



8 February 2019

BTM Working Group  
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Dear BTM Working Group,

**Re: Behind the Meter Distributed Energy Resources Provider Code – Consultation Draft**

Thank you for the opportunity to comment on the *Behind the Meter Distributed Energy Resources Provider Code Consultation Draft (Consultation Draft)*.

The comments contained in this letter reflect the feedback of Energy & Water Ombudsman New South Wales (EWON), Energy & Water Ombudsman South Australia (EWOSA), Energy and Water Ombudsman Queensland (EWOQ) and the Energy and Water Ombudsman (Victoria) (EWOV). We are the industry-based external dispute resolution schemes for the energy and water industries in New South Wales, Queensland, South Australia and Victoria.

We are conscious that Australia's energy system is evolving, and this has profound implications for the nation's energy ombudsman services. Consumers are increasingly obtaining their energy from non-traditional sources, in a market that is quickly innovating away from the traditional model of centralised energy supply towards distributed energy resources (**DER**). While residential solar panels are the most obvious and ubiquitous example of DER, there are a range of products and services (such as micro-grids, home energy management (**HEM**) systems, home battery storage and peer to peer trading) which are likely to re-shape our energy system in the near future. With this evolution, the customer relationship to the energy system will change. Complaints and disputes will still arise, but they may do so in relation to products and services over which energy ombudsman services do not currently have jurisdiction.

This could leave consumers exposed to poor industry practice, in an environment where regulation and consumer protection has not kept pace with market change.

The Consultation Draft of the *Behind the Meter Distributed Energy Resources Provider Code (BTM Code)* has been developed as an early first step in addressing this challenge. The document builds on the Clean

Energy Council (**CEC**) *Solar Retailer Code of Conduct* to expand across all current and future DER, drafted to be technologically neutral and future proof. The Consultation Draft is an easily read, accessible and logically structured document which sets a high standard of industry practice. As has been the case with the CEC *Solar Retailer Code of Conduct*, there is little doubt that signatories who comply with the provisions of the Consultation Draft will meet community expectations as well as consumer law requirements.

That being said, and as has been the case with the CEC *Solar Retailer Code of Conduct*, the potential limitations of any finalised BTM Code do not lie within the terms of the document itself but with the challenge of ensuring it achieves a high profile with consumers - and a high level of coverage amongst suppliers in the market. The effectiveness of any finalised BTM Code will also naturally depend upon the degree to which it is enforced. Even then, the strongest sanction available under the Consultation Draft (to have your status as a Code signatory revoked) will only have significant import if consumers are sufficiently aware of the Code to actively avoid traders who are not Code signatories. It is very clear that the effectiveness of the envisaged BTM Code will be highly dependent on implementation and industry and consumer buy-in. Even then, the BTM Code will have inherent limitations which hamper its capacity to provide truly stringent consumer protection.

We have provided a brief response to the discussion questions raised in the Consultation Draft explanatory memorandum below, acknowledging that some questions are directed at industry practitioners.

## **1. General Issues**

### **1.1- Do the key commitments address the goal of good standards of consumer protection? Are there any known poor market practices that would not be sufficiently addressed by the key commitments?**

The Consultation Draft is structured in line with the customer journey, from pre-sale information and marketing through to post sale obligations, and expresses signatory commitments (i.e. obligations) in very clear terms. Signatories are held to standards expressed in terms of high-level principles (framed as key commitments), as well as specific practice requirements. The cumulative effect is that the Consultation Draft provides effective protection at all stages of a consumer's interaction with a signatory, and is sufficiently broad to address any foreseeable misconduct that may occur. This is particularly so if the key commitments are read broadly, as we expect they would be. Our experience as effective dispute resolution schemes for the energy industry highlights the importance of providing clear expectations of industry conduct throughout the entire customer journey.

The Consultation Draft is framed by technology neutral language, enabling the protections it provides to apply to as yet unforeseen new energy products and services as well as covering the current range of behind the meter products and services that it is designed to address.

We are not aware of any poor market practices which would not be sufficiently addressed by the key commitments

***1.2 - Are there any Code obligations that industry consider are overly restrictive and that could deter them from becoming a signatory to the Code, even if the majority of industry participants sign up?***

Not applicable.

***1.3 - Does the Code provide sufficient certainty to industry as to practices required of them? If there are any areas of uncertainty, would this be sufficiently addressed by the Code Administrator exercising its right under the Code to prepare guidelines for industry?***

Not applicable.

