



Government of Western Australia  
Energy Policy WA

# Creating a dynamic customer protection framework for behind- the-meter electricity services

**Directions Report**

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**Energy Policy WA**

David Malcolm Justice Centre  
28 Barrack Street  
Perth WA 6000  
Locked Bag 11 Cloisters Square WA 6850  
Main Switchboard: 08 6551 2777  
[www.energy.wa.gov.au](http://www.energy.wa.gov.au)  
ABN 84 730 831 715

Enquiries about this report should be directed to:

**Anne Braithwaite**

Telephone: +61 8 6551 4735  
Email: [anne.braithwaite@energy.wa.gov.au](mailto:anne.braithwaite@energy.wa.gov.au)

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# Contents

<b>Glossary</b> .....	<b>iv</b>
<b>Abbreviations</b> .....	<b>v</b>
<b>Executive summary</b> .....	<b>vi</b>
<b>1. Introduction</b> .....	<b>1</b>
1.1 Terms of Reference .....	1
1.2 Proposed regulatory framework .....	1
1.3 Learnings from other review processes .....	2
1.4 Work plan and timing .....	4
1.5 Structure of the report.....	4
<b>2. The current legislative framework</b> .....	<b>5</b>
2.1 The licensing framework .....	5
2.2 The exemption framework .....	5
2.3 Other generic customer protection legislation .....	6
<b>3. Deficiencies of the regulatory framework</b> .....	<b>8</b>
3.1 Flexibility of the framework .....	8
3.2 Consumer protections.....	8
3.3 Enforcement .....	9
3.4 Dispute resolution .....	9
<b>4. A preferred regulatory framework</b> .....	<b>11</b>
4.1 Regulating alternative electricity services .....	11
4.2 Categories of alternative electricity service .....	11
4.3 Regulated codes of practice .....	11
4.4 Registration, compliance and enforcement .....	12
4.5 Dispute resolution .....	12
<b>5. BTM Code</b> .....	<b>13</b>
5.1 Code components .....	13
<b>6. Next steps</b> .....	<b>14</b>
<b>Appendix A: Alternative licensing and regulatory models</b> .....	<b>15</b>

# Glossary

Term	Definition
ASIC Act	<a href="#"><u>Australian Securities and Investment Commission Act 2001</u></a>
behind-the-meter generation and storage service	<p>A behind-the-meter generation and storage service means a service whereby electricity is generated by a <i>small energy system</i>, which may include an <i>energy storage facility</i>, to supplement grid supply electricity.</p> <p>A <i>small energy system</i> has a generating capacity not exceeding five megawatts.</p> <p>An <i>energy storage facility</i> means a facility used to manage the delivery and flow of electricity, including batteries.</p>
Caravan Park Order	<a href="#"><u>Electricity Industry (Caravan Park Operators) Exemption Order 2005</u></a>
community energy projects	<p>Projects where a community group initiates, develops, operates and benefits from a renewable energy resource or energy efficiency initiative. These projects are usually based on common interests or a geographical region; such as a town or suburb.</p> <p>The types of energy projects generally differ based on the needs of that community. Generally, community energy projects are designed to:</p> <ul style="list-style-type: none"><li>• encourage local ownership;</li><li>• encourage regional employment;</li><li>• help address climate change by making local energy consumption more efficient and sustainable; and</li><li>• provide revenues to the community group through the provision of essential system services to the electricity market.</li></ul>
The Act	<a href="#"><u>Electricity Industry Act 2004</u></a>
embedded networks	An embedded network is a group of interconnected loads and distributed energy resources within a clearly defined electrical boundary, acting as a single controllable entity that cannot operate in isolation from the electricity grid it is connected to.
Energy Ombudsman	Western Australian Energy and Water Ombudsman
Exemption Order	<a href="#"><u>Electricity Industry Exemption Order 2005</u></a>
microgrid	A group of interconnected loads and distributed energy resources with clearly defined electrical boundaries that acts as a single controllable entity with respect to the grid, with capacity to connect and disconnect from the grid to enable operation in both grid-connected or islanded mode.
Microgrids Inquiry	Economics and Industry Standing Committee (WA Parliament) <a href="#"><u>Inquiry into Microgrids and Associated Technologies in Western Australia</u></a>
small-use electricity consumers/customers	A customer who consumes not more than 160 MWh of electricity per year.
SPPA Exemption Order	<a href="#"><u>Electricity Industry (Solar Power Purchase Agreements) Exemption Order 2016</u></a>

# Abbreviations

The following table provides a list of abbreviations and acronyms used throughout this document. Defined terms are identified in this document by capitals.

Term	Definition
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
BTM Code	Behind-the-meter generation and storage services Code of Practice
ERA	Economic Regulation Authority
NECF	National Energy Customer Framework
PV	Photovoltaic
SPPA	Solar Power Purchase Agreement

## Executive summary

Technological change is enabling new and innovative energy-related business models and services in electricity systems in Western Australia and around the world. These developments, including small scale generation systems, electric vehicles, stand-alone power systems, microgrids, embedded networks and batteries, have the potential to deliver substantial benefits for electricity consumers and support the evolution of our power systems.

In contrast, the licensing and exemption legislative framework that regulates these activities, as provided under the *Electricity Industry Act 2004* (the Act), was established at a time when electricity supplies were primarily centrally generated and supplied to consumers via large transmission and distribution networks.

