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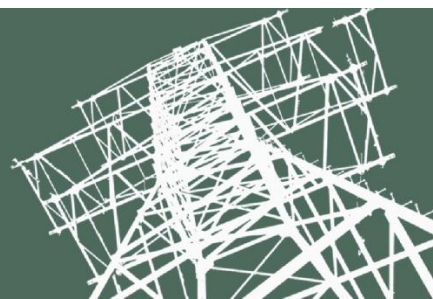
# **Retail licence exemptions for Solar Power Purchase Agreement Providers**

## **Draft Recommendations Report**

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Department of Finance | Public Utilities Office

July 2015



## Executive summary

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Businesses have responded to increasing consumer demand for alternative energy products by developing new and innovative ways to sell energy. These new sources offer an alternative to grid sourced electricity. One method that has been popular, both overseas and in other jurisdictions around Australia, is selling electricity through a Solar Power Purchase Agreement (**SPPA**). This involves the SPPA provider installing the solar power system on a customer's premises without any initial capital outlay by the customer. In exchange, the customer agrees to purchase the electricity generated by the solar power system for an agreed rate over the life of the contract. While this market is yet to fully develop in Western Australia, the Department of Finance, Public Utilities Office has been approached by companies expressing interest in providing SPPAs.

This Draft Recommendations Report outlines why the SPPA arrangement cannot readily fit within the existing retail licensing framework, and the reasons for exempting providers from the requirement to hold a retail licence. Furthermore, as this is an emerging market, without evidence indicating there is a problem requiring government intervention, there is no clear case for additional regulatory protections and monitoring through a retail licence. Imposing a retail licence at this stage will possibly hinder innovation and delay entrants into the market.

Instead, this Draft Recommendations Report recommends that an exemption approach be adopted. There are two options available for exemptions from the regulatory framework, and each has its advantages and disadvantages. This Draft Recommendations Report will explore both, as well as assessing the potential risks associated with introducing an exemption and how these risks may be mitigated. These options are:

- Option 1: individual retail licence exemptions.
- Option 2: new retail licence class exemption.

Under Option 1, SPPA providers would be required to apply for an individual exemption from the retail licence requirement. Option 2 would also exempt these providers but rather than requiring providers to apply for the exemption, a new class exemption would be introduced. The class exemption automatically exempts providers from the licence requirement, with specific conditions attached.

Households and businesses in Australia are increasingly shifting to solar power due to the environmental benefits and the substantial savings to their electricity bills. It is likely there will be increased consumer demand for arrangements such as SPPAs as consumers look for alternative means of accessing solar power without the costly initial capital outlay required to install a new system. As demand increases, the question arises as to whether to regulate this new type of business model.

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# Introduction

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## Purpose

This Draft Recommendations Report is intended to elicit stakeholder views on the options proposed for the regulation of the SPPA business model for selling energy to residential and commercial customers. Stakeholders are invited to comment on the two options, including feedback on the implications of the options, and the perceived advantages and disadvantages of each option. Draft recommendations and consultation questions are included at the end of this paper.

## Proposed timeframe

The proposed timeframe for the consultation process is outlined below:

- Publish the Draft Recommendations Report for four weeks of consultation.
- Collate and analyse submissions from stakeholders.
- Review submissions, and prepare a Final Recommendations Report to the Minister for Energy.

## Invitation for submission

The Public Utilities Office invites submissions on this Draft Recommendations Report by **5pm (WST), Friday 7 August 2015**. Electronic submissions are preferred and should be emailed to [PUOsubmissions@finance.wa.gov.au](mailto:PUOsubmissions@finance.wa.gov.au). Alternatively, submissions in printed form should be sent to:

Alexander Kroon  
Markets and Regulation Division  
Public Utilities Office, Department of Finance  
Locked Bag 11  
Cloisters Square WA 6850

Further information on this Draft Recommendations Report can be obtained from Alexander Kroon, Senior Policy Officer, Public Utilities Office on (08) 6551 4686 or at [Alexander.Kroon@finance.wa.gov.au](mailto:Alexander.Kroon@finance.wa.gov.au).

## Confidentiality

Stakeholders should clearly specify where information they provide is confidential or commercial in confidence (and, where possible, should separate confidential information from non-confidential information). The confidentiality of any information provided will be respected. With the exception of any material identified by the author as confidential or commercial in confidence, submissions will be made publicly available on the Department of Finance website.

Request for access to information relating to the consultation will be treated in accordance with the *Freedom of Information Act 1992* (WA) and Department of Finance processes (please see <http://www.finance.wa.gov.au> for further information).

## Background

Solar power is becoming a popular alternative source of energy for both residential and commercial premises. Solar panels have environmental benefits as they are a source of sustainable, renewable energy with zero emissions at the point of generation. Technological advancements in the industry will also improve solar panel efficiency, and lower the costs of production. Furthermore, they can provide financial savings to a consumer in the long term if the consumer is able to rely more heavily on the energy generated by a solar panel system, rather than purchasing electricity from the grid.

There are three options available to use solar power and each has its own advantages and disadvantages.

### Purchase and installation of a solar power system

This is one of the most common forms of accessing solar power in Western Australia. Customers pay for the solar power system outright, and enjoy the immediate benefits of solar power including reduced electricity bills, and a smaller carbon footprint.

When the system produces more electricity than that used by the customer, additional electricity is fed into the grid and customers may be eligible for payment under the Renewable Energy Buyback Scheme (**REBS**). Residential customers receive a rebate from Synergy of 7.135 cents per kilowatt hour for the surplus power produced. Horizon Power provides differing rebates depending on the location of the customer.<sup>1</sup>

### Solar leasing arrangements

This is similar to a pay-as-you-go arrangement and is akin to renting the solar panel system for a set period of time. The supplier installs the system on the premises and retains ownership, and the customer makes monthly payments for the contracted period. Different options are available at the end of the lease depending on the terms of the contract.