***1.4 - Do the Code Administrator powers and the role of the Code Review Panel provide confidence that the Code will be administered fairly and effectively?***

On a principles basis, the proposed governance structure and intended dynamic between the Code Administrator and Code Review Panel give every reason to expect that the finalised BTM Code will be administered fairly and effectively, with input across the industry from multiple industry associations. However, the Code Review Panel is yet to be determined, as such we reserve our views on this.

It is important to ensure that the BTM Code has whole of industry buy-in and therefore broad coverage and accountability, to ensure its success. Broad coverage is one of the fundamental principles upon which effective industry based dispute resolution is based. This also mitigates the potential for alternative codes to develop, which could encourage forum shopping and lower codified standards in the market – to the detriment of consumers.

***1.5 - Are the dispute resolution processes for consumers under the Code sufficient?***

The Consultation Draft requires that Code signatories have an appropriate internal complaint handling procedure (B.5.1.b), and sets out clear timelines for the resolution of complaints made to internal complaints handling processes.

In the event that a consumer is unhappy with the resolution of a complaint via an internal complaint handling process, clause B.5.1.c advises that they may escalate their complaint to the relevant consumer protection organisation. Clause B.5.1.d further states that consumers are encouraged to inform the Code Administrator of any behaviour reported to a consumer protection organisation which may constitute a breach of the Code (whether it is found to be so by the consumer protection organisation or not), and identifies a Code website dispute form which may be used for that purpose.

Clause C.4.a.ii makes further reference to the Code website dispute form, as one avenue through which potential breaches can be brought to the attention of the Code Administrator, with the commitment that the Code Administrator will investigate potential breaches of the Code (C.4.a). Upon investigating a

breach, the Code Administrator may then allocate a sanction (a range is outlined under C.1.5.e), and the signatory may appeal that determination to the Code Review Panel if they choose to do so. Appeal findings by the Code Review Panel are final (C.6.f).

The dispute resolution processes expressed by the Consultation Draft are clear and comprehensive, although the Consultation Draft could be stronger in asserting the Code Administrator's role. As it is, the Consultation Draft prioritises consumer protection organisations, and merely 'encourages' consumers to register their complaint with the Code Administrator. While the Code is obviously unable to compel consumers to provide this information, it would be stronger if the point was emphasised more clearly (i.e. instead of stating that consumers are encouraged to inform the Code Administrator, the Code could state that consumers are strongly encouraged to make their complaint known via the Code website dispute form, followed by text outlining why it is important that they do – so that the Code Administrator can adequately enforce Code standards). In communicating the Code, (and in constructing the Code website), it will also be very important to strongly highlight the Code website dispute form and encourage its use as strongly as possible. To demonstrate true commitment to resolving complaints and remedying industry misconduct, it may be more appropriate to require signatories to make all their customers aware of the right to complaint to the Code Administrator, similar to the obligations placed on members of our schemes.

We are of course conscious that the envisaged BTM Code will not provide consumers with access to free and independent energy ombudsman services for BTM DER products – access that they would otherwise have for most traditional energy related disputes. Legislative and regulatory reform will be needed to broaden the jurisdiction of ombudsman services to encompass BTM DER products and services. In the event that this occurs, energy ombudsman services will be more likely to draw on regulatory instruments in making their determinations, than on the BTM Code.

The BTM Code will play an important role in establishing high industry standards and identifying areas of systemic industry failure in the short to medium term. However, we remain concerned about the fairness and equity of the consumer experience of dispute resolution in the energy sector, as customers will be able to access ombudsman services for some components of their energy supply grievances, but not others. This needs further and serious consideration and we look forward to engaging with you on this issue.

On that basis it is extremely important that the Code Administrator play an active and highly visible role in investigating potential Code breaches. Further consideration needs to be given to how the Code Administrators will ensure fair, independent and equitable complaints handling that consumers can access without prejudice.

***1.6 - What role could the Code play in providing information to consumers? What types of information and in what format?***

The effectiveness of the BTM Code hinges on strong customer awareness, yet it would be unrealistic to expect that many customers will actually read the Code. Accordingly, the Code Administrator Approved Fact Sheets identified in clause B.1.6 of the Consultation Draft will be vital in ensuring that consumers understand their rights under the Code, and critically, what to do if they feel those rights have been breached. It will also be critical that the Fact Sheets are broadly distributed by signatories to the Code – the onus to promote the Code should not be on the Code Administrator, but on the businesses which have undertaken to comply with Code standards.

