



25 November 2013

By email: [AERInquiry@aer.gov.au](mailto:AERInquiry@aer.gov.au)

Attention: Jacqui Thorpe  
Acting General Manager  
Retail Markets Branch  
Australian Energy Regulator  
GPO Box 520  
Melbourne VIC 3001

Dear Ms Thorpe

### **Submission to the AER Alternative Energy Sellers - Issues Paper**

Consumer Action is pleased to provide comment on the AER's Alternative Energy Sellers Issue Paper (the **Issues Paper**).

We support the AER's approach in attempting to identify a suitable outcome for consumers in an evolving and increasingly complex energy market. We have provided some comments to encourage the AER to be proactive in ensuring consumers of alternative energy sellers and other third parties have sufficient consumer protection.

### **About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation, offering free legal advice, pursuing consumer litigation and providing financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly. We have a significant and detailed history in providing consumer advocacy across energy issues in both Victoria and nationally.

We have a particular focus on energy consumer policy, and believe that effective competition and robust consumer protections are mutually reinforcing. We regularly work on areas of concern for consumers in the national energy market in relation to current regulatory reform in the energy sector and perceived market failure.

### **Alternative Energy Sellers**

The changing role of existing and traditional authorised/licensed businesses, along with their complex products and services, combined with the introduction of alternative energy sellers and third parties, is exposing consumers to an incredibly complex energy market. With this,

comes more complex contractual arrangements, involving multiple parties, raising issues relating to data security, privacy and consumer dispute resolution.

A consumer protection framework that provides consumers maximum protections in the face of these changes is essential. Without this, consumer detriment is likely to arise, leading to consumer distrust. Such consumer sentiments are likely to inhibit competition and efficiency in energy markets.

Our experience is that in changing markets, regulators can be tempted to sit on their hands and play a “let’s wait and see” role. In our view this is the wrong approach. In evolving markets, businesses experiment with new business models and marketing strategies in an uncertain regulatory environment. In the post deregulation telecommunications market, we saw the regulators fail to set the tone for a market, and a culture of poor practices and non-compliance with consumer protections resulted (with which we are still dealing). Similarly, as demand for solar installation grew (encouraged by government subsidies), so did significant poor practices resulting in widespread consumer detriment.<sup>1</sup> With alternative energy sellers emerging, particularly those enabled by smart meters, it’s important that regulators act early to set consumer and market expectations.

We largely support the approach proposed by the AER in the Issues Paper in relation to the exemption framework however strongly recommend that maximum protections are available to consumers in line with those assured by authorised retailers. In particular, consumers must have access to alternative dispute resolution, requiring exempt sellers to become members of ombudsman schemes.

We note that we consider that the approach proposed by the AER may only be a transitional solution and that there may be a case for more specific third party regulation under energy laws.

### **Essential vs Supplementary supply**

In the consultation paper, the AER states it will take a different approach where energy is a supplementary or ‘add on’ service. We do not understand how the AER will assess the difference between essential and supplementary supply. While we can consider the essential supply of energy to be relatively obvious and straight forward, the range of products and services entering the market can serve to complicate this.

We are particularly concerned about the use of supply capacity control products, particularly should it be sold by a third party and where the limit set on that household interferes with the essential level of supply necessary by household occupants. Supply capacity control is a complex product where it is likely consumers will be faced with having to understand and, realistically, know the minimum kilowatt level required for them to run basic appliances (such as fridges, freezers, heaters, cooking appliances and lights) within their home. Further, each household’s usage varies based upon a number of factors, such as; the number of occupants, behaviour of occupants, the housing stock, location, season, type and energy

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<sup>1</sup>See e.g.: <http://www.ewov.com.au/reports/solar-and-smart-meter-update-october-2013>

efficiency level of appliances and medical equipment on premises. Third parties delivering this service need to be accountable to the limit being set too low for some households and the implications of this on essential supply.

We are further concerned about scenarios where consumers enter arrangements which are linked to appliances that could be considered essential. Should a consumer default on a contractual arrangement with a third party, or should that third party become insolvent and cease trading for example, the impact on a household's essential supply and service may be considerable.

We do not consider there to be a simple solution to these examples and while we understand the AER is considering exemptions on an individual basis with these potential providers, there will need to be an overarching approach that ensures consumer's access to essential supply is not compromised.

### **Product complexity and bundling**

We believe that regulators should set an overarching principle of strong consumer protection that will apply to all alternative energy sellers, particularly by requiring simple arrangements around dispute resolution.

We have received a number of complaints from consumers that highlight the complexity of dispute resolution where a number of parties are involved, particularly where at least one of these parties is not an authorised retailer.

Uncovering the most suitable course for resolution, indeed identifying the party responsible for the issue, has proven difficult for our qualified solicitors acting on behalf of our clients.

