

Social Access Solar Gardens: Legal Report

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Commonly used acronyms

Acronym	Definition
NRF	Norton Rose Fulbright
ISF	Institute of Sustainable Futures
CPA	Community Power Agency
SASG	Social Access Solar Garden
AFSL	Ergon Retail
AER	Australian Energy Regulator
MW	megawatt
CNL	Cooperatives National Law
CEG	Community Energy Group

1 Executive Summary

1.1 Objectives and activities of SASG

Each Social Access Solar Garden (**SASG**) is an enterprise bringing together community groups, retailers, solar developers and community customers and members to develop solar farms between 100kW to 5 MW in capacity across Queensland, New South Wales and Victoria.

Each SASG has the following key project objectives:

- (1) provide customers or members with electricity equivalent to the output from their share of the SASG, as a credit on their electricity bills;
- (2) enable community participation in solar for those households that are not able to install solar on their roofs; and
- (3) create a sustainable, replicable model or models that will facilitate future projects.

Based on information provided to us by ISF and CPA, to meet these objectives we understand the core activities of SASG are to:

- (1) raise sufficient capital or finance to develop solar farms (with funding sources from members and potential external funding from commercial or alternative sources e.g. grants, loans);
- (2) distribute benefits to their members (in the form of credits on electricity bills); and
- (3) enable participation from low income consumers, renters and apartment dwellers (whether self-funded or via funding support from independent third parties).

1.2 Aims of this report

To achieve this purpose, this report assists project groups seeking to establish a SASG to determine the most appropriate legal forms for the SASG business models. It addresses:

- (1) different legal structure options that may be used as membership vehicle, management vehicle and / or project development vehicles;
- (2) an overview of the legal, regulatory and commercial landscape relevant to the model; and
- (3) further issues for SASG project groups to consider, including aggregation and electricity benefit arrangements.

1.3 Options and assessment of legal forms

In assessing what legal form might be appropriate in the context of the SASG business models we have sought to identify the most relevant criteria on which that assessment is made:

- (1) **Key Project Objectives** – how effectively can each structure meet the project objectives and deliver the core activities for that vehicle?
- (2) **Legal Considerations** – what legal restrictions, obligations or requirements need to be taken into account?

- (3) **Practical and Commercial Considerations** – what broader factors may influence implementation?

Within each criteria, project groups will need to assess the priority given to each of the key objectives both in terms of the weighting given to a specific criteria but also providing guidance where criteria may be in competition or contradiction.

1.4 Key conclusions

Based on our discussions with ISF and CPA we have not sought to find a one size fits all model.

However, we expect that in many cases the **co-operative** legal form may be the most appropriate model for the membership based vehicle as:

- (1) its facilitates community participation in project delivery;
- (2) it has relatively low regulation and establishment costs; and
- (3) it can be scaled for larger projects (in the context of the range of projects to be undertaken).

However, it should be noted that undertaking aspects of the SASG projects require sophisticated specialist skills. In this respect, we note that the advantages of a co-operative may be best achieved when complemented by having a management entity that can provide services and expertise to the community vehicle.

The corporate form of any management entity is potentially less of an issue. Depending on the form of assistance, it could be a company limited by guarantee if the intention was that it is created on a not for profit basis.

In other circumstances a public company (limited by shares) may be as or more appropriate. The public company is particularly attractive under an aggregation model, where multiple smaller SASGs could raise funds under a larger SASG entity. We address the benefits and limitations of the public company throughout this report.

While we note that there are examples of co-operative based entities operating in the sector, this is a relatively little understood corporate form for counterparties, other than those used to operating in the community sector, and the more commercially orientated a projects aims to be, the more suitable a public company form may become.

A trust structure, while potentially flexible in certain circumstances, will likely fall under the managed investment scheme (**MIS**) regulations. This will expose the structure to high establishment and ongoing costs of establishment, operation, administration and regulatory compliance and we do not recommend this be considered.

1.5 SASG in context

SASG is an innovative new business model in the social enterprise and energy sectors. The practical reality of establishing and implementing SASG projects is that the more unusual the model, the more difficult it may be to seek professional advice and comply with regulatory requirements.


We aim to establish a framework for project groups to navigate. Amongst other legal issues, we do not consider:

- (1) tax advice;
- (2) insurance requirements;
- (3) impacts for any other entities or third parties besides the project development vehicle and membership vehicle; and
- (4) the business question of can the SASG efficiently and economically deliver the anticipated electricity bill discounts to sufficient households.