In addition to Code Administrator Approved Fact Sheets, it is our experience that web-based multi-media and social media assets should also be developed to raise awareness of the Code. These should be rolled out through to a comprehensive and ongoing whole of industry communications strategy. Again, the Code itself is unlikely to be a major information source for many customers, but concise, summarised information *about* the Code – widely distributed - will be necessary to ensure the Code is widely known and understood.

In addition to highlighting the existence of the Code and consumer rights under it, Code related communication pieces could also highlight common poor practices in the industry. These would educate consumers of potential pitfalls – operating as warnings and alerts. Those pieces would also highlight the value of the BTM Code and the protection it provides, emphasising that consumers should always seek to deal with a BTM Code signatory.

## **2. Specific Issues**

### **2.1 - Does the Code, (e.g. paragraph B.1.4), deal sufficiently with all avenues for unsolicited marketing of behind-the-meter products (e.g. door to door, telemarketing, targeted internet marketing etc)?**

The Consultation Draft does not individually address the above sales and marketing avenues, but instead addresses them through broad “catch-all” clauses such as B.1.4. While we support the principles-based approach taken in the drafting of the Consultation Draft, this is one area where some specific delineation may be useful. Reports suggest that misleading marketing and mis-selling are rife in the unsolicited selling of solar panels<sup>1</sup>, and it is likely that this will also occur in other markets as BTM DER products and services grow in popularity. Our respective complaint handling experience highlights many of the problems with door to door marketing and telemarketing, including unsupervised sales staff driven by commission-based incentives. These sales staff are well-placed to leverage significant information asymmetry regarding relatively complex products, along with growing anxiety over rising energy bills to make inappropriate sales.

To that end, it may be useful for both consumers and Code signatories to be able to turn to the BTM Code and identify clauses specifically related to at least door to door marketing and telemarketing.

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<sup>1</sup> For example, see: Consumer Action Law Centre, *Knock it off! Door-to-door sales and consumer harm in Victoria*, November 2017. Available at: <https://policy.consumeraction.org.au/2017/11/20/knock-it-off/>

Those clauses should clearly outline all rights and obligations relevant to those areas as set out by relevant legislation, and would operate as a clear ‘how to guide’ for consumers who struggle to deal with assertive sales staff. Those clauses would include allowable hours of contact, which the Consultation Draft does not currently highlight. As currently drafted the Consultation Draft does not provide consumer protections against unsolicited sales in excess of those provide by the Australian Consumer Law (ACL), which is perhaps a lost opportunity. That being said, it could certainly do more to at least highlight those protections.

***2.2- The Code recognises that the purchase of products or systems may result in a consumer’s electricity tariff changing. To alert consumers to this, paragraph B.2.5d of the Code requires the product or system provider to tell consumers this and that it is their responsibility to contact the electricity supplier before purchasing the product or system to see what tariffs will apply. Is this sufficient to protect consumers? Note that the provision of electricity – and hence electricity providers – are not within the ambit of the Code and so the Code cannot place obligations on them. Also for privacy reasons it is not possible for the product or system provider to undertake these enquiries on behalf of the consumer.***

This is a difficult area, and the Consultation Draft has taken what appears to be the best position possible. If anything, the clause could be expanded to explicitly state the impact of a tariff change, and make it clear that Code signatories are not able to make enquiries on behalf of the consumer (additions highlighted in bold):

*“We must advise you that your energy retailer may change your electricity contract/tariff following installation of the distributed energy resource product, system or service **and this will affect how much you pay for electricity. We are not permitted to contact your electricity provider for you, it is your responsibility to contact your electricity supplier to discuss this...**”*

This may assist in reducing customer confusion and complaints about how their purchase could impact their existing relationships with the energy industry.

***2.3 - Paragraph B.3.1.a of the Code requires a product or system structured payment plan to be through a licensed credit provider (i.e. where the consumer is not required to make payment in full upon installation). This means that the consumer has the benefit of the National Credit Code protections including interest rate requirements, fee disclosures, hardship provisions and external dispute resolution access. Do these benefits outweigh the restrictions for industry?***

This is an important progression from the CEC *Solar Retailer Code of Conduct*. Requiring BTM Code signatories to work with licensed credit providers will ensure that consumers have access to a free and independent ombudsman scheme (the Australian Financial Complaints Authority (AFCA)), in the event that a dispute arises concerning the financing of their BTM DER product or service.

