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Thank you for the opportunity to comment on the Issues Paper: *Regulating innovative energy selling business models under the National Energy Retail Law*.

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers.

EWON's jurisdiction over exempt sellers

EWON, unlike all the other jurisdictional energy and water ombudsmen, has jurisdiction over exempt sellers:

- *Electricity Supply Act 1995* - s96B gives EWON jurisdiction to investigate complaints between small customers and exempt sellers.
- *Electricity Supply Act 1995* - s96D provides that a retailer or exempt person is bound by a decision by the energy ombudsman and must not fail to comply with any such decision.
- *Electricity Supply (General) Regulation 2014* -s 11 includes among the persons who may apply to an energy ombudsman for a review of a decision 'a small customer in respect of a matter arising between the customer and an exempt person concerning a contract for the supply of electricity or gas (including charges for electricity or gas) or any other matter relating to the supply of electricity or gas by the exempt person to the customer'.

Initially the EWON Board decided that exempt retailers would not be required to join EWON. As long as the number of complaints remained relatively low, the cost of investigating complaints against exempt retailers would be spread across all the members of the scheme. This was in recognition of the difficulty of:

- potentially compelling hundreds of small exempt retailers to join EWON
- managing their membership
- billing them for dispute resolution services.

To date, complaint numbers have averaged less than 100 per year, and these have mainly related to Residential Parks.

When EWON responded to the 2013 AER *Issues Paper: Regulation of alternative energy sellers under the National Energy Retail Law*, our view was that EWON's exempt jurisdiction was only intended to extend to those situations where the exempt seller was the primary provider of energy to the customer, for example where there is a private network within Residential Parks¹.

Where a business operating under a Solar Power Purchase Agreement (SPPA) was only providing a small additional supply supplementary to the primary supply from the authorised retailer, we considered NSW Fair Trading to be the appropriate dispute resolution service for disputes relating to specific contract terms. With the addition of battery storage however, there is the potential for the SPPA provider to become the primary supplier of energy. The impact on EWON's jurisdiction is now not so clear.

From a review of some of the recent applications by SPPA providers for exemption to the AER indicates that the dispute resolution body nominated has been NSW Fair Trading, the Australian Commercial Dispute Centre, and is frequently the jurisdictional ombudsman.

We appreciate that the SPPA model is still in its early stages, and the availability of affordable battery storage is still some way off. It may eventuate that the target market is larger commercial customers rather than small residential customers.

However if these alternative energy sellers gain significant market penetration among small retail customers, and customer complaints to EWON accordingly increase, the EWON Board will need to review whether the decision to provide services free of charge to exempt sellers remains sustainable.

In addition to these general comments relating to EWON's jurisdiction, the specific questions raised in the Issues Paper are addressed in the following pages.

If you would like to discuss this matter further, please contact me or Emma Keene, General Manager Policy and Community Engagement, on 02 8218 5250.

Yours sincerely



Janine Young
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¹ 2013 EWON submission available [here](#) at www.ewon.com.au



Energy & Water
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Submission to the Australian Energy Regulator Issues Paper: Regulating innovative energy selling business models under the National Energy Retail Law

Energy & Water Ombudsman NSW

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Contents

INTRODUCTION	3
QUESTIONS FOR STAKEHOLDERS	3
1. WHAT DIFFERENCE, IF ANY, SHOULD STORAGE AND/OR OTHER EMERGING TECHNOLOGIES HAVE ON HOW THE AER PROPOSES TO REGULATE SPPA AND OTHER ALTERNATIVE ENERGY SELLING MODELS?	3
2. WHAT ARE STAKEHOLDERS' VIEWS ON THE AER'S PROPOSED OPTIONS? ARE THERE OTHER OPTIONS TO WHICH THE AER SHOULD HAVE REGARD?	4
3. IN RELATION TO OPTION 2 (EXEMPTION, RATHER THAN AUTHORISATION), WHAT, IF ANY, CONDITIONS SHOULD BE PLACED ON AN INDIVIDUAL EXEMPTION FOR AN ALTERNATIVE ENERGY SELLER?	4
4. SHOULD THE AER INCLUDE A 'TRIGGER POINT' FOR REVIEW OF INDIVIDUAL CASES IF IT PROCEEDS WITH OPTION 2?	7
CONCLUSION	8

INTRODUCTION

The Energy & Water Ombudsman NSW (EWON) welcomes the opportunity to respond to the AER's Issues Paper: *Regulating innovative energy selling business models under the National Energy Retail Law*.

Established in 1998, EWON is the approved independent dispute resolution mechanism for customers of electricity and gas providers in NSW, and some water providers. Our aim is to provide fair, equitable and independent investigation and resolution of customer complaints. We work with all the key stakeholders – providers, community, government, regulators – to improve the standard of service delivery for the benefit of NSW consumers.

