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**Behind the Meter Working Group**

C/o Australian Energy Council;

Clean Energy Council;

Consumer Action Law Centre;

Energy Consumers Australia;

Energy Networks Australia;

Public Interest Advocacy Centre;

Renew; and

Smart Energy Council

**Submitted by email to: BTMIndustrycode@cleanenergycouncil.org.au**

**6 February 2019**

Dear Behind the Meter Working Group

**Behind the Meter Distributed Energy Resources Provider Code**

Thank you for the opportunity to provide feedback on the Behind the Meter Working Group (**BTMWG**) Draft Behind the Meter Distributed Energy Resources Provider Code (**BTM Code**).

AGL Energy (**AGL**) commends the BTMWG on the work to date in developing the BTM Code. AGL supports the COAG Energy Council's request in 2017 that industry, consumer groups and other stakeholders develop an industry-wide Code of Conduct proposing consumer protections for customers acquiring new energy products and services.

AGL supports the COAG EC's view that while current consumer protections provided by the National Energy Customer Framework (**NECF**) and Australian Consumer Law (**ACL**) are generally sufficient for BTM products, there are clear benefits in industry taking the lead in developing the BTM Code. In our view, the function of the BTM Code is principally to build customer confidence in distributed energy resource (**DER**) products, systems and services, thereby encouraging greater and faster participation in the emerging DER market. The BTM Code has the potential to improve customer confidence by reducing information asymmetry for consumers and requiring certain basic standards for sales practices.

We consider that this overarching purpose is articulated well in the BTM Code aims.

Nevertheless, given the infancy of the DER market, careful drafting will be required to ensure that the BTM Code fulfils its stated aims and does not lead to unintended consequences by stifling innovation or leading to poor customer outcomes. In this regard, we support the drafting principles set out in the explanatory memorandum, namely:

1) balancing consumer protections with market efficiency and the promotion of innovation;
2) being technologically neutral and future proof;

3) expressed in plain English and accessible;

4) structured in line with the customer journey;

5) proving practical guidance and enforceability; and

6) administered and enforced fairly and independently.

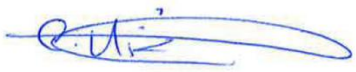
We have assessed the Draft BTM Code based on these drafting principles and provide our detailed feedback in the **Attachment**.

At a high level, we consider that the BTM Code would benefit from:

- a preamble that more clearly states the scope of its intended application;
- being limited to residential and small business customers;
- being fuel agnostic;
- clarifying its application to dealings involving third parties;
- explicit cross-referencing of existing legal and regulatory obligations throughout;
- Clear delineation in the functions of the BTM Code and the technical schedules. The BTM Code should set out actionable obligations that apply to signatories and the technical schedules should fulfil the secondary function to provide guidance to the industry, on better practice approaches though not formally part of the BTM Code;
- Clearer drafting in Parts A, B and C that aligns to the customer journey and does not impose unnecessary prescription to the detriment of product and service innovation; and
- Clear definitions of major and severe breaches and the associated penalties involved.

Should you have any questions in relation to this submission, please contact Kurt Winter, Regulatory Strategy Manager, on 03 8633 7204 or KWinter@agl.com.au.

Yours sincerely



Con Hristodoulidis

**Senior Regulatory Strategy Manager**

**ATTACHMENT**

## Scope of application

AGL believes the BTM Code would benefit from a preamble that more clearly states the scope of its intended application and captures the following scoping matters.

*Residential and small business customers*

The draft states that the BTM Code applies to residential and small business customer and, unless expressly stated in the contract, to other customers. In our view, the Code should explicitly state that, consistent with the NECF, it only applies to residential and small business customers and does not extend to commercial or industrial customers. In our view, this distinction strikes the right balance between consumer protections and market efficiency and the promotion of innovation. While residential and small business customers may benefit from an industry code that improves information asymmetry and builds customer confidence, commercial and industrial customers are better placed to understand the impact to their business of particular energy arrangements and negotiate terms on their own behalf. Indeed, BTM solutions for industrial and commercial users are no different to any other business decisions they would make whereby they will evaluate the upfront and on-going costs of the BTM products and services against the savings from an energy efficiency and operational perspective and if the payback is appropriate, will make the necessary investment. Applying some of the more prescriptive provisions of the BTM Code on commercial and industrial customers could limit the ability of energy providers to develop innovative energy solutions for these customers. We also recommend the BTMWG adopt the definition for small business and the associated consumption thresholds utilised under the NECF.

