



K&L GATES



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Regulatory issues affecting distributed solar PV

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SESSION OVERVIEW

- Changes to traditional retailing models
 - Regulatory framework – sale of electricity (retailer authorisation or exemption – AER statement of approach)
 - Regulatory framework – lease of solar panels / consumer credit contracts
- Changes to traditional network usage
 - Emerging debate regarding reform of network tariffs

BACKGROUND

- Recent popularity of rooftop solar in Australia
 - Over 200,000 households and small businesses in NSW now have a solar PV system
- Large uptake of rooftop solar linked to feed-in tariff schemes
 - Most rooftop solar in Australia is owned by the building owner or occupier – purchased up-front
 - Building owner/system owner receives benefit of FIT
 - Incentive to make up-front investment

BACKGROUND

- Decline in feed-in tariff schemes
- Emergence of new types of solar arrangements
 - Often designed to minimise upfront costs to customers and make solar electricity available to households and businesses who do not have the initial capital to initially purchase a system outright
 - May reduce the “hassles” associated with owning a solar system eg: maintenance

SOLAR ARRANGEMENTS

- A number of different ways in which a solar arrangement may be structured
 - Up-front purchase of solar system by customer:
 - Customer owns system from the outset
 - Up-front cost for customer
 - Customer owns all electricity generated
 - Electricity consumed at customer premises and excess exported to the grid
 - If applicable, FIT paid

SOLAR ARRANGEMENTS

- Solar system owner sells electricity to customer:
 - Likely to be a long term arrangement
 - System owner retains ownership of PV panels during the term – no up-front cost to the customer
 - Customer grants system owner a licence to install system on customer's roof
 - System owner sells electricity generated by the system to the customer during the term – only electricity is sold
 - Customer may have a right or obligation to purchase system at end of term

SOLAR ARRANGEMENTS

- Solar system owner leases system to customer:
 - Likely to be a long term arrangement
 - System installed at customer's premises but system owner retains ownership during the term
 - Customer leases the system rather than purchasing the generated electricity
 - At end of term the system is either recovered by owner or sold to customer
 - Lease with right or obligation to purchase is a sale of goods by instalment under the National Credit Code

SOLAR ARRANGEMENTS

- Other possible arrangements could include:
 - Loan
 - Lender lends the customer money for the customer to purchase system from system owner (third party or lender)
 - Agreement for work done and materials supplied
 - System owner supplies and installs system and customer pays for the work by instalments
 - Customer owns system when first installed or upon payment of final instalment

DIFFERENT REGULATORY REGIMES DEPENDING ON TYPE OF ARRANGEMENT

- Different regulatory regimes apply to different types of arrangements
- Sale of electricity vs lease of system
 - Sale of electricity – NERL/NERR
 - Lease of system – National Credit Code (residential)
- Generally likely to be clear from terms of agreement, however...

SUBSTANCE OVER FORM APPROACH

- Potential for regulators or courts to take a substance over form approach
- Eg: arrangement described as lease – construed as a sale of electricity?
 - AER Exempt Selling Guideline suggests that lease of panels is “effectively selling electricity”
 - Could depend on how lease payments are expressed – eg: based on kWh of electricity produced v fixed monthly payments

SUBSTANCE OVER FORM APPROACH

- Eg: arrangement described as sale of electricity – construed as a lease?
 - Potential argument that an arrangement whereby a customer is sold electricity from a solar system installed at its premises (but owned by a third party) also involves hiring the system itself
 - Seems to be a stretch to make this argument if clearly sale of electricity only with licence for system owner to use roof space (ownership and possession to remain with owner)
 - Might depend on the wording of individual agreements

REGULATORY FRAMEWORK – SALE OF ELECTRICITY

- Australian Energy Regulator (AER) is the regulator in NECF jurisdictions
- National Energy Retail Law (NERL) – section 88:
*“A person (**the seller**) must not, in this jurisdiction, engage in the activity of selling energy to a person for premises unless—*
 - (a) the seller is the holder of a current retailer authorisation.... or*
 - (b) the seller is an exempt seller.”*