For example, some companies will transfer ownership of the system to the customer at the end of the lease, while in other cases ownership will revert back to the supplier. Customers may also have the opportunity to buy the system by paying a residual amount, or choosing to extend the lease.<sup>2</sup> The advantage of this arrangement is that it provides financial flexibility for customers, as they are able to spread the cost of the solar installation across the lease period.

However, this also means they are effectively paying more for the system than if they had bought it upfront due to the interest charged on the payments over the term of the lease.

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<sup>1</sup> Retailers such as Horizon Power and Synergy offer their own schemes, each with specific terms and conditions. For example, Horizon Power provides varying buyback rates for both residential and commercial customers. The rates provided differ based on the location of the town to reflect the cost of electricity generation in each town. Rates provided go up to 50 cents per kilowatt hour. ([http://www.horizonpower.com.au/renewable\\_energy\\_agreement\\_buyback\\_price.html](http://www.horizonpower.com.au/renewable_energy_agreement_buyback_price.html))

<sup>2</sup> Choice, *Solar PV system leasing and PV power purchasing agreements*. (<http://www.choice.com.au/home-improvement/energy-saving/solar/articles/solar-pv-system-leasing-and-power-purchasing-agreements-ppas>)

## Solar Power Purchase Agreements

SPPAs are a substantially different means of accessing solar power. The terms solar lease and SPPA are sometimes used interchangeably, but there is one main difference between the two. Under a solar lease, the consumer pays a monthly lease payment, or 'rent', in exchange for using the power produced by the system. Under a SPPA, the consumer agrees to buy the electricity generated at a set price per kilowatt hour.

The SPPA arrangement involves a provider installing and maintaining a solar panel system at a customer's premises at no up-front cost to the customer. In exchange, the customer agrees to purchase the energy generated by the solar panels from the provider over an agreed period at an agreed rate. A typical contractual period can be between 10 to 20 years. The agreed price is usually below that charged by an electricity retailer for supplies from the grid.

The nature of the agreement will vary from case to case, depending on the needs of the customer, and the terms of use will be negotiated prior to installation.<sup>3</sup>

### ***Benefits and risks***

The SPPA business model can be beneficial for both residential and commercial customers. Similar to a solar leasing arrangement, customers benefit from having no direct maintenance costs and no upfront payment for the solar panel system. There are no performance risks or operational risks as the retailer is responsible for maintaining the solar panels. There is also consistency in electricity pricing as the rate is agreed prior to entering the contract.<sup>4</sup> Most importantly, customers will enjoy an immediate reduction in their energy bills as the price of electricity generated by the solar panel system is lower than that purchased through the grid.

However, some of the disadvantages for SPPA customers are higher transaction costs over the long term compared with buying a system outright, and potential administrative burdens as a result of paying, and managing, two separate electricity bills. Furthermore, there are two possible consumer protection concerns to consider from the residential customer perspective.

- The first is in relation to potential changes to the REBS rebate rate and the effect this would have on customer benefits and savings under a SPPA.
  - Under a SPPA, customers must purchase all the electricity generated regardless of whether they are able to use this energy.
  - Through REBS, a residential customer is eligible for a rebate directly from Synergy (or Horizon Power) for any excess energy generated but unused.
  - The agreed rate for purchasing electricity generated by the SPPA will likely be higher than the REBS rate provided by Synergy. The REBS rate provided by Horizon Power will vary depending on the location of the town site.

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<sup>3</sup> Variations include differences in the size of the system, the rate charged, the length of the agreement, termination clauses and options, and entitlement to a renewable energy rebate.

<sup>4</sup> Note that the agreement may include a term stating that the electricity charge will be subject to increases in line with CPI movements.

- There could be adverse effects for customers if the REBS rate drops, or if consumption needs change over the course of a SPPA's 15 or 20 year contract. Customers need to be made aware of the potential financial implications of changes in circumstance and consumption behaviour.
- The second is in relation to early termination options available to customers, and the flexibility of any exit clauses.
  - Customer circumstances may change over the course of the arrangement. For example, their electricity consumption patterns could change over the course of the contract which would diminish the financial benefits received under the SPPA, or they might move house.
  - Rights and obligations of the customer should be made clear prior to entering the contract.
  - In relation to termination clauses, a customer should be made aware of any costs with terminating early and having the system removed. If any termination fees are imposed, these should be calculated purely on real costs, and should not be punitive.

## Objective

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The objective<sup>5</sup> of this paper is to determine the best approach to regulating SPPAs. The approach adopted will be informed by three considerations:

- Promoting market competition in Western Australia.
- Reducing red tape imposed on business and government.
- Ensuring consumer protections are adequate and proportionate to the risk of consumer detriment.

## Statement of the Issue

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SPPA arrangements are yet to be fully utilised in Western Australia. Anecdotal evidence suggests that one of the factors inhibiting entry into the market is the cost of retail licensing. Increasing competition and consumer choice in the market is a government policy objective but imposing a retail licence requirement would make it difficult for this market to develop. Furthermore, SPPA providers do not readily fit within the existing retail licence framework.