*Fuel agnostic*

While the BTM Code makes references throughout to electricity, it does not currently contemplate gas. To ensure that the BTM Code aligns with the NECF as well as being technological neutral and future proof, we recommend the BTMWG consider its application to both electricity and gas. While particular technology applications may be contemplated in the technical schedules, the BTM Code would benefit from a clear preambular statement on its consistent application.

*Clarify application to third parties*

The draft states that the BTM Code applies to signatories in their dealings with their customers. The BTM Code may also benefit from clarity around its application to arrangements involving third parties, including the circumstances in which the BTM Code may apply to signatories' subsidiaries, intermediaries and contractual business partners. A section on the application of the BTM Code to third party dealings would clarify the operating environment for signatories and would ensure that customers received the same standard of protections from signatories regardless of the contractual arrangements involved.

*Cross reference existing legal and regulatory obligations*

The draft states that the BTM Code complements and goes beyond the law in many respects. While we consider that the Draft generally provides useful information for consumer and signatories on industry best practice consistent with businesses' existing legal obligations under the ACL, we would recommend that the BTM Code's role is to explicitly cross-reference existing legal and regulatory obligations to facilitate signatories' compliance.

We see the role of the BTM Code as two-fold. One is to communicate the actionable obligations that apply to signatories. The secondary function is to provide guidance to the industry, on better practice approaches the Code Administrator considers would help improve consumer outcomes. While the BTM Code itself should address the first function, in our view the technical schedules should fulfil the second function of elaborating industry best practice, though not formally part of the BTM Code.

**Part A - Key commitments**

As we have noted above, we support the aims for the BTM Code.

We are generally supportive of the wording of Part A, which provides useful information for consumers and signatories of relevant standards of business practice, consistent with businesses' existing legal obligations under the ACL. To facilitate signatories' compliance, we recommend Part A explicitly cross-reference applicable provisions of the ACL.

We recommend that the BTM Code provide further clarity on the following clauses:

- *A.1 dot point 4 what the ongoing costs of energy will be, including any applicable incentives or rebates and any continuing services fees.* The BTM Code should clarify whether this requirement applies to quoting any assumptions which have been used or rather power purchase agreements where there is an actual sale of energy. While it is beyond the scope of a BTM provider to set or comment on the retail rate of energy, the provider may be required to be clear in relation to any assumptions which have been used.
- *A.1 dot point 8 any limitations that may impact you such as portability or functionality.*
- *A.2 We will draw your attention to any areas of the contract that have the potential to create disagreements.* We consider that the scope of clause is very broad and should be more specific, for example applying to rights to an early termination fee or balloon payments at the end of a set term.
- *A.3.* In our view it may not be appropriate for a provider that is not the holder of the Australian Financial Services License to provide the consumer will all of the information required under this clause, beyond for example ensuring that the financial provider provides information as to interest rates. The reference to cooling off rights should also clearly state what it applies to and the applicable timeframe, noting that 7days may not be a sufficient timeframe.

**Part B – Practice requirements**

While we are generally supportive of the wording of Part B, we would recommend the sections explicitly cross-reference the applicable provisions of the ACL to facilitate signatories' compliance.

We note that some of the sections in Part B would benefit from some amendment to ensure practical application and an appropriate balance between customers protections, market efficiency and the promotion of innovation.

*Approvals (B.1.3)*

We would suggest that the onus to obtain owners' corporation approval in the context of an installation in a strata title unit would generally reside with the customer and should not be the responsibility of the installer to inform the customer.

*Sales disclosures (B.1.4)*

This section appears to focus solely on on-site marketing and would benefit from further consideration and clarity as to the circumstances in which these requirements are to apply including whether they are to apply to all unsolicited consumer agreements as so defined in the ACL (including telemarketing) and e-marketing, as well as consideration as to whether these obligations duplicate existing obligations under the ACL and should instead be simplified to note that providers must comply with the unsolicited consumer agreements regime under the ACL.

*Materials and contact information (B.1.6.)*

Clause a) requires that providers also provide Code Administrator Approved Fact Sheet(s) that explain the consumer protection framework that applies under legislation and this Code and sets out other key information. The BTM Code should clarify who would prepare these fact sheets, particularly as new technologies and services are contemplated in the technical schedules. We consider that this would be a function of the Code Administrator.