This report is general information only provided for the purpose described above, it is not legal advice and we do not address legal issues beyond the above scope. SASG groups should seek their own legal, tax and accounting advice specific to their own objectives, circumstances and needs.

1.6 Legal assessment: Summary

 = less favourable, difficult to implement, high cost, does not meet criteria

 = somewhat favourable, possible to implement, some costs, meets some criteria

 = favourable, easier to implement, lower cost, meets most criteria

	Private Company (limited by shares)	Public Company (Unlisted, limited by shares)	Co-operative (trading / distributing)	Managed Investment Scheme (Unlisted Unit Trust)
Summary				
Key Project objectives	A companies' overall purpose of profit maximisation and shareholder voting may conflict with community driven objectives and engagement although this could be managed via express provisions in the company constitution	A companies' overall purpose of profit maximisation and shareholder voting may conflict with community driven objectives and engagement although this could be managed via express provisions in the company constitution	Co-operatives are established to benefit their members, therefore the co-operative structure is aligned to social enterprise objectives. It could maximise community engagement & participation to meet the needs of members.	MIS' overall purpose of profit and net asset value maximisation and unitholder voting may conflict with community driven objectives and engagement although this could be managed via express provisions in the constitution trust.
Legal considerations	Minimum member risk however 50 member cap makes structure less feasible. Transferability makes investor buy-in/exit easy No AFSL is required*	Minimum member risk, however, requires larger member base. Directors are subject to greater accountability to members and must be at least 3 directors. No AFSL is required*	Generally favourable legal considerations with the least constraints and compliance burdens. Minimum of 5 members Transferability is usually subject to board approval to ensure shares can only be acquired by "active members", its aligned values. No AFSL is required*	Most costly and highest initial and ongoing regulatory burden. Responsible entities are subject to significant regulatory duties and accountability to unitholders AFSL is required*
Practical and commercial considerations	Minimum member risk however 50 member cap makes structure less feasible. Transferability makes investor buy-in/exit easy Establishment and ongoing	Minimum risk, however, requires larger member base. Directors are subject to greater accountability to members. Establishment and ongoing	Generally favourable legal considerations with the least constraints and compliance burdens. Transferability is usually subject to board approval to ensure transferee	Most costly and highest regulatory burden. Responsible entities are subject to significant regulatory duties and

	Private Company (limited by shares)	Public Company (Unlisted, limited by shares)	Co-operative (trading / distributing)	Managed Investment Scheme (Unlisted Unit Trust)
	compliance costs.	compliance costs can be material	<p>meet relevant eligibility criteria. Non “active” membership is cancelled.</p> <p>Least establishment and ongoing compliance costs</p> <p>Potentially some lack of understanding of legal structure outside of community players.</p> <p>Legislation/constituent documents can be flexible enough to manage issues</p>	<p>accountability to unitholders.</p> <p>Significant establishment and ongoing compliance costs.</p>

* AFSL issues for the management company do not arise for any structure except for the MIS. AFSL issues for the project development vehicle do not arise if it only enters into a single PPA. If more than one PPA is entered into then an AFSL exemption may be required and must be considered on a case by case basis. The usual exemption is to engage a third party licensee (for a fee) under which it appoints the SPV as its corporate representative for the purposes of the execution for the PPA – see section 7.1 below.