These regulatory arrangements have not kept pace with the rapid growth of alternative electricity supply arrangements and business models. Consequently, the regulatory regime is not well equipped to ensure the adequacy of customer protections, including some protections that electricity consumers have enjoyed under the more traditional supply arrangements.

In this context, the Minister for Energy has asked Energy Policy WA to review the regulatory framework for electricity retail licensing and exemptions and identify a preferred regulatory framework that facilitates businesses providing behind-the-meter electricity services, including generation and storage, while ensuring consumers of those services have adequate consumer protections.

This Directions Report describes the deficiencies with the existing regulatory framework in relation to the new business models, with a focus on behind-the-meter electricity services. These deficiencies include the limited flexibility of the framework, level of customer protections, an inadequate compliance and enforcement regime, and restricted access to some dispute resolution services.

An alternative framework identified by Energy Policy WA to better address these deficiencies is to develop customised codes of practice for categories of 'alternative electricity service', with a focus on ensuring adequate consumer protections for service recipients or prospective recipients. Each code of practice would be developed in consultation with industry stakeholders and consumer representatives. To enable these codes of practice, a new head of power would be inserted in the Act to allow an alternative regime to the existing licensing and exemption arrangements. Regulations would then be made to prescribe categories of alternative electricity service. This approach will allow the framework to respond to new and emerging electricity service business models as needed.

Legislative amendments would also establish powers of compliance and enforcement and a mechanism for resolving disputes between service providers and consumers.

In the first instance, behind-the-meter generation and storage services would be prescribed as an alternative electricity service. Future services that could be prescribed include electric vehicle charging stations, community energy projects and peer-to-peer trading.

Energy Policy WA will provide the Minister for Energy with a report outlining the detailed arrangements and implementation requirements for the alternative regulatory framework by March 2020, to be accompanied by a draft Code of Practice for behind-the-meter generation and storage services (BTM Code). Energy Policy WA has convened a working group of industry representatives to assist development of the BTM Code.

# 1. Introduction

Rapid technological change is enabling the adoption of new and innovative energy-related business models and services in electricity systems in Western Australia and around the world. These developments, including small scale generation systems, electric vehicles, stand-alone power systems, microgrids, embedded networks and batteries, have the potential to deliver substantial benefits for electricity consumers and support the evolution of our power systems.

The licensing and exemption regulatory framework under the *Electricity Industry Act 2004* (the Act) was established at a time when electricity supplies were primarily centrally generated and supplied to consumers via large transmission and distribution networks. Licences were applied to large operators, while exemptions recognised that not all arrangements would be practical to be licensed. Exempt sellers differ from licensed retailers in that they may lack economies of scale, or alternatively may not sell electricity as their core business.

While this regulatory framework has been in effect since 2004, the effectiveness of the framework is being challenged by a growth in innovative service offerings and new business models seeking exemptions from the electricity distribution and retail licensing requirements. This includes the greater prominence of solar power purchase agreements (SPPAs)<sup>1</sup>. While a number of entities offer this business model under licence exemptions provided in the *Electricity Industry (Solar Power Purchase Agreements) Exemption Order 2016* (SPPA Exemption Order), Energy Policy WA is not accepting any additional exemption applications of this nature.

This growth in new product and service offerings could pose risks for small-use electricity consumers, who may assume continued enjoyment of the protections that are generally afforded via traditional customer relationships with licensed entities. Further, as more customers receive power supplies from an exempt entity, the appropriateness of the relatively limited regulatory oversight provided to parties subject to the licence exemption regime is being questioned.

## 1.1 Terms of Reference

The terms of reference of the review include:

- an objective to identify a regulatory framework which facilitates business providing behind-the-meter electricity services, including generation and storage, while ensuring that adequate consumer protections are available for consumers of those services; and
- a commitment to provide the Minister for Energy with a report on the above matters by March 2020.

## 1.2 Proposed regulatory framework

To ensure that consumers of behind-the-meter electricity services have adequate customer protections, Energy Policy WA is proposing that the Act be amended to allow a customised approach to the regulation of prescribed categories of 'alternative electricity service' in the form of codes of practice, along with provisions for compliance and enforcement, and a mechanism for resolving disputes between service providers and consumers. In the first instance, a code of practice would be developed for behind-the-meter generation and storage service providers (BTM Code).

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<sup>1</sup> The SPPA arrangement involves a supplier installing and maintaining a solar power 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 system from the supplier 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 a retailer for electricity supply from the grid.

In identifying this framework Energy Policy WA considered the:

- a. types of customer protections available to energy consumers under existing legislation, including dispute resolution services; and
- b. ability of the existing regulatory framework to respond to new and emerging business models.

The preferred regulatory framework is outlined in Chapter 4 of this report.

In accordance with the Ministerial Statement dated 20 May 2019, the proposed framework will not have any impact on other Exemption Orders made under the Act, including the *Electricity Industry Exemption Order 2005* (Exemption Order) and *Electricity Industry (Caravan Park Operators) Exemption Order 2005* (Caravan Park Order).

Legislative arrangements that may apply to new technologies, such as safety regulation requirements administered by the Building and Energy Division of the Department of Mines, Industry Regulation and Safety, network connection requirements imposed by Western Power and Horizon Power, and customer protections in relation to financial products and services, are beyond the scope of this report and will not be affected by the changes proposed in this report.

