

14 November 2022

Submitted via email to: retailmarket.reform@delwp.vic.gov.au

Manager, Policy
Energy Consumer Policy Branch,
Energy Sector Reform
Department of Environment, Land, Water and Planning
PO Box 500 East Melbourne VIC 8002

To whom it may concern,

Protecting consumers of distributed energy resources (DER)

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Department of Environment, Land, Water and Planning's (**DELWP**) Consultation Paper on further protections needed for Victorian consumers using Distributed Energy Resources (**DER**).

In response, we have included our May 2022 submission to the Australian Energy Regulator (**AER**) as part of its Retailer Authorisation and Exemption Review (now known as the Review of Consumer Protection for Future Energy Services) as Appendix A. Many of the issues addressed in our submission to the AER are also relevant to this consultation. This includes consumer harm linked to misleading and high-pressure sales tactics, inappropriate and unaffordable financing, and failings in installation, grid connection or ongoing performance of DER products and services.

The included submission is informed by our experiences assisting Victorians to resolve issues relating to DER products and services over recent years. Much of this work has related to rooftop solar, given that this has been the predominant DER product in the market to date. Over recent years we have received multiple calls to our legal advice line from people seeking assistance with issues related to their solar panels. As noted above, these calls have often centred around high-pressure and misleading sales practices, unaffordable finance, and inaccessible dispute resolution. Based on our experience, we recommend that further key protections for Victorian consumers of DER would include:

- widening the prohibition on unsolicited sales;
- prohibiting the use of unregulated credit products to fund DER purchases; and
- access to dispute resolution through EWOV.

We consider that ensuring these basic consumer protections are in place in the future energy market would both mitigate harm that people are currently experiencing, as well offering protection into the future as new DER products and service emerge. Problematic sales practices, unaffordable finance arrangements and disputes are

persistent problems that can be expected to arise for future DER product or services if adequate protections are not in place.

From the above recommendations, we would draw particular attention to the need for a prohibition on all forms of unsolicited sales for DER products and services. That unsolicited sales of DER results in consumer harm, particularly for people in vulnerable circumstances, has already been acknowledged in Victoria given the State Government's recent decision to ban door-to-door sales for retailers participating in the Solar Homes program. However, we consider that the ban must also encompass cold-calling and apply to all retailers selling DER products and services, not just those participating in the Solar Homes program. The problems inherent in door-to-door sales (unfair, high-pressure sales tactics and the nature of the interaction being 'sprung' on the consumer) are also present in cold calls. The fact that both door-to-door sales and cold-calling are prohibited for traditional grid-supplied energy acknowledges that both channels are problematic. By failing to include cold calls in the current ban, it is likely that retailers will simply shift marketing efforts into this channel allowing consumer harm linked to unsolicited sales of DER to continue.

Similarly, it is essential that the prohibition covers all retailers selling DER products and services. Although the Solar Homes program accounts for most solar system installations in Victoria, much of the worst conduct is likely to occur outside the program, necessitating that the ban be extended to cover those retailers not participating in Solar Homes.

It is also important that equivalent protections apply across traditional energy and DER. Ensuring equal protections apply across all energy products and services is essential to informed consumer engagement and trust in the market. There is no good reason for lesser consumer protections to apply to DER than to traditional energy – these are no longer niche products with limited consumer awareness that require spruiking via unsolicited sales channels. Rather than helping the energy transition, we consider that allowing unsolicited sales to persist will be counter-productive, harming trust in the market for DER products and services and dampening uptake. Door-to-door sales and cold-calling are at best a nuisance, and at worst lead to consumers being pressured into signing up for products and services that they do not want or not, do not understand, and may not be able to afford. Unsolicited sales should have no place in the future energy market.

We also acknowledge the challenge of ensuring the regulatory framework can address the continued growth of DER, given the uncertainty around what future products and services will become available, how they will be accessed and how products and services will interact. Our submission to the AER also covers need for structural updates to the regulatory framework to ensure it can remain responsive, flexible, and adaptable. These structural updates would encompass limiting exemptions, adopting an outcomes-focused approach, and favouring regulation over industry codes. In particular, it will be essential that the jurisdiction of the Energy & Water Ombudsman (Victoria) be extended to DER providers.

Uptake of DER not only allows people take control of their energy supply and reduce their energy bills but is also a key contributor towards a net-zero future. The importance of DER, both for people and planet, requires that robust consumer protections and an appropriate regulatory framework are in place, to ensure trust in the market and promote uptake. Ensuring that equal consumer protections apply to all energy products and services is essential for informed consumer engagement and trust in the market. These protections are also critical to an equitable clean energy transition, enabling people experiencing vulnerability and those on low or fixed incomes, to participate in the transition and enjoy the benefits of DER products and services.

