

Explanatory notes

Evolution of Draft DER Code – V9.0

Introduction

1. This explanatory document is provided to the Behind-The-Meter Working Group (BTMWG) to summarise the key developments in the drafting of the BTM/DER Code. Once the BTMWG have reviewed and endorsed a Draft Code to go forward to Council Of Australian Governments (COAG) Energy Council, this document is intended to be updated to become the “Explanatory Memorandum” that will accompany that Draft Code.

Background

2. In August 2017, COAG Energy Council requested four industry associations (the Clean Energy Council (CEC), Energy Networks Australia (ENA), the Smart Energy Council (SEC) and the Australian Energy Council (AEC)), to collaborate with Energy Consumers Australia (ECA) to develop a single, industry-wide Code of Conduct for all Behind-the-Meter (BTM) electricity supply services and products. The request referenced the Australian Competition and Consumer Commission (ACCC) guidelines for developing effective voluntary industry-based codes.
3. Representatives from other consumer advocacy organisations (the Consumer Action Law Centre, Renew (previously the Alternative Technology Association) and the Public Interest Advocacy Centre) – joined with the industry associations and ECA to progress this important work.
4. Since October 2017, the BTMWG has worked on the development of the draft Code, looking specifically at the customer journey and how to achieve better consumer outcomes.
5. The draft Code was released for broad stakeholder consultation during the last week of November 2018. The stakeholder consultation targeted a broad range of industry, government bodies, consumer and stakeholder groups and organisations. Stakeholders were invited to attend forums in Adelaide, Brisbane, Sydney and Melbourne in the second week of December. Registered interest was very high at almost 300, with 115 attendees. Hundreds of comments and suggestions were received through these forums – which were shared with the BTMWG.
6. At end January 2019, some 82 participants attended Technical forums in Brisbane and Melbourne, where attendees responded to structured questions and tested draft Code provisions for applicability to 6 broad categories of BTM technologies and services. Again, a significant number of gaps and suggested refinements were identified and again tested and workshopped by the Code drafters.
7. In parallel with this activity a small group from the BTMWG had been working with representatives of the key Industry Associations to develop a Memorandum of Understanding about how the stewardship and administration of the proposed Code would be managed. This was agreed in late January and the key provisions have been reflected in the current Draft of the Code.
8. In early February, 16 written submissions were received from individuals and organisations – which were also analysed and workshopped by the drafters and members of the BTMWG.
9. As a result of these numerous steps to test successive drafts and to obtain expert feedback, the Draft Code has been extensively revised in several stages from Version 5.5 that was circulated in November 2018 - through to this version 9.0. This document provides a summary of the key substantive changes that have been applied to the Draft Code as a result of stakeholder and expert contribution. It also identifies the main categories of suggestions that were not incorporated into the Draft Code – for a range of reasons.

Diverse views

10. It is important to note that no voluntary Code intended to apply to a diverse industry will ever have 100% agreement by all stakeholders to the content and style. Any such Code must inevitably balance a number of sometimes competing objectives such as:
 - a. The tension between consumer-friendly, accessible language and using industry-familiar terms;
 - b. The tension between keeping the Code succinct, yet providing enough explanation and detail;
 - c. The need to explain the interaction with other forms of regulation, yet avoid repeating provisions that belong elsewhere;
 - d. The desire to use principles-based obligations to allow for different scenarios, yet make it easy for signatories (often very small businesses) to know how to comply; and
 - e. The need to choose terms and language that can apply to a wide range of technologies, yet be descriptive enough to make sense.
11. In some cases, there are more fundamental conflicts of interest where a proposed consumer protection may have significant consequences for some business models and practices. These are not a question of careful drafting, rather they are important policy choices that must be made.

Results of feedback

12. A significant number of changes were **accepted** and made to version 9.0 of the Draft Code as a result of the feedback and advice received. Some resulted in changes to the structure and presentation, some in a series of key themes that were reflected in multiple places in the document and many were detail changes that have improved the flow and operation of particular sections. These are discussed in sections below.
13. Some suggested changes were **not accepted** – for a range of reasons. A few key issues were judged to be broader than the scope of a voluntary Code and are to be referred to COAG Energy Council as matters more appropriately dealt with by law or regulation. Inevitably, many were at odds with other feedback and a judgement was made by the BTMWG to go one way or the other. Some were matters of design choices – the drafters trying to strike the right balance amongst many competing pressures.
14. Many suggestions were recognised as important, but for practical purposes, identified as issues that should be taken up in **supplementary material** to be approved by the Code Administrator – rather than as part of the main Code – these are discussed below.

