

22 January 2018

By email: BTMIndustryCode@cleanenergycouncil.org.au

Secretariat
Behind-the-meter code working group
C/- Clean Energy Council

Dear Sir/Madam

Behind the Meter Distributed Energy Resources Provider Code

We write to provide feedback on the Consultation Draft Behind the Meter Distributed Energy Resources Provider Code (the **Draft Code**).

In summary, we consider:

- the name of the code should be readily understood by the public;
- the code should promote consumer protection as a means to ensuring innovation benefits consumers;
- the code should prohibit all forms of unsolicited selling, or require an 'opt-in' model for unsolicited selling;
- the code should require signatories to only deal with credit providers that are appropriately regulated; and
- the sanctions available for breach of the code should be robust and the code should not unduly limit their application.

About Consumer Action Law Centre

Consumer Action is an independent, not-for-profit consumer organisation with deep expertise in consumer laws, policy and direct knowledge of people's experiences 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.

Name of code

The name of the code needs to better reflect community understanding with the types of products and services that are being regulated.

The current name, "Behind the Meter Distributed Energy Resources Provider Code" reflects an industry-specific view of the sector. For example, the term 'behind the meter' is from the industry's perspective; from

the consumer's perspective the relevant products and services are in front of the meter. Furthermore, the term 'distributed energy resources' is a highly technical term.

We recommend consideration be given to "solar, battery and related energy products and services" as a more appropriate name for the code.

Drafting principles

The explanatory memorandum for the Draft Code outlines certain drafting principles, the first of which is "balancing consumer protections with market efficiency and promotion of innovation". With respect, we consider the premise that consumer protection and efficiency/innovation need to be balanced or traded against one another to be misguided.

Innovation can produce significant benefits for consumers. However, not every product intervention is necessarily in consumers' best interests. This is particularly the case in complex or essential services markets, where the risk of bad product design and mis-selling can have severe consequences. For example, it appears "innovation" in solar retail largely involves finance offerings that evade national credit laws. This is not innovation that benefits consumers.

An effective industry code needs to ensure that innovation and efficiency genuinely meets the needs of Australian consumers rather than simply facilitating the selling of products more effectively.

Key commitments

We support the key commitments articulated in Part A of the Draft Code.

However, we suggest that in addition to sales practices being "responsible", the key commitments acknowledge that sales practices, products and after-sales service be provided fairly, honestly and in accordance with community expectations. This would recognise that community expectations regarding the provision of relevant services cover their full life-cycle and not just the point of sale.

We also note that the key commitment regarding payment and finance (A.3) should reference an Australian Credit Licence, not an Australian Financial Services Licence.

Practice requirements

Unsolicited selling

We strongly recommend that the Draft Code be amended to specifically prohibit unsolicited selling, including door-to-door selling and tele-marketing. There is substantial evidence of consumer detriment caused by these selling methods, and they do not meet community expectations.

The report *Knock it Off: door-to-door sales and consumer harm in Victoria*, jointly published by Consumer Action Law Centre, the Loddon-Campaspe Community Legal Centre and Westjustice, includes over twenty case studies, more than half of which related to the selling of solar panels. As the report notes, "unsolicited retail sales of solar panels are causing significant consumer harm—this is driven by a number of factors



including consumer anxiety over rising energy costs, limited understanding of the product and appropriate cost, and access to (often inappropriate) finance which makes the purchase achievable".¹

The report also outlines a number of psychological or behavioural techniques that contribute to the risk of consumer detriment associated with door-to-door selling, including:

- 'The foot in the door'—rather than being a literal, physical, foot-in the door, this technique describes a process whereby a person is induced into complying with a significant request by first agreeing to a smaller request, or a number of small requests. The more the subject complies with the requester, the more likely they are to continue complying, despite the potential large or demanding nature of the final request.
- Social norms, politeness and the commercial advantage of familiarity—the act of asking a person to leave your front door, closing the door on them, or hanging up the phone requires greater psychological resources than simply walking away, as a consumer may do in a store setting.
- The cognitive impact of poverty—research suggests that people on lower incomes are less likely to assert themselves and are more likely to agree to an undesirable transaction than others. This is because such people can have reduced "bandwidth" due to the life stresses involved in being poor.

In addition, the report outlined original research that demonstrates that cooling-off periods don't work. A behavioural experiment showed that where people had to take action to demonstrate regret, they did not do so. The research concludes that the findings are explained by the concept of "inertia". This concept dictates that those who make a decision are very unlikely to use their cooling-off rights to change their mind.²

For this reason, as an alternative to a complete prohibition, the *Knock it Off* report recommended an opt-in model for unsolicited selling. This would require consumers to opt into an unsolicited sale, a certain period after a sale. A major benefit of this approach would be to remove the influence of sales staff on a final purchase decision.