Should you wish to discuss any of the issues raised in the included submission, please contact Luke Lovell, Senior Policy Officer at Consumer Action Law Centre at luke@consumeraction.org.au or on 03 9670 5088 for more information or to arrange a meeting.

Yours sincerely,
CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

About us

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

APPENDIX A. SUBMISSION TO THE AUSTRALIAN ENERGY REGULATOR'S RETAILER AUTHORISATION AND EXEMPTION REVIEW

25 May 2022

Submitted via email to: AERpolicy@aer.gov.au

Mark Feather

General Manager, Strategic Energy Policy and Energy Systems Innovation
Australian Energy Regulator
PO Box 3131
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Dear Mr Feather,

Retailer authorisation and exemption review: Issues Paper

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Australian Energy Regulator's (**the AER**) Issues Paper as part of its review of the retailer authorisation and exemption frameworks set out in the National Energy Retail Law (**Retail Law**).

While we are supportive of the review's objective to ensure the consumer protection framework is fit for purpose for a post-2025 energy market and safeguard against future consumer harms linked to Distributed Energy Resources (**DER**), we also urge the AER to bear in mind the role of basic consumer protections that should be present in any well-regulated market.

We have been working on consumer issues relating to DER for many years, with a particular focus on rooftop solar. Over this time, we have received many calls to our legal advice line from Victorians who have run into issues with their solar panels. Ensuring basic consumer protections, such as prohibiting harmful sales practices, are in place across the DER market would mitigate many instances of consumer harm, particularly for consumers in vulnerable circumstances. We consider that these reforms should encompass:

- a prohibition on unsolicited sales (door-to-door sales and cold-calling);
- requiring that only regulated credit products can be used to fund the purchase of DER;
- access to free and simple dispute resolution through state-based energy ombudsman schemes.

As the Issues Paper rightly acknowledges, there is an inherent difficulty in designing fit-for-purpose regulation for the future energy market given the degree of uncertainty around what products and services will be available and how people will access them.¹ However, introducing these protections will have the dual benefit of both mitigating harm that people are currently experiencing, as well as offering a degree of future proofing, in that they will address harms that are likely to occur with any future DER product or service.

¹ Australian Energy Regulator (2022), [Retailer authorisation and exemption review: Issues paper](#), .p7

The review should also draw on lessons from other regulatory regimes, and we urge:

- limiting the use of regulatory exemptions and exclusions that allow for loopholes;
- adopting outcomes-based regulatory tools;
- not placing important consumer protections in industry-codes; and
- ensuring vulnerability remains core to the regulatory framework.

As Australia's energy market undergoes rapid change, we must ensure that it delivers fair outcomes for all. We consider that introducing the above protections would make a significant contribution to achieving this. More detail about the most common issues in the DER market people have reported to our legal service, as well as the recommended reforms, are presented below.

About us

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Common consumer issues and recommended remedies

As noted above, we have been working on consumer issues relating to DER for many years. In 2014 we published our report '[Smart Moves for a Smart Market](#)', which included a consumer survey to ascertain people's interest in the DER market, and suggested a number of simple steps to ensure consumer protections kept pace with the evolving energy market. These included addressing privacy and data security, ensuring all people can access the market, and making information clear and relevant.²

Since that time, we have received numerous calls to our legal service from people seeking advice about problems they have encountered in the DER market. The vast majority of the calls have related to rooftop solar systems, given this has been the primary DER product available in the market during this time. The issues people have raised most frequently with us have included:

- misleading and high-pressure sales tactics;
- inappropriate or unaffordable financing being offered for the purchase of solar systems;
- failings in solar installation, grid connection, and/or product faults.

Over recent years, we have published several reports drawing on our casework experience to draw attention to these issues and recommend measures to mitigate consumer harm. These include our joint 2017 report with WEstjustice and Loddon Campaspe '[Knock it off!](#)' (which unpacks the harms associated unscrupulous sales practices by solar retailers and/or their sales agents), our 2019 report '[Sunny Side Up](#)' (which offers a range regulatory options to improve consumer protections for solar) and our 2021 report '[The New Energy Tech Consumer Code](#)' (which highlights the challenges associated with industry codes of conduct and problems with unregulated credit being offered for the purchase of DER products).

More detail about these issues, and clear, practical solutions to address them are presented below. Although we focus largely on solar (as this is where our casework experience is), we consider that these issues will repeat in future DER products and services, meaning that the proposed recommendations will also serve to mitigate future consumer harm.