REGULATORY FRAMEWORK – SALE OF ELECTRICITY

- Must have a retailer authorisation or an exemption in order to sell electricity “for premises”
 - “for premises” not defined or explained
 - Interpret this to mean sale of energy for consumption by an end-user (as opposed to sale of energy to a retailer who then sells it to an end-user)
 - Therefore someone who sells electricity generated by a solar PV system to an end-use customer must either have an authorisation or an exemption
- AER discretion as to whether authorisation or exemption required – but only where connected to the national grid

RETAILER AUTHORISATION

- Retailer authorisation – licence to sell electricity
 - Costs and obligations of being an authorised retailer – can be onerous
 - Must meet technical, financial and suitability criteria
 - Reporting obligations
 - Compliance with customer protection obligations under the NERL and NERR, especially for small customers, eg: standing offers, disconnection procedures, customer hardship programs
 - Not appropriate for all sales of electricity

EXEMPTIONS

- AER (Retail) Exempt Selling Guideline
- Types of exemptions
 - Class exemptions and individual exemptions
 - Class exemptions can be deemed or registrable
- No class exemption for solar PPA (SPPA) sellers
- Must apply for individual exemption
- Exemptions may have conditions attached

AER – STATEMENT OF APPROACH

- In June 2014 the AER released a statement of approach regarding regulation of alternative energy sellers under the NERL
- Sets out the AER's approach to determining whether an authorisation or an exemption will be required
- Alternative energy seller – non-traditional business models for selling electricity
- Focus on solar PPA (SPPA) providers who sell electricity generated by solar panels installed at customer's premises

AER – STATEMENT OF APPROACH

- AER has indicated that an authorisation is likely to be required where seller of electricity is:
 - the primary source of electricity to the premises of a small customer
 - selling electricity across multiple sites
 - registered in the wholesale market and is the FRMP for the particular premises
- Unclear exactly how this is to be interpreted

AER STATEMENT OF APPROACH

- What does “primary” seller of electricity mean?
 - Best interpretation seems to be sole or only seller of electricity (rather than seller of the most electricity in terms of quantity)
- Significance of reference to “small customer”?

AER – STATEMENT OF APPROACH

- AER has indicated that an exemption may be issued where the seller of electricity is:
 - providing an “add-on”/optional service to a customer who also buys electricity from an authorised retailer
 - providing a bundled contract that includes sale of electricity but where that sale of electricity is a small component of the overall contract

AER STATEMENT OF APPROACH

- Possible scenarios
 - Solar PPA where premises is completely “off-grid” – not connected to the grid or capable of being connected to the grid
 - Solar PPA is sole source of electricity
 - Outside the NERL regime
 - Solar PPA where premises is connected to the grid
 - Solar PPA and grid contract – solar PPA is not sole source
 - Solar PPA where premises is within the grid but is not connected to the grid
 - Solar PPA and no grid contract – solar PPA is sole source

AER – STATEMENT OF APPROACH

- AER's reasoning:
 - **Discretionary nature of SPPAs**
 - Electricity sold through SPPAs is discretionary and additional to the energy sold to customers by an authorised retailer
 - **Impact of disconnection**
 - If disconnection occurs under the SPPA the customer still has access to grid electricity through contract with authorised
 - **No duplication of NECF protections**
 - SPPA customer already has NECF consumer protections under their contract with authorised retailer
 - Regulation should be “fit for purpose” and only apply where actually required

AER – STATEMENT OF APPROACH

- **Other protections**

- Other consumer protections still apply eg: Australian Consumer Law (ACL)

- **Flexibility**

- AER acknowledges need for flexible approach given rapid changes to energy industry

AER – STATEMENT OF APPROACH

- Exemption conditions
 - SPPA provider must inform its customers that it:
 - is not an authorised retailer
 - is not bound by the obligations of authorised retailer's under the NERL
 - is bound by all other relevant consumer protection legislation (eg: ACL)
 - Exemption for the business model not the entity
 - Exemption conditional on SPPA provider not:
 - registering in wholesale market to purchase electricity
 - being the FRMP for the particular premises

RETAILER OF LAST RESORT

- AER considers that participation in the RoLR scheme is not necessary for SPPA providers (primary authorised retailer would be a participant)
- A number of the circumstances which constitute a “RoLR event” under the NERL are not applicable to SPPA provider eg: revocation of authorisation
- If SPPA provider insolvent or unable to sell, customer still able to obtain electricity through grid contract
- Hard to see how RoLR could take over SPPA if it doesn't own the solar panels or have a right to the generated electricity

NECF CUSTOMER PROTECTIONS

- Regulatory customer protections generally only relevant to small customers
- Small customer
 - residential customer or a business customer who consumes energy at business premises below the upper consumption threshold (100MWh in NSW) (s5 NERL)
- Large customer
 - business customer who consumes energy at business premises at or above the upper consumption threshold (s5 NERL)

NECF CUSTOMER PROTECTIONS

- Business premises
 - premises of a business customer, other than premises used solely or principally for personal, domestic or household use
- “Premises” not defined
- Premises could mean a property as a whole, a supply point or a NMI?