Next steps

15. The timeline for moving the Draft Code through to its next stage is very tight. The key steps are:
 - a. Review of version 9.0 of the Draft Code by the BTMWG and its networks – *by March 5th*
 - b. Any final changes/refinements (matters not previously considered) – complete for circulation to BTMWG – *by March 8th*
 - c. Energy Markets Transformation Project Team (EMTPT) review of package – *by March 15th*
 - d. Final submission of the Code and explanatory communications to COAG Energy Council – *by April 1st*
 - e. Submission of the Draft Code to the ACCC for approval – *by end April*

Accepted changes

Structure and presentation

16. In response to stakeholder reaction, the overview section of the draft Code, Part A, has been drastically simplified and presented largely as a consumer-facing infographic representing the key steps in the customer 'journey'.
17. In response to stakeholder reaction, Part B, which is the detail of the practice obligations, has been re-written:
 - a. to more closely follow the customer journey and provide a visual link to the infographic;
 - b. to make the language more clearly technology-neutral (and further from some of its original drafting roots as a Solar/PV Retailer Code);
 - c. to better accommodate DER services (rather than just products or systems); and
 - d. to improve consistency and (hopefully) readability.
18. Definitions have now been moved to Part C.
19. Provisions governing the administration of the Code have been moved into an Annexure. The intention is to better distinguish the customer-facing language in Part A and B, (expressed as promises from "we" the signatory, to "you" the customer) from the language needed for Code administration (mostly between the Administrator and the signatory) which is in the Annexure.

Content changes by theme

20. Hundreds of detail changes have been made to the Code over the past three months in response to stakeholder input, most of which fall into some key themes, set out below.
 - a. This sector is in a state of rapid change and innovation and a number of obligations were redefined to allow for greater flexibility and to recognise that what is **good practice may not yet be clear**.
 - b. The proliferation of different technologies and offerings meant that a number of **definitions required refining** to allow for new and emerging aspects of the environment.
 - c. The sector has a widening range of participants who play different roles in delivering products, systems and services to customers. Some clauses needed to be rewritten to **accommodate the sector's diversity**.
 - d. A number of terms that are familiar to industry were identified as being unhelpful for customers without the same background knowledge and have been replaced with **simpler language** (not least of which are "Behind the Meter" and "Distributed Energy Resources").
 - e. In a number of places, **additional consumer protections** have been added in order to meet expectations of the COAG Energy Council and of consumer advocates (eg. finance, complaint-handling and vulnerable customers).
 - f. In other areas, changes have been made to make it **easier for signatories to know when they will be complying** and to avoid setting tests that in practice, are difficult to define.
21. Attachment A provides a tabular summary of the key content changes that have been made as a result of all of the stakeholder and expert inputs.

Not accepted

Out of scope

22. A number of significant issues were raised by stakeholder in the course of consultations that could not be accepted and included in the Code – because they were beyond its scope. These issues included aspects of off-grid provision of DER, collective purchases of a single DER product such as a microgrid, concerns over phoenixing activity, problems raised with the conduct and responsiveness of large electricity providers, perceived gaps in the existing legal and regulatory framework, protection for industrial and commercial (larger-scale) DER provision, pricing and safety practices that are regulated by governments and so on.
23. Other issues raised were considered to be valuable but would require coordinating action from governments or other parts of the sector. One example was providing access to energy Ombudsmen services (as applies in the established energy retail markets). This would require enabling legislative amendment in most jurisdictions and resolution of funding issues.
24. The BTM Working Group has prepared a letter setting out many of these issues and referring them for consideration by the COAG Energy Council.

Code style

25. A number of submissions and suggestions came from industry, asking for greater definition of what should be required of signatories to demonstrate compliance. In particular, concerns were raised that terms such as 'reasonable' or 'good practice' are open to different interpretations and could result in inadvertent breaches or create disagreements with customers or the Code Administrator.

Some of these suggestions were adopted, in part, but many could not be applied while keeping faith with the objective of a simple, customer-friendly Code and the objective of flexible provisions that would apply to all products and services in the DER space.

The outcome for many of these suggestions will be for referral to the Code Administrator to incorporate, to the extent possible, into supplementary materials such as Standards, Guidelines and non-binding guidance.