Misleading and high-pressure sales tactics

We consider that any update to the consumer protection framework for DER should ideally ban all forms of unsolicited selling, or at a minimum introduce an opt-in model for unsolicited sales (recognising that behavioural economics research has highlighted the inadequacy of cooling off periods as a form of consumer protection³). Consumer detriment linked to unsolicited sales has been one of the most prominent DER-related issues encountered in our casework. In our joint 2017 report 'Knock it off!' more than half of the case studies of consumer harm concerned sale of solar panels. As we stated in the report:

Unsolicited consumer agreements are problematic because they often involve unfair, high-pressure sales practices which result in inappropriate or unaffordable purchases—often by people experiencing vulnerability who are ill equipped to withstand such tactics, and least likely to assert their rights in the event of a bad deal. Aggressive, manipulative, confusing, misleading and persistent sales tactics are not uncommon. Very often, goods are bought simply to get the salesperson to leave, or so as not to seem impolite. As is generally acknowledged, a power imbalance exists that needs to be addressed by regulation.⁴

² Consumer Action Law Centre (2014), [Smart Moves for a Smart Market: Simple steps to ensure consumer protections keep pace with innovation in a hi-tech energy market](#), p.9

³ Consumer Action Law Centre (2016), [New research shows cooling off doesn't work](#)

⁴ Consumer Action Law Centre, Loddon Campaspe and WEstjustice (2017), [Knock if off! Door-to-door sales and consumer harm in Victoria](#), p.13

This has played out in our casework, with multiple people reporting to us that they were convinced to purchase solar panels during an unsolicited sales visit after being falsely told that by installing the system they would never have another electricity bill again. Unscrupulous salespeople have used the complex nature of the product to their advantage, convincing people to sign up based on illusory, or over-stated, claims. As new, and more complex, DER products and services enter the market over coming years this scenario will recur.

The harms linked to unsolicited sales have already been recognised by the existing energy market, with many of the large retailers ceasing to use door-to-door sales. In Victoria this has gone further, with the Government banning retailers participating in its Solar Homes program from engaging in door-to-door sales as of 1 September 2021. We recommend that the AER build on this approach and prohibit all forms of unsolicited sales for DER. Door-to-door sales and telemarketing are at best a nuisance, and at worst lead to consumers being pressured into signing up for products and services they may not want, do not understand, and cannot afford. Doorknocking and cold calling should have no place in the future energy market.

RECOMMENDATION 1. Unsolicited sales of distributed energy resources should be banned.

Inappropriate and unaffordable financing

Second, an updated consumer protection framework for the future energy market should improve the fairness of financing, by ensuring that only finance arrangements regulated through the National Consumer Credit Protection Act 2009 (**NCCPA**) and National Credit Code (**NCC**) are offered for the purchase of DER. This would ensure that people do not suffer harm due to the inconsistent legal protections that apply to unregulated credit products like 'buy now, pay later' (**BNPL**) finance.

Through our casework, we have frequently seen instances of consumer detriment linked to the purchase of solar systems using BNPL products. Often, this has been interlinked with unsolicited sales, with the 'interest free' nature of the financing on offer a crucial part of convincing people to enter into a contract to purchase the panels. However, because these finance providers are not covered under the NCCPA, they are not obligated to assess a person's capacity to repay a loan. We have had many people contact our service who are struggling with unaffordable loans after using BNPL products to finance their solar purchase. We have had people contact us who are at risk of losing their home due to entering into an unaffordable finance arrangement or are forgoing spending on other essentials in an attempt to service this debt.

Furthermore, we have found evidence that retailers are engaging in price mark-ups where solar systems are purchased using BNPL finance. As detailed in our 2021 report 'The New Energy Tech Consumer Code' we had secret shoppers obtain a number of quotes for solar systems to look for surcharging related to purchases using BNPL. We found that surcharging was demonstrated across two thirds of the quotes obtained involving BNPL financing, equivalent to interest rates ranging from 4.6 percent to 11.1 percent per annum.⁵ ASIC has found similarly, reporting that they received evidence that "...merchants may have charged consumers significantly higher prices for using a buy now pay later arrangement, including for...where the price of goods is less transparent and 'negotiable' (e.g. solar power products)," in their 2018 review of BNPL arrangements.⁶

By ensuring that only regulated credit products are available for the purchase of DER products and services, consumers would have access to stronger protections, including responsible lending provisions.