*Written quote and contract (B.2.1)*

Clause j) requires the disclosure of issues or risks with medical equipment connected. We consider that this clause should more closely align with the law on customer guarantees under the ACL. In circumstances where this equipment is not itself provided by a signatory to the BTM Code, signatories should only be responsible to the extent that customers relied upon signatories' representations and it was reasonable to rely upon those representations in the circumstances.

Clause k) requires the provision of information about the portability of products, systems and services. The current drafting may create some ambiguity for signatories and customers. We recommend that further clarity be provided on the type of information required to enable practical application for signatories.

*Physical installations (B.2.2.)*

Clause a) requires a site-specific full system design for physical installation of a distributed energy resource system including how the new system will integrate with other products, systems and services. While an installation plan should be provided (that considers design issues including safety, position, and impacts to efficiency and existing services in operation), we consider that the requirement for a site-specific full system design is overly prescriptive and may not be practical in many circumstances. The term *design* is open to broad interpretation and risks encompassing a broad range of issues potentially outside of the signatories' control, including structural, communications and civil engineering considerations.

It is also unclear whether B.2.2(b)(iii) is intended to introduce a further 10 business day cooling off period in excess of any statutory timeframes. The intent of this sentence should be clarified. As a provider will generally not perform installation works in a cooling off period, a further 10 business day cooling off period may unduly delay customers receiving services.

*Connection to the grid (B.2.6)*

Clause b) requires that where a customer authorises a provider to obtain grid connection approval on the customer's behalf, the provider must not install the distributed energy resource product or system until approval is provided.

We recommend greater clarity on how this requirement aligns with the current regulatory arrangements for pre-approval of installations. As noted at the outset, we do not consider that the BTM Code should apply to commercial and industrial customers.

*Fit for purpose products systems and services (B.2.7)*

While the Draft BTM Code largely reflects the current fit for purpose consumer guarantees with respect to products and services under the ACL, the drafting of this section should state more clearly that this guarantee will not protect the consumer if they did not rely, or it was unreasonable for them to rely, on the supplier's skill or judgment in agreeing to particular goods or services. In our view, these current legal tests ensure that customer protections are appropriately balanced with market efficiency and the promotion of innovation. In circumstances relating to product performance for example, they ensure that customers' expectations are appropriately managed against representations made by signatories.

*Finance and alternative purchasing arrangements (B.3.1)*

Clause a) requires that signatories, when offering a product or system (whether direct or via a third-party) with a structured payment option that is alternative to initial outright purchase, ensure that it is structured as a credit contract or credit lease through a licensed credit provider. Where a product or system offering involves payment instalments, there is an existing legislative regime that is geared towards protecting consumers. Accordingly, we do not consider that it is necessary to offer all structured payment options as a credit contract or credit lease through a licensed credit provider unless the arrangement would fall within the existing legislative regime, for example if interest payments are involved. In our view, this requirement could unduly restrict signatories' ability to develop innovation product and service offerings in the emerging DER market.

Clause b) requires that signatories offering an energy purchase agreement either directly or through a third-party provider, ensure that customers are provided with the aggregate amount payable over the agreement's term based on a stated, reasonable estimate of the energy you will consume. In our view, this may not be practicable in many circumstances and could lead to customers being provided with inaccurate or misleading information. It may be more appropriate to require that signatories clearly disclose applicable pricing structures rather than the aggregated amount for an agreement's term.

Clause c) prohibits agreements which involve "third line forcing" unless prior notification to, or authorisation from, the ACCC has been provided in accordance with the *Competition and Consumer Act 2010* (Cth) (**Act**). We do not consider that this requirement strikes the right balance between customer protections and market efficiency and the promotion of innovation. Consistent with the current law, third line forcing should only be restricted where it has the purpose, effect or likely effect of substantially lessening competition. Under changes to the Act which took effect in 2017, third line forcing is treated in the same way as other forms of exclusive dealing. Lodging a notification is only necessary if you are at risk of breaching this purpose or effect test and most parties engaging in third line forcing therefore no longer need to lodge a notification. The ACCC previously received hundreds of notifications to allow parties to engage in third line forcing, which in most cases raised no competition concerns. To reinstate this restriction may create an unnecessary administrative burden for signatories.