### 1.3 Learnings from other review processes

Development of the preferred regulatory framework and associated BTM Code will be further informed by related work, including the:

- Economics and Industry Standing Committee's *Inquiry into Microgrids and Associated Technologies in Western Australia* (Microgrids Inquiry), if released prior to the finalisation of advice to the Minister;<sup>2</sup>
- draft *New Energy Tech Consumer Code* prepared by industry and currently under consideration by the Australian Competition and Consumer Commission (ACCC);<sup>3</sup>
- Australian Energy Market Commission's (AEMC) mapping of the consumer elements of the National Energy Customer Framework (the NECF) and the Australian Consumer Law (ACL),<sup>4</sup> and
- former Public Utilities Office 2016 review of licensing arrangements for SPPA providers.<sup>5</sup>

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<sup>2</sup> The Microgrid Inquiry Final Report is scheduled to be released by March 2020 [http://www.parliament.wa.gov.au/parliament/commit.nsf/\(InqByName\)/Inquiry+into+Microgrids+and+Associated+Technologies+in+WA?opendocument](http://www.parliament.wa.gov.au/parliament/commit.nsf/(InqByName)/Inquiry+into+Microgrids+and+Associated+Technologies+in+WA?opendocument)

<sup>3</sup> <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/new-energy-tech-consumer-code>

<sup>4</sup> AEMC webpage: *How energy consumers are protected under the NECF and ACL*, available at: <https://www.aemc.gov.au/regulation/energy-rules/NECF-ACL>

<sup>5</sup> The Final Recommendations Report, available at: <https://www.wa.gov.au/sites/default/files/2019-08/Final-Recommendations-Report-Retail-licence-exemptions-for-Solar-Power-Purchase-Agreements.pdf>



## Economics and Industry Standing Committee - Microgrids Inquiry

The Microgrids Inquiry was established in 2018 to investigate and report on the emergence and impact of the proliferation of small-scale solar photovoltaic (PV) systems in the electricity grid and the use of stand-alone power systems as an efficient alternative to traditional grid-supplied power for remote and 'fringe-of-grid' communities.

The Inquiry's terms of reference encompass the development and deployment of these technologies and benefits presented by microgrids. The Interim Report, released on 11 April 2019, provides an overview of the microgrid and distributed energy resource technologies being developed in Western Australia and opportunities along the battery production value chain. The Report also considers the potential impact of electric vehicles.

Submissions to the Inquiry have raised concerns about the ability of the licensing regime to respond to new business models, including its lack of flexibility to accommodate developments such as microgrids.

The Inquiry Final Report is expected to address potential changes to existing regulatory settings that underpin the State's energy market frameworks.

### Voluntary industry code

Industry representatives that supply new energy technologies have drafted the *New Energy Tech Consumer Code* as a voluntary code of conduct to raise standards of consumer protection in the sector, strengthen consumer confidence in new energy technologies and encourage innovation and the development of choice for consumers. On 5 December 2019 the ACCC issued a determination granting conditional authorisation in relation to the *New Energy Tech Consumer Code* for a five year period.

The scope of the *New Energy Tech Consumer Code* extends beyond retail electricity services to include the sale, finance, lease or hire of new energy technology. It also captures third parties engaged by Code signatories, such as suppliers, installers and system designers.

Code conditions relate to requirements that "buy now pay later" finance providers must meet in order for signatories to offer such finance arrangements under the Code, and the prohibition in the Code on "buy now pay later" finance being offered in unsolicited sales of New Energy Tech products.

The industry applicants are also required to report to the ACCC on the operation of the Code, which will enable both the applicants and the ACCC to assess whether the Code is operating as envisioned, including whether there are sufficient protections against harms that arise from unsuitable financial arrangements.

### How energy consumers are protected under the National Energy Customer Framework and Australian Consumer Law

The AEMC is conducting similar work examining customer protections for non-traditional energy services under the NECF and ACL, that recognises the need to analyse and update the NECF to remove barriers to innovation and extend consumer protections to new models of essential service supply.

The AEMC intends to review whether changes to the NECF are necessary to make consumer protections fit for purpose and reduce barriers to innovation. This review will analyse the regulatory approach for new non-traditional energy services and products with a focus on demand response mechanisms for small consumers and distributed energy resources.

The AEMC is aiming to release its first issues paper on this work in December 2019.

## 2016 review of licensing arrangements for SPPA providers

In July 2016, the former Public Utilities Office released a final recommendations report relating to exemptions for SPPA providers from the requirement to hold a retail licence to supply electricity to customers under a solar PPA. The report recommended that an application process be put in place that allows prospective SPPA providers to apply for an individual licence exemption and that any exemptions granted to SPPA providers be made subject to consumer protection and reporting conditions. The report recommendations were adopted by the then Minister for Energy.

A commitment was made to review the exemption framework by December 2019.

### 1.4 Work plan and timing

Coinciding with the release of this Directions Report, a Working Group has been convened that will inform the scope and content of matters included in the BTM Code.

Energy Policy WA will prepare a report outlining a preferred regulatory framework for alternative electricity service to be submitted to the Minister for Energy for consideration by March 2020. Drafting instructions for required amendments to the Act and a draft of the BTM Code will be submitted for the Minister's consideration at the same time.

Figure 1 provides an overview of the development process and timeline.