RECOMMENDATION 2. Only finance arrangements regulated by the national consumer credit laws should be able to be used to purchase DER.

⁵ Consumer Action Law Centre (2021), ['The New Energy Tech Consumer Code: Representing the interest of consumers at the Australian Competition Tribunal'](#), p.9.

⁶ Australian Securities and Investment Commission (2018), [Report 600: Review of buy now pay later arrangements](#), p. 10.

Failings in installation, connection, and/or product faults

The third major issue we have seen through our casework is people reporting failings in solar installation, grid connection and/or product faults. When things go wrong, people face difficulty in getting an acceptable resolution. This is often due to the complex nature of the product and the number of parties involved in getting them up and running. Any updated consumer protection framework for DER should ensure that people have access to affordable dispute resolution, so that problems can be resolved quickly and fairly.

For people seeking to resolve complaints, the current mechanisms available are also not accessible for all consumers, particularly people in vulnerable situations. As we noted in the key findings from our 2019 report 'Sunny Side Up':

When disputes arise with solar retailers, people usually need to go to VCAT to enforce any legal rights they have under the ACL. If they have a dispute about unregulated finance, they would probably have to go to court. People often struggle to access justice in these forums, especially in court which can be prohibitively expensive and risky.⁷

These barriers to free, fair, and reasonable dispute resolution for consumers must be removed. Ensuring people have access to affordable dispute resolution will only become more important as more DER products enter the market. In a future energy market it will likely be increasingly difficult for consumers to identify the source of an issue, especially in instances where they are using multiple DER products provided by different parties. Given the well-functioning energy Ombudsman schemes already in place, the most straightforward solution is to expand their jurisdiction to cover all DER products and services, and require DER retailers to be members.

RECOMMENDATION 3. The jurisdiction of state-based energy and water ombudsman services be extended to include DER products and services.

Reforms to ensure regulatory framework is effective

In addition to the above substantive consumer protections, this consultation presents an opportunity to ensure the regulatory framework remains adaptable, responsive, and flexible. To that end, we recommend a range of structural features that should be adopted.

Limiting the use of exemptions and exceptions

The regulatory framework needs to be simple and easily understood. This not only makes compliance simpler, but improves community understanding and trust in regulatory safeguards. To that end, we urge that the use of exemptions and exceptions be reduced, if not eliminated.

The Financial Services Royal Commission (**FSRC**) made a specific recommendation to eliminate exceptions and qualifications from generally applicable norms of conduct in the regulatory framework.⁸ We strongly support this position. Since then, the Australian Law Reform Commission has been tasked with a significant inquiry to examine simplification of the financial services regulatory framework, including to respond to the FSRC recommendation.⁹ We suggest that the AER consider these developments as part of its review, including the joint consumer submission to the ALRC Interim Report A.¹⁰

⁷ Consumer Action Law Centre (2019), '['Sunny Side Up" Strengthening the consumer protection regime for solar panels in Victoria'](#) Key findings paper, p.3

⁸ FSRC Royal Commission, Final Report, recommendation 7.4

⁹ See: <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/>

¹⁰ See <https://consumeraction.org.au/alrc-report-137-submission-to-interim-report-a/>

We acknowledge that the existing authorisation framework includes regulatory exemptions. As stated by the Issues Paper, the exemptions framework is not well-suited to new types of complex business models in the energy sector. It also leaves the regulator with insufficient oversight.

We consider that instead of regulatory exemptions, the regulator should have broad authority to regulate any business model that is involved in the supply of energy. It should then be able to identify the appropriate level of rules that apply. If a particular business model does not require the full set of regulations, then any decision to 'lighten' the load should be made by the regulator in a transparent and accountable manner. To put another way, the regulator should not be restricted in its ability to regulate.

RECOMMENDATION 4. The AER needs to be empowered to regulate for all businesses who supply energy, and regulatory exemptions and exceptions should be removed.

Outcomes-based regulation

The Issues Paper refers to two recently introduced types of outcomes-based regulation frameworks for the financial services sector, being the 'design and distribution obligations' and the 'product intervention power'. Consumer Action endorses these tools being added to the regulatory toolkit for energy; we were a strong advocate for these changes in financial services. At their core, these reforms put the onus on regulated entities to ensure their products & practices are safe, align with good industry practices and provide the regulator the power to intervene if there is a risk of harm. This approach is proactive and does not require waiting until consumer detriment and loss has occurred. This allows a regulator to be 'a fence at the top of the cliff, rather than an ambulance at the bottom'.