### Current regulatory framework

Any person wishing to sell electricity to a customer in Western Australia must hold a retail licence, or an exemption from the retail licence requirement.<sup>6</sup> Retail licences are administered and monitored by the Economic Regulation Authority (the **Authority**).<sup>7</sup> Retail licence holders are

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<sup>5</sup> Note that the objectives also tie in with the overarching policy objectives of government which are being addressed by the Electricity Market Review. These include reducing the cost of supplying electricity and attracting private-sector participants to the electricity market. (Western Australian Public Utilities Office, *Electricity Market Review Discussion Paper*, 25 July 2014, page 7)

<sup>6</sup> Section 7(4) of the *Electricity Industry Act 2004* states that a person must not sell electricity to customers except under the authority of a retail licence or an integrated regional licence.

<sup>7</sup> The Economic Regulation Authority is responsible for monitoring and reporting to the Minister for Energy on the operation of the licensing scheme, and compliance by licence holders.

subject to specific administrative and compliance requirements, designed to provide consumer protections and transparency in the market.<sup>8</sup>

The current regulatory framework for electricity retailers was not designed with SPPA arrangements in mind. SPPAs are an innovative and alternative method of selling energy distinct from the arrangements where electricity is supplied from the grid. Some of the requirements imposed on retail licence holders under the *Electricity Industry Act 2004* (the **Act**) are therefore either not relevant to SPPA providers, or the costs of complying with the requirements are likely to outweigh the consumer benefits.<sup>9</sup>

## Consumer protections

On the other hand, consumer protection is also an important component of the electricity market and an important rationale underpinning the licensing framework. While reducing barriers to entry in the solar energy market is beneficial, this needs to be balanced with protections to safeguard the interests of customers. The risk of exposing customers to unscrupulous business operators or unfair arrangements is a concern that needs to be addressed when assessing the options. SPPAs are long term contracts between customers and their provider and, if customers are not provided with the relevant information upfront, they may find themselves locked into a contract with unfair terms and few options for termination.

Outside of the retail licensing framework, consumer protections can be found in the Australian Consumer Law (**ACL**). Whether this legislation can sufficiently guard consumers against unfair contract terms or unconscionable conduct depends upon the potential risk of consumer detriment in this emerging market.

Ultimately, the regulatory approach adopted for SPPA providers should be proportionate to the risk of consumer detriment, and reflect the nature of the SPPA business model.

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<sup>8</sup> Further information on consumer protections under the retail licensing framework and the Australian Consumer Law are outlined in Appendix A.

<sup>9</sup> For example, the retail licence fee is currently \$3,416 per annum as prescribed under regulation 6(2) of the *Economic Regulation Authority (Licensing Funding) Regulations 2014*. A licence holder under the *Electricity Industry Act 2004* is also required to pay to the Economic Regulation Authority a quarterly standing charge and licence application fee. Furthermore, section 13 of the *Electricity Industry Act 2004* imposes a performance audit by an independent expert is also a condition of a retail licence.



## Options analysis

The Public Utilities Office is seeking views on the following two options for exempting providers of SPPAs to residential and commercial customers from retail licensing requirements.

**Table 1: Options Analysis**

Options	Outcome
Option 1: individual retail licence exemption	The provider must apply for an individual exemption.
Option 2: new retail licence class exemption	The provider is automatically or deemed exempt from the retail licence requirement, with several specific conditions attached to address consumer protection concerns.

There are implications of introducing an exemption from the retail licence requirement which are relevant to both Options 1 and 2. Stakeholders are invited to consider these broad effects, as well as the specific advantages and disadvantages of the two options.

## General discussion on exemptions

The rationale for pursuing an exemption, rather than retail licensing, for SPPA providers is two-fold:

- Firstly, the sale of energy through a SPPA is a discretionary arrangement that operates in addition to a customer's main electricity supply arrangements.<sup>10</sup> The customer retains access to grid supplied electricity from their licensed retailer.
- Secondly, without clear evidence indicating that unlicensed SPPA providers pose a consumer risk, existing protections under the ACL should be sufficient for SPPA customers.

Under section 8 of the Act, the Governor in Executive Council has the power to exempt a person from a retail licence requirement.

The process for granting individual exemptions, or introducing a class exemption, involves amending the *Electricity Industry Exemption Order 2005* (the **Exemption Order**). Individual exemptions are introduced upon application by each SPPA provider. The Public Utilities Office has discretion to introduce a class exemption at any time, but would need to comply with the same process.

<sup>10</sup> The Australian Energy Regulator, *Industry Guidance: solar power purchase agreements*. (<http://www.aer.gov.au/node/22188>)

## Retail licence exemption conditions

Conditions can be attached to either individual exemptions, or a broad class exemption. While full compliance with the requirements of a retail licence would be excessive, some specific conditions to an exemption can be introduced to complement the existing protections under the ACL.

The following two conditions to an exemption for SPPA providers are proposed:

- Providing customers with a product disclosure statement outlining the important elements of the contract.
- Registering with the Public Utilities Office on commencing the SPPA business and submitting an annual summary report of the business operations.

### **Product disclosure statement**

The objective of the product disclosure statement condition is to ensure consumers are provided with all relevant information about the benefits and the risks of the product prior to signing up to the agreement. The information that must be covered in the product disclosure statement should include as a minimum, the following:

- The provider should clearly explain the nature of the business model – including that the provider is responsible for the equipment, the electricity is provided as an alternative service, and the electricity generated by the solar panel system is not the primary source of energy.
- The provider is not licensed, and accordingly is not bound by the obligations of the Act and its subsidiary legislation, for example the *Code of Conduct for the Supply of Electricity to Small Use Customers 2014* (the **Small Use Customer Code**). Instead, a consumer should be directed to the broad consumer protections available under the ACL.
- Disclosure of any applicable fees and charges<sup>11</sup>, and disclosure about the period and frequency of billing.
- Disclosure of the likely amount of electricity that will be supplied and the cost.
- Comparative cost of the same product if the consumer were to buy the solar power system outright. This should be compared to the aggregate amount payable over the financing term based on a reasonable estimate of the electricity generated by the system.
- Disclosure of the termination rights and obligations of the customer. This might include identifying whether there is an option for individuals wanting to buy the system outright or transfer ownership of the system. The customer should also know whether there are any costs with terminating early and having the system removed.