Figure 1.1: Review process and timeline



### 1.5 Structure of the report

Chapter 2 provides an overview of the current regulatory framework, while Chapter 3 outlines deficiencies associated with the current framework. Chapter 4 provides an overview of the preferred approach to regulating alternative electricity services. Chapter 5 provides a high-level overview of the components of the draft BTM Code and Chapter 6 outlines the next steps in this process.

Appendix A summarises alternative models for electricity licensing regulation.

## 2. The current legislative framework

### 2.1 The licensing framework

The electricity licensing framework is established by the Act and administered by the Economic Regulation Authority (ERA). The Act outlines the requirement for a person or entity to hold an electricity licence if they are generating, transmitting, distributing, or selling (retailing) electricity within Western Australia. An entity conducting multiple activities is required to apply for more than one licence unless the electricity-related operations are in regional areas of Western Australia, in which case there is scope to apply for an integrated regional licence.

The obligations and conditions placed on entities holding an electricity licence are drawn from the Act, which also provides a head of power for subsidiary instruments to which licensees must adhere. Together the Act and these subsidiary instruments constitute a consumer protection regime for the distribution and supply of electricity.

Some of the relevant subsidiary instruments are the:

- [Electricity Industry \(Customer Contracts\) Regulations 2005](#);
- [Electricity Industry \(Network Quality and Reliability of Supply\) Code 2005](#);
- [Electricity Industry \(Obligation to Connect\) Regulations 2005](#);
- [Electricity Industry \(Licence Conditions\) Regulations 2005](#), and
- [Code of Conduct for the Supply of Electricity to Small Use Customers](#).

Collectively these instruments ensure that customers of licensed electricity distributors and retailers are afforded a level of protection commensurate with the provision of an essential service. At a high level, these instruments specify:

- the types of information that must be contained in an electricity customer contract;
- a retailer's obligations to residential customers experiencing payment difficulties or financial hardship;
- a licensee's conduct in relation to supply disconnection or interruption; and
- quality and reliability standards to which an electricity distributor must adhere.

Due to the inflexibility of the head of power in the Act, licensees are required to adhere to all elements of the regulatory regime without exception.

### 2.2 The exemption framework

Under Section 8 of the Act, the Governor of Western Australia may exempt a person from the requirement to hold an electricity licence where it is not contrary to the public interest.

In practice, licence exemptions are typically granted to entities conducting operations that could fall into a licence category, but where the cost of holding a licence is not commensurate with the benefit associated with adherence to the requirements of a licence. Retail and distribution licence exemptions are commonly issued to those businesses for which the distribution and supply of electricity is not a core business activity.

Exemptions can be considered as falling into one of three categories.

1. **General (or class) exemptions** - These exemptions are those to which an entity is deemed to be operating under, if its business model meets certain operating requirements or characteristics. General exemptions are synonymous to 'deemed' exemptions that are used in other jurisdictions, such as Victoria.

General exemptions are for classes of operations identified under the Exemption Order, such as electricity generation facilities sized below 30 megawatts (MW), or electric vehicle charging stations.

2. **General exemptions with conditions** - These exemptions primarily pertain to the on-selling of electricity supplies and are applicable to businesses and supply arrangements involving strata lots, shopping centres or caravan parks. The relevant entity is exempt from the licensing requirements, and certain conditions are imposed upon the entity through the exemption.

In these cases, an individual caravan park, for example, would not need to apply for an exemption if its business model corresponds with the prescribed definition in the exemption order relating to that activity. However, it must also comply with additional obligations and conditions identified in the exemption order. In most situations, there is no efficient means of registering or identifying the number of operations covered by each type of exemption.

The classes of operations covered by these exemptions are specified in the Exemption Order and Caravan Park Order.

3. **Individual exemptions** - These exemptions are granted on a case by case basis through a standardised application process. They can have obligations and conditions applied as part of their exemption.

Individual exemptions are listed in the SPPA Exemption Order and the Exemption Order.

If an entity fails to comply with any condition associated with the exemption, whether individual or general, it is in breach of the exemption and therefore the entity is operating without a licence.

An exemption is generally not suited to instances where the provision of electricity is the core business of the exempt entity, or where robust customer protection provisions are desired.

## 2.3 Other generic customer protection legislation

### Australian Consumer Law

Outside of the electricity licensing framework, the ACL provides generic consumer protections, including protections for consumers that acquire goods or services priced at less than \$40,000 or above \$40,000 if of a kind ordinarily acquired for personal, domestic and household use.<sup>6</sup>

Customers are protected by statutory conditions and warranties including that goods provided are fit-for-purpose and are of acceptable quality. The duration of the guarantee will depend on the circumstances, such as the cost and quality of the item.

Compliance and enforcement activities associated with the ACL are undertaken by the ACCC and State and Territory consumer regulators under a 'one law, multiple regulator model'.<sup>7</sup>

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<sup>6</sup> *Competition and Consumer Act 2010*, section 4B(1)(b).

<sup>7</sup> <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>.

Under this regime, the ACCC's focus is on circumstances that will, or have the potential to, result in widespread consumer detriment or conduct of major public interest or concern. State and Territory agencies focus on individual and local cases. In Western Australia, the Consumer Protection division of the Department of Mines, Industry Regulation and Safety provides a conciliation process to consumers with individual complaints about a service provider, where appropriate.

Licensed retailers and distributors must comply with the requirements of the ACL, in addition to the electricity-specific legislation. Entities that have an exemption from the electricity licensing requirements are still required to comply with the ACL requirements.