*Post-installation (B.4.1)*

Clause a) requires that signatories advise customers how to measure the performance of their distributed energy resource product, system or service. We note that in many circumstances, depending on the

technology concerned, it may not be practical to measure the performance of the product, system or service because performance measurement capabilities are not sufficiently mature. With this in mind, we recommend that post-installation performance measurement be dealt with in the technology schedules to the BTM Code rather than the core text to appropriately reflect differences in technologies and performance measurement capabilities. We also note that Australia's measurement framework is currently under review, with the aim of developing reform options for consideration by the Australian Government in 2020. We recommend that the BTM Code's treatment of performance measurement align with the current requirements under Australian law, to ensure consistency for signatories and enable appropriate reforms into the future.

*Connection to the grid (B.4.2)*

The BTM Code contemplates that the consumer may want to organise connection to the grid themselves and in such circumstances places obligations on the system provider to assist the consumer with information through the process (B.2.6 and B.4.2.b). We do not consider that this achieves the right balance between consumer protection and consumer autonomy. This requirement may create substantial risks in terms of the fit-for-purpose consumer guarantee under the ACL. Given that connecting to the grid entail actions by a range of parties outside of the control of signatories, this requirement may complicate an assessment of whether the customer can reasonably rely upon representations made by signatories with respect to connections.

*Warranty (B.5.2)*

Clause b) empowers the Code Administrator to set the warranty period for the particular distributed energy resource product, system or service from time to time. In our view, it would not be appropriate for the Code Administrator to set a warranty period for covered products systems and services as this power would undermine the principle that the BTM Code be administered fairly and independently. We do not consider that the Code Administrator would have the technical expertise to determine the warranty period that should apply to particular products or services. In our view, consistent with the current law, customers should enjoy the benefit of any warranties from business selling products or services in additional to consumer guarantees under the ACL which may extend beyond the time period of the warranty, depending on the nature of the product or service.

## Part C – Code Administration

*Function of energy ombudsman schemes*

Some State ombudsman schemes have jurisdiction over a range of BTM product and service related issues. Where this is the case, the BTM Code should cross reference the jurisdictional remit of those ombudsman schemes to enable customers to access those services for the timely resolution of their complaints. The remit of the Code Administrator, in its dispute resolution function, should not seek to duplicate the functions of the State ombudsman schemes but rather supplement those schemes where jurisdiction is lacking. In our view, limiting the scope of the Code Administrator's dispute resolution function to those matters where the ombudsman schemes do not apply will provide a clearer pathway for the resolution of customers' complaints. It would also reduce the administrative cost associated with the Code Administrator where certain functions are already provided.

*Code Administrator development of standards and guidelines (C.1.3)*

We support the Code Administrator's function in developing standards and guidelines for particular emerging BTM products and services. In our view, these technical schedules should cross-reference existing regulatory obligations and technical standards. In our view, this will ensure that any guidelines reflect technology best practice and do not create uncertainty for industry through duplication.

Nevertheless, these technical schedules should not be formally part of the BTM Code itself. Rather they should fulfil the secondary function of the BTM Code by providing guidance to the industry, on better practice approaches that the Code Administrator considers would help improve consumer outcomes.

Many of the obligations cross-referenced in the technical schedules would be enforceable through existing regulatory avenues, for example installation and safety standards by jurisdictional safety regulators. Accordingly, we do not consider that it would be appropriate to empower the Code Administrator to also have adjudicative powers over the technical schedules. To do so would create an unnecessary administrative burden for the Code Administrator, the cost of which would be borne by signatories.

This clause also contemplates a 3-month notice period for industry to comply with any new standard or guidelines developed by the Code Administrator. In our view, this time period may not provide sufficient lead time for industry to adjust business practices to ensure compliance. It may be more appropriate for compliance notice periods to be determined in consultation with industry on a case by case basis, depending upon the complexity of individual guidelines and standards.

*Code Administrator monitoring and investigations (C.1.5)*

We support the inclusion of powers for the Code Administrator to monitor compliance with the Code. Nevertheless, greater clarity is needed on the scope of the Code Administrator's compliance function. In this regard, the development of the complaints procedure that will set out how the Code Administrator will respond to and investigate an allegation of breach of the Code would benefit from formal public consultation to enable insights from existing complaints handling procedures. It should also align with the Australian Standard on Complaints Handling AS ISO 10002-2014. The BTM Code may also benefit from a cost recovery provision that facilitates the recovery from the signatory of the costs associated with the Code Administrator's audit and investigation activities with respect to that particular business.