26. Similarly, the BTMWG received requests for cross-referencing within the Code to the relevant sections of related government regulations and standards. The working group took the view that this would be contrary to the intended spirit of the Code and would add a significant continuing workload in maintaining the accuracy of the cross-references. A possible resolution would be for the Code Administrator to publish a cross-reference guide from time to time as an aid to Signatories.

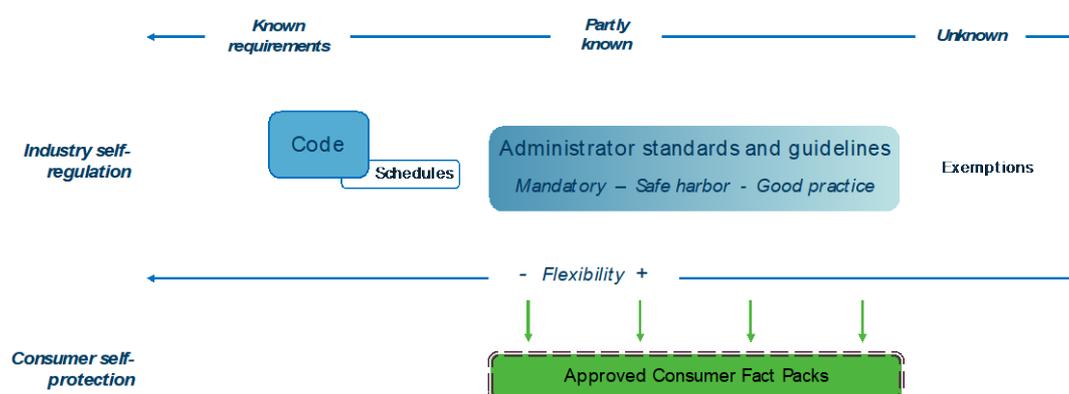
Code reach and enforcement

27. Some of the feedback received proposed standards of consumer protection that are beyond common standards in other sectors – for example outright bans on unsolicited selling. The BTM Working Group took the view that a voluntary code of conduct in what is a fledgling industry needs to balance the need for encouraging take-up by signatories with the aim of raising standards. This would mean that in some areas, it is not reasonable to expect the Code to be 'out in front' of community standards.
28. Similarly, the BTMWG received a great deal of feedback calling for robust sanctions to be applied to those found breaching the Code. Some of this reflected frustration at what is seen as weak enforcement by energy and consumer regulators generally and some reflects a misconception of what can be expected of a voluntary industry Code. The Code provides the Administrator and Panel with the powers appropriate to a voluntary Code, but they are much more limited than those available to legal regulation.

Supplementary material

29. Although there was widespread expectation during the early stages of the development of the Code of a significant need for ‘technical schedules’, this has proved to be significantly less than anticipated. Many issues raised were able to be accommodated sufficiently in the body of the Code, often with a minor change or a few additional words.

Many issues will be more appropriately dealt with in supplementary materials and the following diagram illustrates the range of types of materials envisaged. The left hand side of the diagram is for obligations that are well-known and need the lowest levels of flexibility and as the you move to the right, the issues being dealt with become progressively less well known and require more flexibility in application.



30. The stakeholder and expert forums illustrated a range of needs for supplementary materials that Administrator standards and guidance could address in a number of ways:

- a. Technology-specific requirements could be drafted by relevant experts and included as Schedules to the Code.

There are a couple of disadvantages associated with this course of action. First, the Code could not be finalised and submitted to the ACCC until these Schedules are completed. Second, any change to a Schedule to the Code would require ACCC approval (a process that may take 9 – 12 months). Technical experts consulted thought that this approach was not optimal, given the rapidly-changing nature of this industry.

- b. Mandatory Standards can be made by the Administrator in conjunction with industry.

The Administrator has a power to develop written standards that are binding upon Signatories (para 13 and 26 of Annexure and paragraph 55 of Part B). Where this is done, the Administrator has to publish the Mandatory Standards on its website and give Signatories at least 3 months' notice of the new requirements.

- c. 'Safe harbour' guidelines can be made by the Administrator.

The Administrator also has the power to prepare guidelines (para 13 of the Code Annexure). These can set out a method of complying with a particular Code provision – on the basis that other methods are potentially available to Signatories, but if followed, the Signatory has certainty that they have complied with the Code.