In addition, the ACL is applicable where a customer purchases a solar PV system outright as a piece of equipment and is responsible for its maintenance. As the arrangement does not involve the sale of electricity, the seller is not required to hold an electricity retail licence or licence exemption; however, the sale of the equipment is covered by the general consumer protection provisions of the ACL.

### Financial protections

A customer may source finance from the supplier of a solar PV system, or a third party, to purchase the system outright. In this case, the customer pays the supplier or third party the purchase price plus any interest on agreed terms.

As the customer has used a provider to source financing for purchase of the solar PV system, the customer is afforded protections related to financial products and services under the *Australian Securities and Investment Commission Act 2001* (ASIC Act).

The ASIC Act requires:

- providers of financial products and services to have an Australian Financial Services licence or to be a representative of someone who is licensed; and
- that the financial services supplied to consumers are fit-for-purpose.

The Australian Financial Complaints Authority operates an external dispute resolution scheme for consumer and small business complaints about finance or loan products.<sup>8</sup>

Customer protections in relation to financial products and services are beyond the scope of this report.

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<sup>8</sup> There are limitations on the types of disputes that the Australian Financial Complaints Authority can consider. Further information is available at <https://www.afca.org.au/>

## 3. Deficiencies of the regulatory framework

This section of the report outlines the major deficiencies with the current regulatory framework for electricity licensing in providing adequate customer protections.

As indicated in Chapter 1, while relatively simple, the design of the existing regulatory framework is not well suited to the requirements of the modern consumer seeking greater involvement in energy supply arrangements to their premises, or the new business models emerging to provide a greater range of energy-related services to customers.

Many of the deficiencies are inter-related but, simply put, most deficiencies relate to the fact that the regulatory framework has been developed around a 'one size fits all' approach, based on the traditional electricity supply model.

### 3.1 Flexibility of the framework

The licensing framework was designed for a traditional electricity system in which electricity flows from large scale generators, through extensive transmission and distribution networks, to be sold by large scale retailers to individual end use customers. This model is reflected in the licence types (generation, transmission, distribution, retail and integrated regional) and the scale of compliance obligations.

The framework does not contemplate emerging business models or distributed energy resources, such as SPPAs, peer to peer trading, virtual power plants and stand-alone power systems. These developments are reshaping the retailing of electricity supplies and the current regulatory arrangements are struggling to remain relevant with this change. This is exacerbated by the limited scope for flexibility or customisation of the current framework to, for example, apply a portion of the compliance obligations to a licensee.

To date, ad hoc licence exemptions have provided workarounds for some of the emerging business models, such as the exemptions granted for SPPA providers under the SPPA Exemption Order. These types of licence exemptions are not sustainable as customers are being presented more opportunities to enter into alternative or non-traditional supply arrangements associated with the wider availability of distributed energy resources.

### 3.2 Consumer protections

Consumer protection is an important component of the electricity market and the licensing framework. While reducing barriers to entry to new entrant suppliers in the energy market is beneficial, this needs to be balanced with protections to safeguard the interests of customers. The risk of exposing customers to business practices that may be detrimental to the interests of a consumer, or group of consumers, is a paramount concern that must be addressed in determining the most suitable means of regulating energy suppliers.

However, given the limited flexibility of the current licensing framework, there is not an ability to impose a 'lighter' licensing compliance regime that has appropriate monitoring and enforcement measures, while also allowing scope for additional, or modified, protections being added at a later date if required.

The current exemption framework offers scope to impose conditions on an exemption. For example, the SPPA Exemption Order includes conditions with which exempt entities must adhere such as the requirement to provide a written disclosure statement to customers. The disclosure statement aims to ensure that consumers are provided with clear written information on the features and characteristics of SPPA product offerings and have access to a means of resolving complaints or disputes with their SPPA supplier.

Entities operating under the SPPA Exemption Order are also required to report certain information each financial year to the Coordinator for Energy, including statistics on the number of SPPAs entered into and the generation capacity of the PV systems covered by the SPPAs.

Notwithstanding these conditions, there is no ability for the Coordinator to issue a notice of breach or impose penalties for non-compliance. Instead, a breach of a condition by an entity operating under the SPPA Exemption Order or other exemption orders (no matter how minor), means that the exemption automatically ceases to apply for the period of the breach and the entity that held the exemption can no longer legally conduct its business. The regulatory framework provides no ability to implement a more robust, or proportionate, compliance and enforcement regime to ensure adequacy of consumer protections.

Additionally, the limited customer protections applied under the exemption regime do not give adequate recognition to the interests of financially disadvantaged consumers. As an example, there is no requirement for SPPA providers to offer any form of hardship assistance or payment arrangements to these electricity consumers.

### 3.3 Enforcement

Under the regulatory framework, electricity licences are issued and enforced by the ERA. Exemptions are issued by the Governor on advice from the Minister, while oversight of the regime is conducted by Energy Policy WA.

Licence holders can be subjected to a range of disciplinary actions for non-compliance with licence conditions, which range from warnings to financial penalties through to the revoking of a licence.

As identified in Chapter 3.2, by contrast, there is no provision for disciplinary action for non-compliance with licence exemptions. To date, Energy Policy WA has used informal education and negotiations with exempt parties as a mean of encouraging compliance with exemption conditions.