Additional information that may be relevant to a customer that could be highlighted in the product disclosure statement includes:

- Advice about the benefits of purchasing electricity through a SPPA, as well as the implications if consumption patterns change.<sup>12</sup>

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<sup>11</sup> Fees and charges will include metering costs, fees associated with breaking the contract early and late payment fees.

<sup>12</sup> In particular, in relation to residential consumers, information about the REBS rate and the potential implications if the rate is changed or abolished. Consumers could be adversely affected if their consumption patterns change and the SPPA is no longer the optimal arrangement for their needs.

- Disclosure of matters such as a cooling off period and the length of the contract.
- Outlining the rights and obligations of the customer and the provider in the event of damage to the solar panel system due to external circumstances.
- The types of meters used and the accuracy standards.

### **Registration and reporting**

This condition will help the Public Utilities Office track the progress of this emerging market and the degree of consumer uptake. The reporting requirement will be similar to the record keeping requirement in Part 13 of the Small Use Customer Code.<sup>13</sup>

If providers are not subject to a retail licence, there will be no other information gathering mechanism by which to monitor the market. Therefore, the purpose of this condition is to ensure that government has a clear understanding of which businesses are offering the service, how large the market is, and whether there have been any consumer disputes.

SPPA providers would be required to first register with the Public Utilities Office and indicate their intention to operate under an exemption. The Public Utilities Office would further assist businesses by providing a basic template for reporting, as well as guidance and support. This is expected to encourage compliance and communication between SPPA providers and the Public Utilities Office. The reporting scheme will require submission of information to the Public Utilities Office on:

- The number of customers contracted under a SPPA arrangement.
- The amount of capacity installed (covering both residential and commercial customers).
- The number and type of customer complaints<sup>14</sup> received.

There are broad advantages and disadvantages of pursuing an exemption approach, with the two conditions attached. The advantages and disadvantages outlined below are applicable for both Options 1 and 2.

### **Advantages**

- Facilitates new entrants into the energy market, and stimulates competition.<sup>15</sup> The evolution of new energy services and products increases consumer choice and consumer benefits.
- Opening up the renewable energy market increases investment in the State and enhances employment opportunities for installing and maintaining new solar systems.
- Reduces barriers to entry for potential new entrants to the market (which may include small businesses). A supplier who is exempt from the retail licence requirement will generally face less regulatory risk and cost than one who is obliged to comply with the customer protections, compliance and reporting requirements of a retail licence.

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<sup>13</sup> Division 2 Part 13 of the Small Use Customer Code requires retailers to keep records about the number and types of complaints received (and how those were addressed), the number of compensation payments made and the performance of their call centre.

<sup>14</sup> The definition of “complaint” in Clause 1.5 of the Small Use Customer Code will guide the Public Utilities Office in determining whether a matter is a “complaint”.

<sup>15</sup> The Australian Energy Market Commission, *Power of choice review – giving consumers options in the way they use electricity Final Report*, November 2012, p.41. (<http://www.aemc.gov.au/market-reviews/open/power-of-choice-update-page.html>)

- The product disclosure statement requirement will provide customers with sufficient upfront information about the nature of the contract, and identify important terms relating to their rights and obligations as a consumer.
  - This includes clearly identifying information about the consequences of early termination and the exit clauses available.
- The reporting requirement will provide the Public Utilities Office with valuable information that can be used in a review of the exemption.
  - The registration and reporting requirement ensures the Public Utilities Office is able to collect data on the nature of the market, any developments, and the size (and existence) of any consumer risk.
  - This information can then help to inform a revision of the regulatory framework if required.

### Disadvantages

- While consumer protections are still available under the ACL, prosecuting breaches of the legislation can be a drawn out process, and the ACL only addresses consumer detriment after it has eventuated. This can be perceived as a limitation of the ACL.
- If a SPPA provider is exempt from retail licensing requirements, customers (including residential and small businesses) purchasing electricity through that provider will not have recourse to Western Australian Energy and Water Ombudsman (the **Ombudsman**), or protections outlined in the Small Use Customer Code.
  - Conditions, such as the requirement for a product disclosure statement, attached to an exemption can help to ensure consumers are fully informed before making a decision to enter into the arrangement.

## Option 1: Individual exemptions

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Under Option 1, the SPPA providers would be able to apply for an exemption from the retail licensing requirement through the process outlined in the legislation. The power to grant an individual exemption is provided by section 8 of the Act. The Public Utilities Office also has the discretion to attach conditions, such as the product disclosure statement and registration requirement, to an individual exemption if applicable. Any of the individual exemptions granted could also be subject to a review following commencement.

### ***Residential customers***

In relation to the sale of electricity to residential customers, as outlined in the Exemption Order, the following are exempt from the retail licence requirement:

- Persons operating retirement villages and residential strata schemes.<sup>16</sup>
- Aboriginal communities not supplied by Horizon Power or Synergy.<sup>17</sup>
- Caravan park operators.<sup>18</sup>

None of these exemptions are relevant to the SPPA business model.

In the absence of a relevant exemption, the SPPA provider will have the option of applying for an individual exemption.