That said, we have seen some shortcomings in the implementation of these reforms which we consider could be avoided should the AER be provided these powers:

- The Product Intervention Power (**PIP**) is time-limited to 18-months duration. The first efforts of ASIC in using this power have been limited because of this duration. The business of concern, Cigno Loans, changed its model slightly and then the PIP elapsed without government intervention. We consider that the PIP should not be time-limited, or there should be a requirement for some other regulatory intervention to address continuing harm should it expire.
- Design and Distribution Obligations (**DADOs**) require businesses to issue a target market determination, which sets out the target market for the product, as well as measures to assess whether the product is being distributed to its target market. Unfortunately, to date, our concern is that target market determinations have been vague rather than being based on data about customer outcomes. If DADOs are to be adopted, they should incorporate clear metrics by which a business can be kept accountable.

Separately to the above, we encourage the AER to consider the proposals from the Victorian Embedded Network Review which included a focus on equitable pricing outcomes and consistent consumer protections for Victorians living in apartments and other communal living arrangements.¹¹ This is a growing sector which can deliver benefits associated with bulk purchasing, access to commercial network tariffs, and on-site generation of renewables. While there is a history of rapacious businesses in this sector charging monopoly prices, if implemented appropriately, the Review's recommendations could deliver a competitive landscape of business models focused on good customer outcomes.

RECOMMENDATION 5. Adopt an improved version of product intervention and design & distribution obligations for the energy regulatory framework including distributed energy resources.

¹¹ See: <https://engage.vic.gov.au/embedded-networks-review>

RECOMMENDATION 6. Consider the recommendations from the Victorian Embedded Network Review, which proposed a regulatory framework premised on good consumer outcomes.

Industry codes

We recommend against adopting industry codes to set consumer protection. As set out by the Issues Paper, industry codes are commonly not mandatory, and are the result of negotiation across industry which can result in a lowest common denominator approach. There can also be challenges regarding enforcement, particularly where bodies responsible for monitoring and oversight are under-resourced. As noted by the FSRC, unless code obligations are enforceable and come with consequences for breach, individuals and the communities cannot rely on the commitments made in codes by industry.¹²

By way of example about the problems with industry codes, we point to the New Energy Tech Consumer Code. A number of problems arose with the development of this code:

- The code's development began in August 2017 and, while it is now May 2022, the code is yet to be in operation. Due to come into effect in mid-2023, the code has taken six years in its development.
- The code was authorised by the ACCC, but this process (particularly the subsequent appeal to the Australian Competition Tribunal) suffered from problems. While authorisation is designed to facilitate joint conduct from industry where there is a public benefit, authorisation (particularly as it is based in competition law) was narrowly focused on economic cost-benefit. Australian Competition Tribunal processes are not well-placed to consider consumer vulnerability and the experiences of disadvantaged communities.¹³ We consider that public benefits are achieved when all consumers are protected and empowered, not just those that are more capable of engaging in the marketplace or who can afford to shoulder the cost when the market fails them. This was not the position taken by the tribunal.
- The appeal resulted in a substantial reduction in the protections provided by the code. The ACCC's authorisation of two clauses in the code concerned a prohibition on unsolicited sales of NET products with buy-now-pay-later (unsolicited sales provision) and limitations on the unsuitable offering of BNPL to purchasers of NET products (responsible lending provision). An industry participant was able to successfully have these important protections removed. It was difficult, if not impossible, for a consumer advocacy organisation to present evidence that satisfied the tribunal, given our reliance on the experience of individual consumers that seek assistance as the basis of our evidence. The tribunal preferred industry or market-wide data.

There are thus significant challenges with industry codes of conduct as a vehicle to enhance consumer protection in a way that significantly impacts conduct and behaviour in a market. Review processes can be used by industry to challenge effective consumer protections.

RECOMMENDATION 7. Do not use industry codes as the vehicle of consumer protection in distributed energy services.

RECOMMENDATION 8. Ensure vulnerability is core to consumer protection frameworks for energy services, rather than adopt a narrow cost-benefit economic analysis as the basis for public interest intervention.

¹² FSRC Final Report, see page 105 and following.

¹³ Our 2021 on the New Energy Tech Consumer Code covered this issue in some detail, see <https://consumeraction.org.au/report-our-response-to-the-new-energy-tech-consumer-code/>.

Should you wish to discuss these issues in more detail, please contact Luke Lovell, Senior Policy Officer at Consumer Action Law Centre at luke@consumeraction.org.au or on 03 9670 5088 for more information or to arrange a meeting.

Yours sincerely,
CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is fluid and cursive, with a distinct "G" at the beginning.

Gerard Brody | Chief Executive Officer