### 3.4 Dispute resolution

The Western Australian Energy and Water Ombudsman (Energy Ombudsman) provides dispute resolution services for small use customers supplied by licensed entities. The Energy Ombudsman was established as a simple and practical dispute resolution body for smaller customers, recognising that court processes or arbitration can be onerous. Membership in the Energy Ombudsman Scheme is a condition of every retail, distribution and integrated regional licence under the Act.<sup>9</sup>

Exempt entities are not required to hold membership in the Energy Ombudsman Scheme, therefore customers of exempt entities are not eligible to access the services of the Energy Ombudsman. The inability to access the Energy Ombudsman is a significant shortcoming of the current regulatory framework, as access to a simple, affordable and practical dispute resolution process is a fundamental component of an effective customer protection regime. While customers may be able

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<sup>9</sup> *Electricity Industry Act 2004*, section 101.

to access a form of dispute resolution through the general provisions of other legislation, such as the ACL, or take steps to have a dispute resolved through a small claims court, this is not ideal.



## 4. A preferred regulatory framework

To address the deficiencies identified in Chapter 3, Energy Policy WA is proposing amendment of the Act to provide for the regulation of prescribed categories of 'alternative electricity service'.

This approach of identifying specific services for regulation will allow the framework to respond to new and emerging behind-the-meter electricity service business models as the need arises.

In the first instance, behind-the-meter generation and storage services would be prescribed as an alternative electricity service. This would include SPPAs. Future services that could be prescribed include electric vehicle charging stations, community energy projects and peer-to-peer trading.

### 4.1 Regulating alternative electricity services

To establish a regulatory framework that facilitates businesses providing electricity services through new business models and overcomes the lack of flexibility under the current regime, Energy Policy WA proposes that the Act is amended to:

- Provide a head of power for regulations to prescribe categories of alternative electricity service.
- Specify that a code of practice may be developed for each prescribed category of service.
- Specify that businesses providing a prescribed category of service must:
  - register with the ERA as a code participant and pay any associated registration and/or annual fees;
  - adhere to the requirements of the relevant code of practice;
  - provide specified information to the ERA, as requested; and
  - participate in the Energy Ombudsman Scheme.
- Provide the ERA with compliance and enforcement powers over businesses registered as a code participant (and others operating in breach of these requirements).

The components of the proposed framework are examined in more detail below.

### 4.2 Categories of alternative electricity service

Amendments to the Act would provide a head of power to make regulations to prescribe categories of alternative electricity service, thereby overcoming the lack of flexibility of the current licensing and exemption framework. The level of customer protection would be customised, commensurate with the service being offered.

Initially behind-the-meter generation and storage services would be prescribed. Alternative electricity service that could be prescribed in the future include electric vehicle charging stations, community energy projects and peer-to-peer trading.

### 4.3 Regulated codes of practice

To address the need for tailored consumer protection for different supply models, amendments to the Act would provide a head of power to establish codes of practice for each prescribed alternative electricity service, relevant to the type of service being provided. For example, a code of practice for a community energy provider, which provides retail and distribution services in front of and behind the meter, may be different from a code of practice for a behind-the-meter generation and storage services provider.

Codes of practice would be developed in consultation with relevant industry and consumer stakeholders and be guided by the following principles.

1. Emerging and innovative alternative electricity service models should not be unduly constrained by regulatory requirements developed for traditional generation, distribution and retail businesses.
2. Customer protection requirements should be balanced across the range of electricity providers, whether the electricity services are provided in front of, or behind, the meter, to the extent possible.
3. The State Government's policy objectives of providing affordable, reliable and clean energy supplies to consumers.
4. Approaches to address customer protections for behind-the-meter services, should be easily transferable to innovative business models in front of the meter, including stand-alone power systems, microgrids and energy aggregation services.

The proposed BTM Code is discussed in further detail in Chapter 5.

## **4.4 Registration, compliance and enforcement**

Amendments to the Act would provide a registration, compliance and enforcement regime to be administered by the ERA. Code participants would be required to pay registration and annual administration fees and provide specified information to the ERA based on the obligations contained in the code of practice.

Code participants would be subjected to a range of disciplinary actions for non-compliance with the code of practice, which could range from warnings to financial penalties, through to removal of a participant's registration to participate in the market.

## **4.5 Dispute resolution**

To ensure customers of new and emerging business models have access to appropriate dispute resolution, amendments to the Act would require code participants to become members of the Energy Ombudsman Scheme. The Energy Ombudsman provides fair and independent dispute resolution at no cost to the customer.

Code participants would be required to pay a membership fee to participate in the Energy Ombudsman Scheme (initial fee and on-going annual fees). Membership and annual fees would likely be proportionate to the number of customers served, or average kilowatts of electricity provided, to ensure that fees charged are commensurate with the scale of supply or service.

## 5. BTM Code

Energy Policy WA has convened a working group of industry representatives to assist development of the BTM Code, consisting of industry and consumer representatives. This work will also address Energy Policy WA's commitment to review the SPPA Exemption Order by the end of December 2019.

The BTM Code is not intended to replicate the provisions of the *Code of Conduct for the Supply of Electricity to Small Use Customers*.

Most behind-the-meter generation and storage services are obtained as an opt-in arrangement utilised at the discretion of a customer, while the customer generally continues to receive power supplies from a licensed retailer, which must adhere to the Small Use Customer Code. However, some of the obligations in the Small Use Customer Code may be appropriate for the BTM Code.