REGULATORY FRAMEWORK – CONSUMER LEASES

- National Consumer Credit Protection Act 2009 (Cth) (NCCP)
- National Credit Code (NCC)
 - Schedule 1 to the NCCP
- NCCP and NCC applies to:
 - consumer leases
 - sale of goods by instalment
 - credit contracts
- ASIC is the regulator

REGULATORY FRAMEWORK – CONSUMER LEASES

- Consumer lease
 - Contract for the hire of goods by a natural person or strata corporation with no right or obligation to purchase the goods
- Sale of goods by instalment
 - Contract for the hire of goods with a right or obligation to purchase the goods (lease with option to purchase)
- Credit contract
 - loan

REGULATORY FRAMEWORK – CONSUMER LEASES

- NCC only applies to residential customers
 - consumer leases where the lessee is a natural person or a strata corporation
 - credit contracts for personal, household or domestic purposes
- NCC does not apply to lease agreements with business customers

REGULATORY FRAMEWORK – CONSUMER LEASES

- Key obligations under the NCC
 - Agreement provider must have an Australian Credit Licence or be a credit representative of a licence holder
 - Agreement provider must comply with disclosure obligations in relation to various aspects of the agreement
 - Initial disclosure requirements
 - Ongoing disclosure requirements during the agreement term
 - Sensible lending obligations

REGULATORY FRAMEWORK – CONSUMER LEASES

- Agreement must be consistent with prescribed requirements
- Agreement provider must comply with notice requirements (eg: notice period prior to repossessing leased goods)
- Potential PPSR registration requirements

PROTECTION FOR SYSTEM OWNER

- Key issue for system owner: protection of asset
- Issues to note:
 - Jurisdiction?
 - Status of customer – owner or tenant of premises?
 - Fixture or chattel?
 - PPSR registration?
 - Caveat?
 - Registered lease of part of rooftop space?
 - Insurance coverage for solar panels?

REFORM OF NETWORK TARIFFS

- Emerging issue
- Network tariffs need to cover the network operator's costs of operating and maintaining electricity distribution networks

REFORM OF NETWORK TARIFFS

- Residential electricity prices: two-part tariff (fixed charge and variable consumption charge)
- No DUOS charges apply for electricity produced via on-site systems (eg: solar PV systems) and exported into the grid
 - Rule 6.1.4 of the National Electricity Rules (“Prohibition of DUOS charges for the export of energy”)

REFORM OF NETWORK TARIFFS

- Increased uptake of solar in recent years has led some to call for reform of the current system
- Arguments for change
 - Premises with rooftop solar are "avoiding" network costs
 - Solar premises use the grid to export electricity and still rely on the grid for import during peak periods

REFORM OF NETWORK TARIFFS

- Increased costs for solar can be offset by selling electricity into the grid
- Current system will send market into a "death spiral"

REFORM OF NETWORK TARIFFS

- Alternative perspectives
 - It is inconsistent to target solar premises and ignore other users (such as premises with air conditioning) also "avoiding" costs
 - Pursue alternatives to network tariff reform (eg: battery technology)
 - Solar PV Institute of Australia:
 - Generally supportive of need for reform
 - However, reform should be "technology agnostic", and not specifically target solar

REFORM OF NETWORK TARIFFS

- Proposals to reform network tariffs
 - Increase fixed-fee tariff and/or introduce additional fixed fees?
 - Discrimination between technologies if target solar?
 - May dissuade customers from installing solar or otherwise reducing grid consumption

REFORM OF NETWORK TARIFFS

- Higher network charges during peak periods?
 - Network tariff based on peak demand
 - Supporters argue this would better reflect costs of operating the network (which must operate to peak demand)



Questions?

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