QUESTIONS FOR STAKEHOLDERS

1. *What difference, if any, should storage and/or other emerging technologies have on how the AER proposes to regulate SPPA and other alternative energy selling models?*
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Under the individual exemptions granted to date by the AER for businesses planning to operate under a Solar Power Purchase Agreement (SPPA), customers will still have access to the grid via their contract with an authorised energy retailer. This means that although adding storage capability will allow customers to use more of the power generated from their solar panels at times that is most cost-effective for them, they are not totally dependent on the SPPA for their ongoing supply.

For their supply from the authorised retailer, these customers will have the consumer protections provided under the National Energy Customer Framework (NECF). In particular they are protected against disconnection from that supply when any member of the household is reliant on life support equipment.

For their relationship with the energy on-seller via the SPPA, the Australian Consumer Law provides general protections such as:

- no unfair contract terms
- full price disclosure
- products must be safe and fit for purpose
- guarantees must be honoured.

As with all contracts, customers need to take care that they have understood the key terms before entering the contract. Some of these contracts will be for substantial terms, with potentially high exit fees for early termination, so clear disclosure of all terms, and their financial impact on the customer, should be a core requirement.

The addition of battery storage would seem to be only a matter of degree, requiring no change to the regulatory approach of granting exemptions rather than authorisations. However EWON is concerned whether the current consumer protections are sufficient.

We address this in our response to Question 3.

2. What are stakeholders' views on the AER's *proposed options*? Are there other options to which the AER should have regard?

EWON considers the exemption regime is currently appropriate for on-selling energy via an SPPA. However we support the concept of a trigger point to assess the appropriateness in the longer term. We address this in our response to Question 4.

3. In relation to Option 2 (exemption, rather than authorisation), what, if any, conditions should be placed on an individual exemption for an alternative energy seller?

Many engaged and well-informed customers have already taken steps to install solar panels on their properties at their own expense. It is likely that the small residential customers who may agree to SPPAs might lack the financial resources to install solar panels on their own rooftops, or may have found the process for doing this too complicated and confusing. This suggests that they would potentially be a more vulnerable section of the community, who may require assistance when the contractual relationship is under strain.

The AER's *Exempt Selling Guideline* states at page 16:

"Conditions are designed to provide protections for customers without overburdening exempt sellers, and are modelled on the protections that authorised retailers must provide their customers."

EWON supports the aim of providing customers of exempt sellers with similar customer protections to those enjoyed by customers of authorised sellers, wherever practical.

We have considered a number of scenarios that could potentially be brought to EWON, based on our dispute resolution experience. We are concerned that there may be a need for some further protection for these customers, beyond what they are entitled to under the *Australian Consumer Law*. Many of the 19 Conditions in the *Exempt Selling Guideline* would provide customers of these exempt sellers with additional consumer protection without placing an undue burden on the exempt seller.

They include:

- **Explicit informed consent** – Rule 64 of the National Energy Retail Rules requires the retailer to disclose *"all applicable prices, charges, early termination payments and penalties, security deposits, service levels, concessions or rebates, billing and payment arrangements and how any of these matters may be changed"*.

We consider customers of these exempt sellers should also be entitled to this level of disclosure. In addition it would be preferable if the exempt seller would be required to explicitly provide an estimation of the amount of energy anticipated to be generated (based on average weather conditions for that area) and the amount that can be stored so the customer can make an informed decision.

With the addition of battery storage, the customer could be taking the majority of their supply from the exempt seller. If their tariff is lower than that charged by an authorised retailer, this would clearly benefit the customer. On the other hand, there may be unforeseen consequences if the customer's reduced usage results in a significant increase to the tariff offered by their authorised retailer. The customer may need to be alerted to this possibility in order to make a fully informed decision.

- **Tariff** – it is assumed that the tariff charged to purchase this energy would be cheaper than the standing offer price of the local area retailer, as this is the key selling proposition for customers. We question whether the customer is adequately protected if the on-seller increases the rates during the contract term. We consider paragraphs 1-4 of *Condition 7* should also apply to exempt sellers on-selling energy under an SPPA.
- **Meter accuracy** – we understand this model requires the installation of a new meter to measure the output from the inverter, and that these meters would be remotely read. If the customer has concerns about the accuracy of these meters, it would appear fair and reasonable that they should be entitled to a meter test under similar conditions to Rule 29 (5) in the National Energy Retail Rules, with a disclosed fee charged for a test, which must be refunded to the customer if the meter is found to be faulty.
- **Estimations** – if the remote reading facility malfunctions, or the meter stops working, what procedures are in place for billing this customer? We suggest that the provisions of *Condition 4* be adapted to allow for estimations based on the energy generated by a similar sized installation in a similar location over the same period.
- **Billing arrangements** – the requirements in the following Conditions appear fair and reasonable and not onerous for any exempt seller:
 - *Condition 3* setting out minimum requirements for energy bill content and frequency
 - *Condition 5* pay-by date
 - *Condition 6* receipts
 - *Condition 8* undercharging and overcharging.
- **Payment arrangements** - the requirement in paragraph 2 of *Condition 3* to offer flexible payment arrangements is particularly relevant when selling to potentially vulnerable small residential customers.
- **Disclosure of exit or penalty fees** – Customers can potentially face high exit fees if they need to move house in the early years of the SPPA, and have been unable to transfer the agreement over to the new owners. The provisions of *Condition 3* relate only to the sale of energy, not to any penalty fees under a contract. Perhaps the wording of paragraph 2

of *Condition 3* could be extended to include all fees and charges under an energy agreement.