Regulator statistics also show that there is considerable consumer harm and even breaches of the law associated with telemarketing and the sale of solar. The Australian Communications & Media Authority notes that solar is one of the main areas of concern identified by consumers, particularly about telemarketing.³

It also appears that lead generation, the process of identifying people who are potential sales targets or 'leads', is widespread in solar and related industries. While, for industry, lead generation techniques can connect people with personalised product and service offerings and stimulate consumer demand, such

¹ Consumer Action, *Knock it Off! Door-to-door sales and consumer harm in Victoria*, November 2018, available at: <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>

² Paul Harrison, 'Cooling-off periods don't work: study' *The Conversation*, 28 November 2016 <https://theconversation.com/cooling-off-periods-for-consumers-dont-work-study-69473>

³ ACMA, Action on unsolicited communications July to September 2018, available at: <https://www.acma.gov.au/theACMA/action-on-unsolicited-communications-july-to-september-2018>



marketing practices are likely to cause consumers to be disempowered, manipulated or be misled.⁴ We consider that the most effective protection against these outcomes is to better regulate unsolicited selling.

Payment and finance (B.3)

In addition to dealing with credit providers that have an Australian Credit Licence, the Draft Code should specify that signatories will only offer finance or credit arrangements that are regulated by the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) (including the National Credit Code)—this would avoid the situation where some credit providers have an Australian Credit Licence but structure their product to avoid the protections of the NCCPA.

This would prohibit solar sales to use “buy now, pay later” (**BNPL**) services. We note that these services are common in the solar industry, but consider that they should not be allowed by a best practice industry code, given:

- BNPL services do not have to be licensed;
- BNPL are not required to ensure credit offers are suitable or affordable for consumers; and
- BNPL are not required to have dispute resolution procedures in place.

We note that the reference to ‘credit lease’ in clause B.3.1(a) should be ‘consumer lease’.

Grid connection (B.4.2)

We support the flexibility to allow a consumer to organise connection to the grid themselves, but consider that where the retailer does this on the consumer’s behalf, they should retain responsibility to ensure that the outcome of grid connection and appropriate approvals and requirements are in place. Where the consumer actively chooses to arrange connection themselves, the retailer should assist the consumer with information through the process.

However, we consider that where a consumer chooses to connect to the grid themselves, this should not of itself enable a retailer to deny warranties or guarantees. The retailer should be still required to comply with warranties that are applicable, including those required by the code.

Personal information (B.6.2)

It is better practice to require a consumer to opt-in to the use of their personal information for future marketing, even where it relates to the sale itself. We note that this should not inhibit a retailer from contacting their customer in relation to after-sale service, but it should limit them from selling additional product unless the consumer has actively sought such communication.

⁴ Consumer Action, *Dirty Leads: Consumer protection in online lead generation*, March 2018, available at: <https://consumeraction.org.au/wp-content/uploads/2018/03/Dirty-Leads-Consumer-Action-Law-Centre-March-2018.pdf>



Code administration

We note that the code administration section of the Draft Code is still in development, as such, the following comments are high level only.

In further development of this section of the code, we encourage the working group to be aware of the differences between code administration and complaint handling. Code administration should be primarily focused on promoting and monitoring compliance, including determining breaches and appropriate sanctions. Complaint handling, by contrast, is not the central role of code administration. While it may make sense for the code administration to play a concierge role to assist with resolving disputes, we consider that what is needed is an external dispute body to manage disputes between signatories and consumers.

The Victorian Government's Final Response to the Independent Review of the Electricity & Gas Retail Markets in Victoria supported the recommendation to expand the powers of the Energy & Water Ombudsman Victoria (**EWOV**) to cover emerging energy businesses, products and services. We consider that this recommendation should be implemented such that signatories and other providers submit to the jurisdiction of EWOV.

The independence of the code administration process, including through the appointment of an independent code review panel, is essential to confidence in the industry code. We consider that such a panel should be responsible for overseeing the administration of the code, including compliance promotion and monitoring. It should also respond to particular matters referred to it by the code administrator, including hearing of appeals, and drive better practice standards in the industry.

We are concerned that the Draft Code does not include any reference to sanctions for breach or contravention of the code. This is a significant gap. We consider that there should be a wide variety of robust sanctions available, and that it should be discretionary for the administrator to determine the appropriate sanction. The code itself should not unduly limit which sanctions should be applied, noting that a signatory has the opportunity to make an appeal to the code review panel.

Please contact us on 03 9670 5088 or at info@consumeraction.org.au if you would like to discuss this submission further

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