- d. Non-binding guidance materials can be prepared by the Administrator to assist Signatories

This would not be binding on Signatories. It would be in the nature of a service provided to assist Signatories. For example, the Administrator could develop standard form contracts that Signatories could use or suggestions for good practice with particular types of services or installations.

e. Exemptions can be provided by the Administrator

As a safeguard against unintended consequences and to encourage innovation and experimentation, the Administrator can be empowered to issue exemptions – to aspects of the Code and any subsidiary mandatory requirements. These may be for a limited period of time, for example to permit a pilot project or trial.

f. Customer Fact Packs

Stakeholder and technical expert forums identified the need for customer warnings or educative material. Customer Fact Packs, approved by the Administrator are seen as the vehicle for this, which will generally be compulsory for Signatory providers to supply to their customers.

As noted in V 9.0 of the Draft Code, the Administrator may choose to publish supplementary materials in any combination of the above categories. A Guideline for (say) battery storage may incorporate mandatory elements alongside safe-harbour guidelines and non-binding suggestions for good practice.

31. Understandably, much of the technical input received related to the better-established products, systems and services. We expect that with the passage of time, additional categories will need to be added to include such things as biomass generation, wind, hydro and mini-hydro, non-battery energy storage, engine-driven generation such as gas turbines and diesel, fuel cells and other emerging forms of DER.
32. The following table illustrates examples of supplementary materials that stakeholders and technical experts identified a need for.

Technology/offering	Issue for supplementary material
Across all	1. Identify and prohibit particular problematic high-pressure sales tactics – in response to intelligence from the market
	2. Prepare consumer Fact Pack explaining disposal of system in an ethical manner at end-of-life
	3. Publish general compliance policy providing assistance for Signatories as to how the Administrator will approach monitoring and investigating complaints
SolarPV	4. Publish guidance list of reputable sources for Solar/PV performance
	5. Guidance for factors to be dealt with in site-specific design/plan
	6. Identify accreditation/qualifications required for installers
	7. Identify training required for installers – eg. working from heights, privacy for customer data
Energy storage	8. Publish Guidelines and consumer Fact Pack for battery usable performance information, load profile assessment, standardisation of key definitions

	9. May need guidance/exemptions for pricing uncertainty for some components subject to rapid change
	10. Guidance needed for warranty – usage parameters must include energy throughput, cycles, depth of discharge, etc
	11. Guidance needed for performance monitoring/measurement
VPPs & Microgrids	12. Consumer Fact Pack needed
	13. Code requirement for warning as to uncertainty of returns/benefits is OK for now, but may need Administrator guidance depending on what customer issues emerge with experience
	14. Once data capabilities established, may need guidance for obligation on provider to alert customer to any problems suggested by data analysis
	15. Should develop good practice procedures for protecting customer data at end of contract
Electric vehicle charging	16. Consumer Fact Pack needed
	17. Guidance for factors to be dealt with in site-specific design/plan
Demand management/ response, HEM	18. Standardised contracts may be of benefit
	19. Generally warranty is not an issue for a service, but some offers include hardware and software, may need guidance
	20. Guidance re: service downtimes, software upgrades
	21. May need some guidance for Signatory response to any evidence of tampering by customer
	22. Some guidance may be needed for premises changing hands

Attachment A

The following is a summary of substantive changes made since Version 5.5.

V 9.0 Location	Impetus for change	Summary
Part A	BTMWG & submissions	Simpler overview with infographics
Para 1a.	Technical forum	Must not mislead re: non-government incentives (not just government incentives)
Para 1d.	BTMWG	Advertising and promotion to avoid use of industry jargon
Para 4	COAG, submissions	Take extra care with vulnerable consumers
Para 5 & 6	COAG, BTMWG	Clear upfront obligation to ask about needs and circumstances and ensure products/ services fit for purpose
Para 6	Technical forum	Fit for purpose obligation includes ensuring compatibility with other DER products, systems or services
Para 7b.	Technical forum, BTMWG workshop	Need better definition to allow for different 'through the meter' scenarios – eg. demand response control by service providers, feed-in controls
Para 7d.	COAG requirement, Technical forum, submissions	Quote must make it clear what obligations are on the customer to facilitate operation of service
Para 7e.	COAG requirement	Quote must make product/ service limitations clear
Para 7f.	Technical forum, submissions	Performance estimate must be reasonably based (given that reputable objective data may not exist for some new products/ services)
Para 7g.	Technical forum, submissions	Disclosure must be made to the customer that their energy retailer may impose restrictions on the extent to which the customer can interact with the grid eg. limiting ability to feed-in
Para 7h.	Technical forum	More certainty to be provided to customers as to timeframe for installation
Para 9	Technical forum, submissions	Obligation to specify energy pricing only applies where energy is provided as a DER, not by network supply Also to allow flexibility in estimated cost for PPAs with variable economics
Para 12	Technical forum, BTMWG workshop	Disclosure must be made of costs associated with software upgrades
Para 13	BTMWG	ROI claim must be based on reasonable assumptions and these must be set out in quote
Para 14	Technical forum	Where offer involves payment/ offset to customer, quote must specify how this will be determined, rights to vary price, frequency of payments
Para 17	BTMWG workshop, submissions	Disclosure must be made of fees for connecting to the grid and that energy provider may impose a fee for reconfiguring the customer's meter
Para 20	Submissions	Correction to 3 rd line forcing reference in Act
Para 24b.	BTMWG workshop	Credit contract or consumer lease must not be for a longer period than expected life of product or system