- **Disclosure of termination costs (in addition to exit fees)** – contracts need to provide for the situation where the original customer moves house, and all associated costs should be fully disclosed at the start of the contract. If a contract term allows for the customer to relocate the system to their next house, all the potential costs for doing this should be disclosed in the original agreement, as well as who bears the risk of damage to property and the panels during this process. If the contract term allows the system to be transferred to the new owner, it should be made clear how the value of the system is established at that point of time, and whether any associated costs are to be borne by the previous owner or the new owner.
- **Disconnection** – it is not clear whether an on-seller would have any right to enter the customer's property to disconnect the customer's connection to their rooftop solar panels, or block their access to the stored energy, until the bill is paid. The provisions of *Condition 9, 10 and 11* do not seem particularly appropriate to the SPPA as the customer still has access to supply from their authorised retailer. However if any type of disconnection is anticipated by the exempt seller, the terms should be clearly disclosed in the SPPA.
- **Damage** – while the panels typically remain the property of the on-seller for the duration of the SPPA, they are in fact a fixture on the customer's house. Therefore we suggest that it needs to be made clear who bears the cost if the panels are damaged for any reason, for example by hailstorms. This could include consideration of the consequences (if any) if the capability of the system is reduced for some reason beyond the customer's control, eg shading from vegetation or new structures on a neighbouring property.
- **Other customer service requirements** – *Condition 14* (contact details), *Condition 15* (dispute resolution) and *Condition 19* (maintaining records) appear fair and reasonable and not onerous for exempt sellers.

Many of these comments apply to the SPPA model, with or without the addition of battery storage. We note that the *National Energy Retail Rules* authorise the AER to make variations to individual exemptions that have already been granted, so the AER could make additions to the two general conditions that have been applied to those individual exemptions granted to date.

It is possible that some of the potential contractual disputes canvassed above can be appropriately dealt with in the NSW Civil and Administrative Tribunal (NCAT). However it would assist both parties to the contract, and any dispute resolution body investigating a dispute, if some additional protections incorporating or adapting many of the Core Conditions from the AER's Exempt Selling Guidelines were in place.

We recognise that the SPPA model is still in its early stages, and it may eventuate that the main target market is larger commercial customers rather than small residential customers. With so many businesses having applied to the AER for exemptions to operate under an SPPA, it may provide more certainty for these sellers, as well as clearer protection for customers, if a specific class exemption were established, with a set of defined conditions.

4. Should the AER include a 'trigger point' for review of individual cases if it proceeds with Option 2?

While EWON supports the continuation of the exemption framework for these on-sellers, we anticipate the possibility of some of these companies growing to a size that this is no longer the most appropriate regulatory approach.

The small customers' needs for the consumer protections already discussed do not vary depending on the size of the business. However, it may be reasonable to expect that a larger business should bear higher reporting and compliance obligations for example a requirement to operate a hardship program for their customers. EWON supports the inclusion of a condition for review of an exemption at a particular trigger point to assess this.

A trigger point based on either the seller reaching a particular customer base, kWh sales volume or storage capacity would appear to rely on voluntary self-reporting by the exempt seller at the point the particular target was reached. This reporting approach could place both an additional burden on a small exempt seller, and on the AER to chase up compliance, and may outweigh the potential benefit intended.

It would be transparent to all concerned to have a time triggered review, say every two years, when every on-seller would be required to submit a report to the AER on their kWh sales volume, storage capacity and customer base. This would allow for a comprehensive review of the market at regular intervals, and allow for the AER to consult with the key stakeholders including the energy ombudsman.

While EWON's comments have focussed on the SPPA model as being most likely to impact on our current jurisdiction, the trigger mechanism would seem equally appropriate to other alternative selling models such as "wheeling arrangements" and not-for-profit community arrangements.

CONCLUSION

EWON, unlike all the other jurisdictional energy and water ombudsmen, has jurisdiction over exempt sellers. EWON would appreciate the opportunity to discuss with the AER the issues raised in this submission, at an appropriate time. There would be value in the AER engaging with the Australian and New Zealand Energy and Water Ombudsman Network (ANZEWON) and EWON would be happy to facilitate this.