Given the cost of many BTM DER products and services it is not surprising that financing purchases is very common. In the solar panel industry, for example, financing is ubiquitous enough that at least one firm has established itself as a specialist finance provider in that industry.<sup>2</sup> As with much of the financing in the solar panel industry, the firm is not a licensed credit provider – the firm offers finance on a putatively interest free basis. These finance models can leave consumers exposed in the event of a dispute, as there is no requirement for unlicensed credit providers to belong to ombudsman schemes - whilst licensed credit providers are required to do so. This will not build consumer confidence in the energy industry or the BTM Code.

Accordingly, by stipulating that Code signatories must work with licensed credit providers, consumers receive the benefit of being able to have their dispute heard by a financial ombudsman (along with a raft of other protections that come with credit licensing). Given that energy ombudsman services do not currently have jurisdiction over the majority of BTM DER products and services, providing consumers with access to AFCA through this clause of the Consultation Draft does much to lift the BTM Code's credentials in terms of effective dispute resolution. While many consumers will not yet be able to avail themselves of energy ombudsman services to resolve a dispute regarding their BTM DER product or service, if the dispute concerns the financing of their product or service then they will at least be able to have that aspect heard by a financial ombudsman service.

We are strongly supportive of this provision.

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<sup>2</sup> See: [www.brighthouse.com.au](http://www.brighthouse.com.au)



***2.4 - Paragraphs B.2.6 and B.4.2.b contemplate that the consumer may want themselves to organise connection to the grid (e.g. where a solar system is purchased), rather than delegating this task to the system provider. These paragraphs place obligations on the system provider to assist the consumer with information through the process. Does this achieve the right balance between consumer protection and consumer autonomy, recognising that the multi-party nature of the task of connecting to the grid creates potential for miscommunications and delays that adversely affect the consumer?***

The multi-party nature of some BTM DER installation and connection processes can make it difficult to resolve disputes in the event that the product or service does not deliver as promised. Our experience of many solar disputes indicates that the multi-party nature of solar installation is often a source of consumer confusion and detriment. For that reason, from our perspective it would be preferable if the BTM Code simply required the Code signatory to take responsibility for ensuring effective connection to the grid.

While energy ombudsman services do not currently have jurisdiction for these disputes, in the event that we do acquire jurisdiction it would be much simpler to have a single point of contact and clearly stated line of responsibility for securing a working connection. While we understand that some argue in favour of consumer autonomy, asserting that consumers should have the right to organise connection to the grid themselves, it is difficult to see what any consumer actually gains from having that autonomy. The certainty of knowing that if the grid connection is not resolved properly then the Code signatory can be held accountable under the BTM Code would seem to be more valuable to consumers than any right to undertake the task themselves. We do question whether there is any real value providing for consumers to do this, rather than simply requiring the Code signatory to do it on their behalf. If there are good reasons for this, we remain open to be convinced.

***2.5 - Paragraph B.8.a is an undertaking by product, system or service providers that they will comply with standards and guidelines set by the Code Administrator. Paragraph C.1.3 gives power to the Code Administrator to develop standards and guidelines to support the key commitments in Part A of the Code (3 months' notice must be given via the Code website). This is a mechanism for ensuring that the Code keeps up with market developments. Is this appropriately balanced with fairness and certainty for industry?***

We are strongly supportive of this mechanism. We see it as an important inclusion in a fast growing and quickly innovating industry. If the BTM Code is to remain relevant and provide the effective consumer protection that it purports to do so, then it will need to be responsive to market developments. We are conscious that the energy system is changing rapidly and there are certain to be developments in the BTM DER market which will require the BTM Code to be updated. We look forward to continuing to engage with you to ensure that fair and equitable access to free and independent dispute resolution mechanisms evolves to support strong consumer outcomes and industry performance.



Three months' notice is an appropriate period of time to enable Code signatories to adjust to accommodate any new standard or guideline, although notification by direct electronic mail should be provided in addition to notification via the Code website.

We trust these comments are useful. Please do not hesitate to contact us if you would like further information regarding this work.

Yours sincerely



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