### ***Commercial customers***

In relation to the sale of electricity to commercial customers, the Exemption Order provides a class exemption for generating works on commercial premises.<sup>19</sup>

The exemption states that a person (the supplier) is exempt from the retail licensing requirement if:

- the electricity is generated using generating works operated by the supplier; and
- the electricity is sold for consumption on commercial premises on which the generating works are located.

This exemption will only apply if all the electricity generated is solely used by the commercial customers on the premises. That is, there cannot be any export of excess unused electricity to the grid. While the exemption exists, in practice there are few circumstances where it will be relevant for SPPA providers as it is rare to have an arrangement without some exports of electricity.

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<sup>16</sup> Clause 5(3) of the *Electricity Industry Exemption Order 2005*.

<sup>17</sup> Clause 7(3) of the *Electricity Industry Exemption Order 2005*.

<sup>18</sup> Clause 5 of the *Electricity Industry (Caravan Park Operators) Exemption Order 2005* states that caravan park operators are exempt from the retail licence requirement in relation to the supply of electricity at the caravan park, subject to specific conditions.

<sup>19</sup> Clause 4A(2) of the *Electricity Industry Exemption Order 2005*.

Where the system exports excess electricity to the grid, the exemption is no longer applicable. Instead, the SPPA provider would need to apply for an individual exemption in order to sell electricity to a commercial customer.

## Advantages

- Requiring individual applications for an exemption is in line with the Australian Energy Regulator's (the **AER**) approach to exemptions for SPPA providers.
  - The AER does not offer a specific class exemption for SPPA providers. The AER argues that each business model is different and a class exemption will not be able to cover all possible business models while the alternative energy sellers market is still developing.
  - Instead, the AER grants individual exemptions to SPPA providers.
- Individual applications ensure additional consultation on each exemption,<sup>20</sup> and that a public interest test applies to each individual exemption application.
- Conditions to an exemption can be tailored to each specific business model and the types of customers being sold to.
  - An individual exemption can operate much the same way (and serve the same purpose) as a restricted retail licence.
- This is a more flexible and adaptable approach which ensures the exemption is able to address any emerging matters that may arise as the SPPA market develops.

## Disadvantages

- This option will increase red tape burden on government as it is resource intensive for the Public Utilities Office to process and assess each individual application. This involves completion of a Regulatory Impact Assessment on the proposed changes, finalising drafting instructions, and possibly further public consultation if the application is contentious.
- This option will also increase red tape burden on business as any provider proposing to sell SPPAs, to residential or commercial customers, will be required to submit an application to the Public Utilities Office requesting a licence exemption (it is noted that these costs will be lower than those associated with making a retail licence application).
- Due to the time taken to process individual applications, an applicant's entry into the market will be delayed, and applicants will face uncertainty about when they will be granted an exemption.

## Option 2: Retail licence exemption for SPPA providers

Under Option 2, a new class exemption would be introduced through the Exemption Order. Section 8 of the Act provides the power to exempt any class of persons from the requirement to hold a licence. The Public Utilities Office also has the discretion to attach conditions to the class exemption, such as the product disclosure statement and registration requirement. The class exemption would be subject to a comprehensive review three years following commencement.

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<sup>20</sup> Note that this will be a similar approach to the Australian Energy Regulator where there is a minimum one month public consultation for all individual exemption applications.

## Advantages

- This is a more streamlined approach compared to Option 1, as it will involve introducing a single class exemption into the Exemption Order, rather than numerous individual exemptions.
- A specific class exemption provides greater clarity and business certainty to SPPA providers. SPPA providers will not be subjected to delays while waiting for their applications to be processed. Instead, the class exemption will automatically exempt these business entities from the licensing requirement.
- This will have a lower administrative burden on government as the Public Utilities Office will not be required to process each individual exemption application. This also reduces administrative burden on businesses as there will be no requirement to submit an application for the exemption.

## Disadvantages

- Establishing a class exemption means there is no regulatory oversight of this emerging market except through the proposed condition to register and report to the Public Utilities Office.
  - Contrary to the AER's approach to SPPAs, there will be no scrutiny of individual applications for an exemption and no opportunity for public comment or discussion.
- Introducing a class exemption for SPPAs might not provide the requisite level of flexibility for this emerging market.

## Preferred option: Option 2

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Introducing a new class exemption with specific conditions is the preferred approach.

Due to the alternative nature of the SPPA business model, retail licensing under the existing regulatory framework is not a suitable approach for regulating in this space. In practice, the cost of licensing under the current retail licence regime is likely to be prohibitive for prospective SPPA providers, and may restrict entry into the market. It is State Government policy to reduce regulatory costs wherever possible, and to identify the net public benefit resulting from any new regulation introduced. In relation to SPPA providers, licensing is likely to result in increased regulatory cost without any clear benefit to consumers or industry.

Regulatory equality and an even playing field are also fair considerations. However, whether providers of SPPAs and essential electricity services should be subject to the same regulation is a different question. The nature of the SPPA business model is distinct from that of an essential service. Importantly, SPPA customers will still have access to electricity from the grid. The retailer providing electricity from the grid is already regulated and monitored by the Authority, and accordingly, the provider of the SPPA should not be subject to duplicate regulation through a retail licence.

The introduction of an exemption means residential and small business consumers will not have recourse to the Ombudsman with respect to energy supplies from SPPA providers. Instead, their main source of consumer protections will be found in the ACL. The ACL is limited in that the enforcement powers and remedies under the legislation will only apply for actual breaches, or suspected breaches.



However, there is no evidence to suggest that a stringent consumer protection regime, or access to the Ombudsman service, is required. Until there is evidence demonstrating the existence of a problem that requires redress through regulation, the ACL will be able to provide sufficient deterrents against unscrupulous behaviour, and provide adequate consumer protections to residential and commercial customers.

