janine@consumeraction.org.au or on 8554 6943.

Yours sincerely,

CONSUMER ACTION LAW CENTRE

Handwritten signatures of Gerard Brody and Janine Rayner in black ink.

Gerard Brody
Chief Executive Officer

Janine Rayner
Senior Energy Policy Officer