Para 25.	Technical forum	Exception from licensing obligation for government financier
Para 26b.	BTMWG, submissions	Exception from licensing obligation for a PPA provider
Para 27	Technical forum	If contract requires payment/ offset to the customer, this must be done on time as per contract. If payments are calculated using an undisclosed formula, our payment calculation system must be regularly audited by a registered company auditor to ensure that payments are accurately calculated.
Para 29	Technical forum, BTMWG workshop	Have specified that installation must be by an installer qualified to undertake the work
Para 30-32	BTMWG workshop	Refine words to accommodate different meter activities
Para 33	BTMWG	Addresses activation of a product/ service other than by connecting to Grid and allocates responsibilities
Para 34a.	Technical forum	Advice prior to the time product/ services ready to commence must include how to optimise the product/ service
Para 34b.	Technical forum	Prior to the time product/ services are ready to commence, provider must explain customer's obligations - eg to maintain an internet connection that provider can access
Para 34c.	Technical forum	Advice about how to utilise product/ service – now encompasses possibilities that better cater for range of products/ services
Para 34c. & 35c.	Technical forum	Advice as to how to assess benefit may be a commitment to provide regular reports quantifying benefit in which case these must be provided.
Para 35	BTMWG, BTMWG workshop	Performance obligations – services must be provided with due care and skill, ICT-enabled products and systems must be secure
Para 36	Technical forum	Recall obligation where become aware that product is defective or unsafe
Para 37	Technical forum	Provider who uses customer's other equipment must do so in a way that is consistent with the equipment manufacturer's instructions and warranty requirements
Para 38	Technical forum	Sale of premises provision – purchaser of premises can substitute into a contract with lock in provision unless reasonable basis for provider to refuse to this
Para 39	Technical forum	Warranty provision better encompasses services by referring to provision of compensation
Para 46	Technical forum	Code should begin with positive commitment to good customer service – before dealing with complaints, warranty etc
Para 48	BTMWG, submissions	Complaints obligations expressly stated – fair and timely resolution of complaints
Para 50	Technical forum, submissions	Provider obligation to keep customer's data safe and only to use data for permitted purpose Express consent must be obtained from the customer if the provider wants to supply customer's data to a third party (eg inform a product retailer of a customer with an inefficient appliance)
Para 50	BTMWG	All providers (even if not caught by Privacy Act) must keep customer personal info secure and only use customer personal info for intended purpose or with consent
Para 56	BTMWG	Provider is responsible for third party marketeers

Para 56	Technical forum	Provider is responsible for installer if provider engages the installer
Part C definition of DER products, systems and services	Technical forum	The definition includes a service that manages or monitors a customer's usage of grid-delivered energy
Part C definition of customer	BTMWG workshop	Includes the operator of a retirement village
Part C definition of small business	BMTWG	Small business definition – uses ABS definition - now less than 20 people
Annex paras 1 to 3	BTMWG workshop	Replicates MOU principles and provides a summary of roles of each participant in governance and administration of the Code
Annex para 5b	BTMWG, technical forums	Application process to act as a limitation on phoenixing in the sector
Annex para 7	BTMWG, submissions	Specify the fee principles for transparency
Annex para 8	BTMWG, submissions	Reasonable notification of fee changes
Annex para 12	Technical forum, submissions	Administrator power to provide an exemption – could be used to allow 'sandboxing' for new offerings - ie without full compliance
Annex paras 17 & 21	BTMWG, submissions	More express sanctioning powers for Administrator and Panel