The proposed conditions under Option 2 provide additional protection through full disclosure of important information to customers prior to signing a SPPA. If consumers are fully informed, and there is transparency about the terms and conditions, the risk of consumer detriment will be lowered. The Public Utilities Office appreciates that there may be some costs involved in complying with the proposed conditions. However, this light handed regulatory approach is not expected to impose an onerous burden on businesses, and is a markedly lesser compliance burden compared to the requirements under a retail licence.

Finally, the long term nature of these contractual arrangements further reduces the perceived risk of possible consumer detriment. The value of this type of arrangement to the SPPA provider is based on the ongoing business relationship with the consumer. Therefore, providers have a clear incentive to ensure the solar system installed is operating effectively, that metering is accurate, and consumers are satisfied. This incentive should be sufficient to deter any potential unscrupulous behaviour.

The market should encourage innovation; however, this needs to be balanced with the proper level of regulatory certainty and consumer protection. A clearly defined class exemption will provide this certainty, and the reporting requirements will ensure adequate monitoring of any consumer complaints. A class exemption under Option 2 will also be a lower administrative impost on government compared to Option 1, which requires an ongoing assessment of individual exemption applications.

A review of the class exemption and its operation would take place three years after its commencement. The review condition is an important mechanism to deliver clearer laws and ensure the legislation aligns with government policy. The Public Utilities Office would be responsible for undertaking the review to look at how well the exemption is operating and whether there is a need for government to revise its regulatory approach.

Information gathered through the reporting process will inform the review. The review should encompass an assessment of the objectives of the exemption (and whether these continue to be met), the real consequences and implications of introducing the exemption, and any regulatory effects or risks that have arisen.

Furthermore, the information collected through this review mechanism will also be relevant to the issue of full retail contestability, which is currently being assessed under the Market Competition work stream of the Electricity Market Review process. Depending on the final recommendation on full retail contestability stemming from the Electricity Market Review, a review of the licensing framework under the Act may be required. At that point, it may be suitable to reassess the operation of the licensing framework and the regulation of SPPAs as a subset of the broader matter of regulatory reform.



## Draft Recommendations

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### Draft Recommendation 1

The class retail licence exemption for SPPA providers should be granted with the following conditions attached:

- The SPPA provider must provide a product disclosure statement to the customer outlining the important elements of the contract.
- The SPPA provider must register with the Public Utilities Office upon commencing its business and submit an annual summary report of its operations.

### Draft Recommendation 2

The product disclosure statement must contain the following information:

- The SPPA business model is an alternative service, and the electricity generated by the solar panel system is not the primary source of electricity supply.
- The SPPA provider is not licensed, and is not bound by the obligations under the Act or its subsidiary legislation.
- Disclosure of any applicable fees and charges.
- Disclosure about billing period and frequency.
- Information on the likely amount of electricity that will be supplied, and the estimated cost.
- Comparative cost of the same product if the consumer were to purchase the system outright.
- Disclosure of the termination rights and obligations of the customer.

### Draft Recommendation 3

The class exemption should be reviewed after three years to assess the effectiveness of the exemption.

#### Questions

- Do you have any comments to make on the three draft recommendations?
  - The Public Utilities Office is keen to gauge a clearer understanding of the quantified costs for business of any changes in regulation. In particular, do you have any comments on the possible costs involved with complying with the product disclosure statement, or the registration and reporting requirements?
- Do you have any additional comments on exemptions for SPPA providers?

## Appendix A

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### Retail licence holders and consumer protections

The Authority is responsible for regulating licence holders and monitoring their compliance in Western Australia. Retail licence holders are subject to specific administrative and compliance requirements under both the Act and its subsidiary legislation, which are designed to ensure greater consumer protection and transparency in the market.

Under the Act, there are specific licence conditions which apply to retail electricity licence holders:

- Completing a performance audit within two years of receiving a licence.<sup>21</sup>
- Complying with standard form contracts (and non-standard form contracts as prescribed by the legislation).<sup>22</sup>
- Complying with extension and expansion policies for certain corporations.<sup>23</sup>
- Performing the functions of the supplier of last resort.<sup>24</sup>
- Complying with the Small Use Customer Code.<sup>25</sup>
- Membership with an approved ombudsman scheme.<sup>26</sup>

The Small Use Customer Code deals with supply and marketing of electricity, but not the reliability and quality of supply. Specific protections for customers through the Small Use Customer Code include the following:

- Prescribing the type of information that must be disclosed in a contract.<sup>27</sup>
- Obligations in relation to frequency of billing and particulars contained in each bill.<sup>28</sup>
- A customer's entitlement to request testing of meters or metering data, and to request a review of the bill.<sup>29</sup>
- An obligation to develop a Financial Hardship Policy, and provide alternative payment arrangements for customers experiencing payment difficulties.<sup>30</sup>
- An obligation to implement a complaints handling and dispute resolution process.<sup>31</sup>
- Access to dispute resolution services through the Ombudsman in the event of a dispute between the customer and the SPPA provider. It is a condition of every licence holder to be a

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<sup>21</sup> Section 13 of the *Electricity Industry Act 2004*.

<sup>22</sup> Section 54 of the *Electricity Industry Act 2004*.

<sup>23</sup> Section 65 of the *Electricity Industry Act 2004* (this only applies to licences held by a corporation).

<sup>24</sup> Section 76 of the *Electricity Industry Act 2004*.

<sup>25</sup> Section 82 of the *Electricity Industry Act 2004*.

<sup>26</sup> Section 101 of the *Electricity Industry Act 2004*.