### 5.1 Code components

It is envisaged that the BTM Code will place obligations on registered participants in relation to the following:

- Marketing and information disclosure – minimum requirements for standards of marketing and pre-contractual consumer information in plain English (such as the anticipated annual costs of the service).
- Obtaining explicit informed consent prior to entering into an arrangement for the sale of electricity.
- Establishment of an internal dispute resolution process.
- Ongoing customer information – such as the form and content of a bill and details of dispute resolution processes (internal and external).
- Arrangements for customers experiencing payment difficulties or financial hardship.

## 6. Next steps

Energy Policy WA will provide the Minister for Energy with advice on the preferred regulatory framework by March 2020 and has developed the implementation timeline detailed below in Table 6.1.

*Table 6.1: Implementation schedule for Directions Report*

Milestone	Anticipated Timing
1. Publication of Directions Report	December 2019
2. Draft BTM Code prepared in consultation with Working Group	March 2020
3. Recommendations on the preferred regulatory framework presented to the Minister for Energy for consideration. The package will include: <ul style="list-style-type: none"><li>– the detailed regulatory framework and implementation plan;</li><li>– a draft BTM Code; and</li><li>– drafting instructions for legislative change.</li></ul>	March 2020

# Appendix A: Alternative licensing and regulatory models

Energy Policy WA reviewed approaches to regulation of the retailing or supply of electricity in selected electricity markets in the other Australian jurisdictions and the United Kingdom to assist in identifying the preferred regulatory framework. This review has identified that on an international basis licensing or permitting arrangements, or similar, remain the predominant form of regulation for electricity retailing and supply activities. The review has also identified that regulation of alternative electricity services is in its infancy, although it would seem some other jurisdiction's frameworks have been able to accommodate these services to some extent.

A summary of the regulatory models adopted in other jurisdictions is provided below.

## A.1 National Electricity Market framework

Under the National Retail Law, a person selling electricity or gas to small customers<sup>10</sup> must hold a retailer authorisation. However, a person engaging in certain activities may be eligible for a retail exemption. The Australian Energy Regulator (AER) administers retailer authorisations and exemptions from the requirement to hold a retail authorisation. The *Retail Exempt Selling Guideline* sets out the AER's approach to retail exemptions.<sup>11</sup>

The criteria for granting a retail exemption are similar to the criteria applied in Western Australia, such as where the sale of electricity is not the seller's core business, where the cost of having a retailer authorisation outweighs the benefits to customers, or where an insignificant amount of energy is being sold.

There are three different types of retail exemptions:

1. Deemed exemptions - Deemed exemptions apply automatically to certain classes of energy sellers and usually for small-scale arrangements that require little to no regulatory oversight. Deemed exemptions are similar to Western Australia's General Exemptions in that they apply to particular activities, such as caravan parks or holiday park that sell metered energy to people in short term holiday accommodation.
2. Registrable exemptions - 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. Providers of SPPA arrangements, which is classified as supplementary supply, fall under a registrable exemption. The exemption is valid for commercial customers and residential customers only where the duration of the SPPA is less than 10 years and the customer is able to terminate the agreement early. Providers operating under this exemption are required to:
  - a. provide the customer in writing a plain English notice explaining that the power purchase agreement is covered by Australian consumer protection laws and is separate to the customer's contract with their retailer and distributor which are covered under the National Energy Retail Law;
  - b. refrain from registering in the wholesale market for the purposes of purchasing energy; and

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<sup>10</sup> Small customers are defined by jurisdictional legislation and mostly refers to customers who consume less than 1TJ of gas and 100MWh of electricity per annum.

<sup>11</sup> AER *Retail Exempt Selling Guideline*, March 2018, available at <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-exempt-selling-guideline-march-2018>.

- c. not be the financially responsible retailer for the premises (rather, this must be an authorised retailer).
3. Individual exemptions - Individual exemptions normally apply to the sale of energy at a particular site and/or to a particular customer/s, with conditions attached that are intended to balance the needs and rights of customers and the regulatory requirements that the exemption holder has in meeting those conditions.
4. These exemptions are granted to entities based on similar criteria to that applied when granting individual exemptions under the Western Australian regulatory framework.

The framework administered by the AER also provides for exemptions for parties to be registered as a network service provider. Three classes of exemptions, similar to retail exemptions, are provided: deemed, registerable and individual exemptions.

## A.2 Victorian exemption framework

Under the Victorian *Electricity Industry Act 2000*, anyone supplying, selling or generating electricity in Victoria must hold an electricity licence or be exempt from the requirement to hold a licence. The [General Exemption Order 2017](#) prescribes the regulatory framework for electricity licensing exemptions.

In 2018, Victoria implemented changes to its Exemption Order to ensure that customers supplied with electricity by exempt entities would receive customer protections appropriate to the supply arrangement. Exempt sellers now have to comply with specific customer protection provisions from the [Energy Retail Code \(Vic\)](#).

These provisions broadly relate to explicit informed consent, billing requirements, assistance with payment difficulties, a prohibition on security deposits for residential customers, obligations to provide disconnection notifications and life support equipment requirements. Exempt retailers are now also required to be a member of an approved ombudsman scheme.<sup>12</sup>

The Victorian provisions reflect as closely as possible those in place in other jurisdictions as set out in the AER's *Retail Exempt Selling Guideline*.