*Clarity of functions between the Code Administrator and the Code Review Panel* (C.1.5.e, *C.2., C.4 and C.6*)

Clause 1.5.e) provides that the Code Administrator would be empowered to enforce remedial action and sanctions, including where appropriate referring case to the Code Review Panel for consideration. We consider that the governance structure for the BTM Code would benefit from further clarity around when a breach would be adjudicated upon by the Code Administrator and when a breach would be referred to the Code Review Panel. In our view, a tiered approach would be preferable whereby the Code Review Panel only deals with appeals from the Code Administrator. This would ensure greater integrity in the appeal process than would be the case if the Code Review Panel could also review cases in the original instance. Clause C.4 c) and d) entail some ambiguity in suggesting that the Code Review Panel would in some instances also deal with alleged breach in the original instance.

*Code Administrator remedial action (C.4)*

Clause C.4 a) provides that possible breaches may be identified by the Code Administrator including in the course of its compliance checking as well as through self-reporting by Signatories and by customer or any

other person or body including by using the BTM Code website dispute form. To improve compliance, we consider that clear timeframe should be set as to when signatories are required to report breaches. We note that this may vary depending on the severity of the breach concerned.

Clause C.4 b) iii. provides that, in the context of the Code Administrator investigating a breach, it must give the signatory 21 days to respond to the Code Administrator setting out its comments and evidence on the alleged breach.

In the context of both reporting and investigating breaches, we recommend consideration be given to the current AER Compliance Procedures and Guidelines in the formulation of appropriate timeframes for self-reporting and responses to breaches under investigation. As far as possible, these timeframes should align with the current AER framework to ensure consistency for signatories. Longer timeframes may be appropriate depending on the severity of the breach and the extent to which the response is expected to also include a mitigation strategy.

*Appeals (C.6)*

Clause C.6 does not indicate whether there would be some form of hearing in the appeal process that would provide signatories the opportunity to discuss their appeal grounds with the Code Review Panel. We would recommend that such an opportunity be provided to improve the integrity of the appeal process.

Clause C.6 states that there is no further right to appeal from decisions made by the Code Review Panel. To improve clarity for signatories and consumers, the BTM Code could provide clarity as to whether merits review and judicial review may still be available from decisions of Code Review Panel, given that the Code Review Panel would be enforcing a pseudo-public function in accordance with the ACL.

*Publication of breaches (C.1.5 e)iv and C.4 g)*

The BTM Code would benefit from greater clarity around when breaches would be published. Clause C.1.5 e) iv. suggests that the Code Administrator would have broad discretion to publicise breaches on the Code website. On the other hand, clause C.4 g) states that if the Code Review Panel considers the matter to be a major breach, the fact of the breach will be publicly listed on the Code website and in the Code Annual Report. If the breach is not rectified in a period of time that the Code Review Panel considers is reasonable in the circumstances, these listings will identify the name of the signatory involved. We recommend revision to reconcile these two clauses, to clarify which governing body would have authority to order publication and in which circumstances (breach or only circumstances of major breach).

**Part D – Glossary and Definitions**

*Definition of distributed energy resource products, systems and services*

Clause d) provides a catch all examples of distributed energy that may fall outside of the scope of the definition. While we agree with this approach, the definitions section would benefit from further review to ensure that the definition appropriately captures all current distributed energy applications, including for example orchestration platforms and services.

*Definition of major and severe breaches (C.2 f) ii), C.4 b) vi. C.4.g))*

Clause C.4 b) vi. empowers the Code Administrator to allocate sanctions *depending on the severity*. On the other hand, clause C.4.g) empowers the Code Review Panel to publish *major breaches.* Clause C.2 f) ii. enables publication of *severe breaches that are not rectified.* The BTM Code would benefit from consistent

terminology and an appropriate definition of the threshold that would constitute a severe or major breach. We recommend that a tiered approach be adopted in the assessment of severity which multiple thresholds which take into account safety, monetary and comfort impacts to customers as well as the frequency of these breaches. Further consultation with stakeholder may be required to determine the appropriate tiers contemplated in the Code and the associated penalties envisaged. Consideration should also be given to the AER Compliance Procedures and Guidelines to ensure consistency for signatories as far as possible.