#### **Case study 1 (151545)**

Client X had solar panels and an inverter installed in May 2012 by company Solar Mega Mart (SMM), for the cost of approximately \$8,000. The company the solar panels were purchased from subsequently underwent an ownership change (Illuminate Pty Ltd) followed by liquidation (Tech Energy). In November 2012 Client X's inverter was not working, and they tried to get them repaired. The Client replaced the inverter however the Client was then told by Tech Energy that it too was unsafe and was switched off.

Working with the client, Consumer Action advised about a potential claim for damages under the Australian Consumer Law against the seller, but as they were under external administration this could be problematic.

Further advice was that the client approach the manufacturer with one last opportunity to replace with a functioning inverter, but that if the problem still persisted that the client would reclaim purchase price and or damages suffered with advice to go to VCAT if they refuse to pay.

### **Case study 2 (151329)**

Client Y entered into an agreement to acquire solar panels with company Unleash Solar. They subsequently closed down/went into insolvency.

Our client found that the way that the solar system was installed was problematic; the feed in tariff allocated was not correct, the watts in the system were higher than that required, and that the installation was not approved.

Further, our client had issues with a meter installed by SP Ausnet but which the solar system was not connected to.

Our client continued to pay for the solar system via the finance company, but is concerned that they are doing so without alterations or certifications for approval.

### **Case study 3 (162593)**

Client Z entered into an agreement to acquire solar panels with company Unleash in September 2012. They subsequently closed down/went into insolvency.

The inverters however were not working, ie producing enough solar power. In June/July 2013 our client had an independent meter installed (\$400 brand new from wholesaler) to check whether the smart meter was correct or the inverter. The independent meter agreed with the smart meter which further demonstrated the inverter was not working (it stated it would produce 50kw a day, however it produced 25kw a day).

Our client had paid for a 10 year warranty on the inverter, however Unleash Solar did not forward this to the manufacturer (JFY Son Twins) in China. The manufacturer has a five year guarantee.

The client had the inverter upgraded, so now all devices align and confirm 50kw produced per day. However over that time, with the inverter stating it produced 8000kw, and the smart meter recording 4000kw, our client was out of pocket for \$1000 of the shortfall in energy produced.

Seeking refund for the consequential loss of acquiring the independent meter, a refund for the electricity rebate lost, we discussed whether the ACL would apply, re section 55 in relation to 'fitness for purpose', but the issue was whether there was anyone in Australia who was solvent to pursue for the loss. There was found to be no company to take action against.

### **Case study 4 (146211)**

Client W entered into an agreement with company Sunburst Solar in 2011, however while their retailer was Simply Energy, our client was not getting the offset they thought they would get due to failed application to apply the correct feed in tariff, combined with a faulty inverter which was not feeding energy into the grid.

The client tried to resolve the dispute with Simply Energy, who claimed they didn't

know any thing about it. The client then got their own electrician to look at the inverter who confirmed it wasn't working.

The Client raised the dispute with Sunburst Solar who claimed the issue was the fault of the manufacturer.

At time of contract the lock in the rate was 60ckw feed in tariff which the client was eligible for. That opportunity passed, and the feed in tariff is much lower at 21.3ckw. However as the inverter was not working, it was difficult to claim initial rate as no energy was being fed into grid at this point.

The client suggested to Sunburst that if they fixed the inverter by a certain date they would forego the loss suffered. They have done this, but then the client received a demand for \$900 for payment of travel costs associated with fixing the inverter, who later filed against the client in VCAT for these costs.

Consumer Action provided extended advice to Loddon Campaspe Community Legal Centre throughout this process.

Outcome, settled with Sunburst Solar, Simply Energy continued to be unresolved.

These cases demonstrate that the complexity of contractual arrangements in the alternative provision of energy services. At minimum, third parties granted exemption will need to demonstrate a strong awareness of the consumer protection framework and other regulatory obligations outside of energy laws. All businesses should assist consumers resolve their disputes, and direct them to the bodies established to do so. The AER too should provide clear advice to consumers about how to resolve disputes. We think that with respect to essential services, it is insufficient consumer protection to require consumers to resolve disputes through consumer affairs departments or small claims tribunals. Consumer Affairs Victoria, for example, has no binding powers, meaning traders can choose not to participate. VCAT in our experience can be very lengthy, time and cost intensive and fail to produce fair outcomes (for example, because parties can be pushed to mediation where there are significant power imbalances).

We suggest that the AER could develop a Memorandum of Understanding with key regulators and ombudsman to enable a seamless approach to consumer dispute resolution in relation to alternative energy sellers. This would need to include a clear outline of protections available to consumers and guidance about where to seek resolution, both directly for consumers but also for assistance services such as our own.

With the increasing incidence of finance products being linked to solar panels and energy provision, we query how consumers or other dispute resolution mechanisms will otherwise untangle these contracts.

We would welcome an opportunity to further discuss this submission with you. Please contact Janine Rayner on 03 8554 6907 or [janine@consumeraction.org.au](mailto:janine@consumeraction.org.au).

Yours sincerely

**CONSUMER ACTION LAW CENTRE**

A handwritten signature in black ink, appearing to read "Janine Rayner".

Janine Rayner  
Senior Policy Officer