<sup>27</sup> Part 2 of the *Code of Conduct for the Supply of Electricity to Small Use Customers 2014*.

<sup>28</sup> Part 4 of the *Code of Conduct for the Supply of Electricity to Small Use Customers 2014*.

<sup>29</sup> Clauses 4.11 and 4.15 of the *Code of Conduct for the Supply of Electricity to Small Use Customers 2014*.

<sup>30</sup> Part 6 of the *Code of Conduct for the Supply of Electricity to Small Use Customers 2014*.

<sup>31</sup> Part 12 of the *Code of Conduct for the Supply of Electricity to Small Use Customers 2014*.

member of an approved scheme.<sup>32</sup> The Ombudsman only investigates matters concerning the provision of services by a member of an approved ombudsman scheme.

In addition, customers of a licensed retailer will have recourse to existing broad protections under the ACL. The ACL framework covers:

- Misleading and deceptive conduct.
- Unconscionable conduct.
- Unfair contract terms in standard form consumer contracts.
- Guarantees of consumer rights when buying goods and services.
- A product safety law and enforcement system.
- Penalties, enforcement powers and consumer redress options.

Australian courts and tribunals can enforce the ACL, and prosecute any breaches of its provisions. The Consumer Conciliation Service within the Consumer Protection division of the Department of Commerce is also available to consumers.

The general consumer protections available under the ACL relevant to SPPA arrangements are protections in relation to misleading and deceptive conduct, unconscionable conduct and unfair contract terms.

Misleading or deceptive conduct refers to any behaviour that misleads, or is likely to mislead. Businesses can potentially breach this law by making express statements that mislead or by failing to disclose relevant information.

Unconscionable conduct includes failing to disclose primary contractual terms, not properly explaining the conditions of a contract, or not allowing sufficient time to read an agreement or get advice.

Residential customers of SPPA providers will have recourse to all these protections under the ACL. However, the unfair contract term provisions of the ACL do not apply to business to business contracts. This means SPPAs with commercial customers, including small businesses, are not subject to the provisions relating to unfair contract terms.

The unfair contract term protection establishes general standards of business conduct, and provides that unfair terms in standard form consumer contracts are void. Terms may be declared 'unfair' if:

- It would cause a serious imbalance in the parties' rights and obligations.
- It is not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term.
- It would cause detriment to a party if it was relied on.

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<sup>32</sup> Section 101 of the *Electricity Industry Act 2004* states that a licence holder cannot supply electricity under a retail licence unless the licence holder is a member of an approved scheme.

The ACL includes enforcement powers, penalties and remedies which will apply for breaches or suspected breaches of the legislation. The Consumer Protection division of the Department of Commerce can take steps to address a breach by taking action such as seeking monetary penalties for contraventions of the ACL, disqualification orders or applying for an adverse publicity order against a SPPA provider.

The consumer law remedies that are available to a consumer of a SPPA arrangement are:

- Injunctions – an affected person can seek an injunction to stop a business from engaging in the conduct that is in breach of the ACL, or force the business to take specific action.
- Damages – an affected person can seek damages to recover any loss or damage suffered.
- Compensation orders – an affected person can seek compensatory orders for loss or damage suffered as a result of a breach of the ACL.

## Appendix B

### Jurisdictional comparison

From 1 July 2012, the AER has been responsible for regulating retail energy markets in jurisdictions around Australia where the National Energy Customer Framework (the **Customer Framework**) applies. The Customer Framework includes the National Energy Retail Law (the **Retail Law**), the National Energy Retail Rules and National Energy Retail Regulations.

The Retail Law requires anyone selling energy to customers to either hold a retailer authorisation or a valid exemption.<sup>33</sup> The AER regulates sellers of energy, and administers retail authorisations and exemptions.

Table 3 outlines the regulatory framework, and the relevant regulator, for retail electricity markets around Australia.

**Table 3: Regulation of retail electricity markets**

Jurisdiction	Regulator	Regulatory framework	Commencement of date
<b>NSW</b>	AER	Retail Law	Current
<b>QLD</b>	Department of Energy and Water Supply  AER post 1 July 2015	<i>Electricity Act 1994</i>  Retail Law post 1 July 2015	Current  Retail Law commences 1 July 2015
<b>ACT</b>	AER	Retail Law	Current
<b>TAS</b>	AER	Retail Law (but limited application of the AER's exempt selling framework)	Current
<b>SA</b>	AER	Retail Law	Current
<b>VIC</b>	Essential Services Commission	Energy Retail Code (version 11)	Current (adoption of the Retail Law not yet announced)
<b>NT</b>	Utilities Commission	<i>Electricity Reform Act</i>	Current
<b>WA</b>	Economic Regulation Authority	<i>Electricity Industry Act 2004</i>	Current <sup>34</sup>

<sup>33</sup> Section 88 of the National Energy Retail Law.

<sup>34</sup> The National Energy Retail Law does not apply in Western Australia, where the retail energy market continues to be monitored by the Authority. However, adopting the National Energy Retail Law framework may be considered in the future.

## Australian Energy Regulator

As part of its responsibility to regulate exempt selling, the AER has developed an exempt selling guideline that outlines the framework for regulating exempt sellers.<sup>35</sup> It details various exemption classes, and the conditions attached to those exemptions. There are three kinds of exemptions provided, which are outlined in the table below.