Earlier reforms were implemented in 2017 that amended the categories of licence exemptions. The categories of exemption now include the following:

1. Deemed exemption - for certain retail (selling) and network (on-supplying) related activities.
2. Registerable exemption - for certain retail (selling) and network (on-supplying) activities.
3. Generation exemption - for electricity generators with facilities with a capacity less than 30 MW.
4. Multiple activity exemptions - tailored for specific situations, such as SPPAs and community energy projects. Under this arrangement, a SPPA provider has a number of conditions to which it must adhere, including that:
  - a. the price, or range of prices, at which electricity (and services related to the provision of electricity) may be sold or supplied under the exemption must not exceed a maximum price formulated and published by the Essential Services Commission;
  - b. the generating capacity of the generator or generators installed at the relevant premises is less than 5 MW;

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<sup>12</sup> General Exemption Order (Vic), clause 11.

- c. it is not the financially responsible market participant for the relevant premises and the financially responsible market participant for the relevant premises is a licensed retailer;
- d. it is not registered in the wholesale electricity market for the purposes of purchasing electricity;
- e. it must provide the customer with written notice at the time of entering into the agreement for the supply and sale of electricity that the agreement is covered by the ACL and separate from the customer's contracts with their licensed retailer and licensed distribution company. The notice must be in plain English and include a summary of the relevant rights of the customer under the ACL; and
- f. it must provide to the Minister or the Essential Services Commission any information requested by the Minister or Commission, that the Minister or Commission may reasonably require for the administration of the exemption.

The Essential Services Commission, which is the equivalent to ERA in Western Australia, administers the licensing and exemption regime.

### A.3 United Kingdom exemption framework

An organisation must hold a licence, or an exemption from a licence, to participate in the United Kingdom electricity market.<sup>13</sup> Exemptions can apply to individual cases or a class of activity and may be conditional or unconditional.<sup>14</sup>

1. Class exemption - Class exemptions apply automatically to those persons falling within the terms of a relevant class exemption.<sup>15</sup> A number of class exemptions have been created for discrete categories of generation, distribution and supply activities. For example, if:
  - a. supplying electricity, there is a class exemption for 'small suppliers'. Small suppliers are suppliers who do not supply more than 5 MW of electricity that they generate themselves, of which no more than 2.5 MW is supplied to domestic customers; and
  - b. generating electricity, there is a class exemption for small scale generators producing no more than 10 MW.
2. Individual exemptions - Individual exemptions relate to individual generation, distribution or supply undertakings that do not fall under a class exemption. Generation exemption applications have usually only been considered for generation facilities of less than 100 MW capacity, while supply or distribution licence exemptions in most cases are not considered. This is because the licensing regulating body (Ofgem) rarely considers it appropriate for these activities not to be subject to the full terms of the licensing regime. Applications for exemption where exceptional circumstances apply may still be possible.
3. Licence Lite - New entrants to the United Kingdom electricity supply market can also access the Licence Lite program, allowing a new supplier to partner with an existing licensed supplier to take responsibility for some of the more costly and technical parts of a supply licence.<sup>16</sup>

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<sup>13</sup> Section 4, *Electricity Act 1989*, available at <http://www.legislation.gov.uk/ukpga/1989/29/contents>.

<sup>14</sup> Department for Business, Energy and Industrial Strategy. *Electricity. Generation. Distribution and Supply Licence Exemptions Frequently asked questions (FAQs)*, available at <https://www.gov.uk/guidance/electricity-licence-exemptions#frequently-asked-questions>.

<sup>15</sup> *Electricity (Class Exemption from the Requirement for a Licence) Order 2001*, available at <http://www.legislation.gov.uk/uksi/2001/3270/contents/made>.

<sup>16</sup> Further information on Licence Lite is available at <https://www.ofgem.gov.uk/publications-and-updates/licence-lite-slc-11-3-operating-guidance%20>.

The existing licensed supplier carries out compliance for those parts of a supply licence, such as compliance with industry codes, that may be particularly challenging for a new supplier (which are often relatively small organisations). Often the regulatory costs incurred by complying with these codes are disproportionately high for smaller suppliers.

The Licence Lite regime has allowed a number of generators and innovative electricity suppliers to enter the retail market. Innovative supply arrangements that have been allowed to develop under this regime include fleet managers of electric vehicles.

## **A.4 Suitability of alternative frameworks for Western Australia**

An effective licensing framework needs to be able to adapt to protect the modern small use consumer seeking greater involvement in the energy supply arrangements to their premises and allow new business models to provide a greater range of energy-related services, without being unduly hampered by a licensing regime that was developed around a 'one size fits all' approach and based on the traditional electricity supply model.

The Victorian and National Electricity Market (NEM) based frameworks are similar to the framework operating in Western Australia, in that conditions are applied to exemptions, with the number and type of conditions varying according to the type of exemption being sought. However, in the Victorian and NEM frameworks responsibility for the administration and enforcement of exemptions has been placed on their respective regulators, the ESC and AER. This contrasts with Western Australia, where the regulator has no role in administering the exemption framework.

While Western Australia could add conditions to its exemptions along similar lines to the Victorian and NEM frameworks, this approach would not address current deficiencies relating to enforcement and dispute resolution.

Similarly, the United Kingdom Licence Lite model, is not suitable in Western Australia due to the relatively small retail market and dominance of one large retailer. The proposed approach provides for a regulatory framework closer to the Victorian and AER models in that the regulator oversees the administration of the framework for the provision of alternative electricity services. However, the approach is tailored for alternative electricity services, rather than for exemptions, and to fit within Western Australia's legislative framework.







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