**Table 4: Australian Energy Regulator Exemption Framework**

Exemptions	Details
<b>Deemed exemptions</b>	<ul style="list-style-type: none"> <li>Deemed exemptions are usually for small scale selling and apply automatically to certain classes of persons. An eligible person or entity does not need to apply or register with the AER.</li> <li>The eligible person will still need to abide by the conditions of the relevant class of exemption.</li> <li>The Retailer Exempt Selling Guidelines identifies obligations that a person may need to meet as a condition of the exemption (some conditions do not apply to certain exemption classes).</li> </ul>
<b>Registrable exemptions</b>	<ul style="list-style-type: none"> <li>Registrable exemptions apply to certain classes of people, and will only apply to a particular individual for a particular site (usually applicable to on-selling activities). Due to the scale of the on-selling activities and the nature of the customers involved, these classes require greater transparency and regulatory oversight through registration with the AER.</li> <li>The eligible person or entity does not need to apply for the exemption, but must submit an online registration form to the AER.</li> <li>The AER places details of the eligible person or entity on the public register and the exemption applies from that date.</li> <li>Conditions are also attached to registrable exemption classes.</li> </ul>
<b>Individual exemptions</b>	<ul style="list-style-type: none"> <li>Individual exemptions are applicable where the sale of energy is not covered by a class exemption. These exemptions are tailored to specific circumstances or businesses.</li> <li>Conditions are generally attached with the view to balancing the needs and rights of customers and the regulatory burden imposed on the exemption holder.</li> </ul>

The AER must give regard to the policy principles and factors outlined in the Retail Law in deciding whether a business needs to be authorised or whether an exemption is more suitable.<sup>36</sup> These policy principles and factors also inform the AER's decision on the need for particular classes and the exemption conditions themselves.

<sup>35</sup> The Australian Energy Regulator, *Retail exempt selling Guideline* – July 2013. (<http://www.aer.gov.au/node/18677>)

<sup>36</sup> Section 114 of the National Energy Retail Law.

## Alternative energy sellers

The AER recognises there are approaches to selling energy that were not originally envisaged by the Retail Law, and accordingly, there may be justification for a different regulatory approach to these business models. The sale of electricity through SPPAs is a case in point.

During 2013 and 2014, the AER undertook consultation to determine the optimal approach for regulating the sale of electricity through SPPAs. The choice was to either require authorisation under the Retail Law, or allow for an exemption from the authorisation requirement. The AER released its Statement of Approach in July 2014 outlining that it will adopt the exemption approach for SPPA providers.<sup>37</sup> The AER has also released Industry Guidance on solar power purchase agreements, which outlines the AER's approach.<sup>38</sup>

Under the AER's exempt selling framework, most retail exemptions have conditions attached (this applies to both class exemptions, as well as individual exemptions). These conditions must be met for the provider to be covered by the exemption. They are designed to provide protections for customers without overburdening the seller, and are modelled on protections that authorised sellers must provide to their customers.

An important consideration for regulators to bear in mind is that conditions should not be overly burdensome, as this could discourage sellers from providing this service. This in turn will also disadvantage consumers in the long term, as it reduces competition and hinders access to new solar options.

## Individual exemptions for SPPA providers

Individual exemptions are assessed on a case by case basis, and the AER granted its first exemption for a SPPA provider in December 2013. To date, the AER has granted and approved over 40 individual exemptions for businesses selling electricity through SPPAs.<sup>39</sup>

The application for an individual exemption requires a person to submit certain information about the nature of the service provided, and fundamental aspects of the SPPA contract. The particulars relating to the nature and scope of the proposed operations need to be provided to the AER.

These include:

- The nature of the service and whether the electricity is sold as an ancillary supply to the customer.
- The types of meters that will be used, and accuracy standards.
- The dispute resolution procedures in place to deal with complaints.
- Pricing structure and disclosure of fees and charges.
- The person responsible for the maintenance and repair of the solar panel systems.
- The length of the contract.

<sup>37</sup> The Australian Energy Regulator, *AER Statement of Approach: Regulation of alternative energy sellers under the National Energy Retail Law – June 2014*. (<http://www.aer.gov.au/node/22188>)

<sup>38</sup> The Australian Energy Regulator, *AER's Final Exempt Selling Guideline*. (<http://www.aer.gov.au/node/2388>)

<sup>39</sup> Note that one of the exemptions was for a business selling through SPPAs, wind PPAs and embedded generation PPAs.

- In what form and how often customers will be billed.
- The circumstances in which a customer can terminate the contract.
- The options available to customers at the end of the contractual period.

As noted above, most exemptions have conditions attached to them. The AER's approach is to attach the following two conditions on individual exemptions for SPPAs:

- The exempt seller must provide the customer with a notice explaining that the SPPA is covered by Australian consumer protection laws, and is separate from the customer's contract with their retailer, which is covered by the Retail Law.
- The exempt seller must refrain from registering in the wholesale market for the purposes of purchasing energy, and must not be the financially responsible retailer for the premises.

The first condition is intended to ensure customers understand the nature of the service they are buying, and the protections they are entitled to (and from whom). The second condition is intended to ensure SPPA providers only sell electricity generated through the solar panel system. The condition limits the exempt seller from retailing more broadly. An SPPA provider wishing to expand energy sales activities will be required to apply for a retailer authorisation, or another individual exemption.

On 18 November 2014, the AER published an issues paper in relation to regulating innovative energy selling business models under the Retail Law. The paper builds on the AER's initial consultation and final statement of approach in July 2014. Public consultation on the issues paper closed on 15 February 2015; stakeholder submissions have been published on the AER's website.<sup>40</sup> The AER intends to undertake further consultation on proposed amendments to the revised exempt selling guidelines in late 2015.

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<sup>40</sup> The Australian Energy Regulator, *Regulating innovative energy selling business models under the National Energy Retail Law*. (<http://www.aer.gov.au/node/28403>)