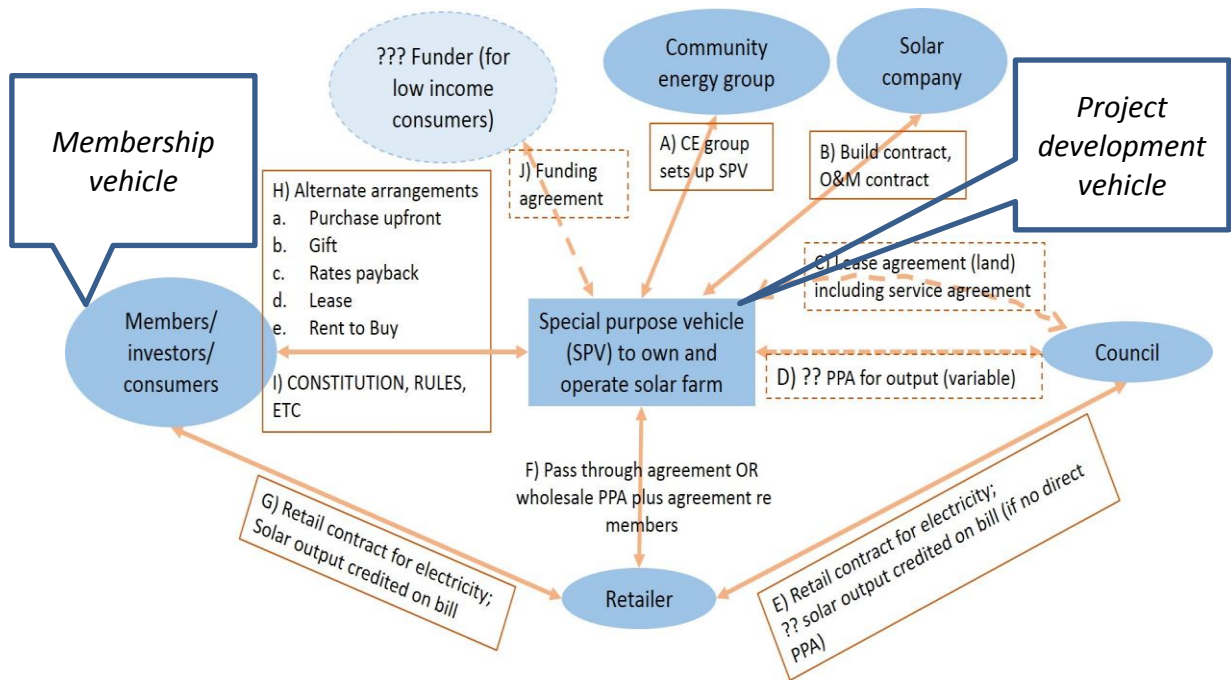
1.7 Member Participation

This table analyses preferred legal form for the membership vehicle against a range of priority aims and notes risks and further considerations. In any particular case, the final decision on legal structure will depend on the core aims and objectives of the particular SASG business model and group.

Priority aim	Most suitable legal form	Rationale	Risks	Other considerations
Fund raising (equity from members and other funding)	Public company and co-operative structure if other non-equity and non-bank funding required is available	Public company <ul style="list-style-type: none"> - simple, common legal form, easy to raise funds - flexible, transparent Co-operatives <ul style="list-style-type: none"> - recent examples of raising significant funding - availability of funding mechanisms such as CCUs 	Disclosure requirements are costly but may be overcome through scale and crowd sourced funding	High establishment and compliance costs for small community groups / projects
Community participation	Co-operative	<ul style="list-style-type: none"> - one member one vote principle aligns with community participation model - active membership - can have localised eligibility if desired - participatory governance 	May be harder to raise capital / debt from outside of community sector Can be risk of vocal minority getting greater ability to influence decision-making given democratic process	Less flexible / commercial than public companies
Electricity bill benefit	Public company, co-operative	<ul style="list-style-type: none"> - customer / investor interface with retailer - eligibility, share class 	Solvency risks if co-operative	Retailer to offer white label electricity product beyond investment members to the broader community
Scalability, replicability	Public company or co-operative group	<ul style="list-style-type: none"> - aggregate investment platform for local groups - economies of scale for an overarching vehicle 	Liability for sub-groups passed through to umbrella entity	Aggregator platform may have less local investment priority
Develop solar farm with third parties	Public company	<ul style="list-style-type: none"> - simple contractual interface, commercial - Less risk for counterpart 	Development risk sits with members	Credit / default risk Partner with existing developers

2 Commercial features of each SASG business model

Note: The information in this section has been provided by ISF and CPA and summarised by NRF.



2.1 Community-led SASG business model

- (1) Features of a Community-led SASG business model include:
 - (a) led by community energy group or council (**CEG**);
 - (b) CEG facilitates the establishment of a special purpose vehicle (**SPV**), capital raising and / or owns and develops solar farm;
 - (c) CEG designs SASG to pass through benefit to customers via electricity bill with nominated retailer;
 - (d) CEG makes arrangements for nominated retailer to on-sell SASG energy output to customers; and
 - (e) customers must be participants in the capital raising scheme.
- (2) Groups pursuing a Community-led model include:
 - (a) Shoalhaven; and
 - (b) potentially Blacktown and Swan Hill.

(3) Roles and parties in Community-led SASG business model

Role	Party
Developer	CEG
Customer relationship	Upfront payment for share of farm; gifted; lease, rates payback, rent to buy
Owner	CEG-owned SPV
Operator	CEG-owned SPV
Bill provider	Nominated retailer
PPA counterparty	Nominated retailer and/or council

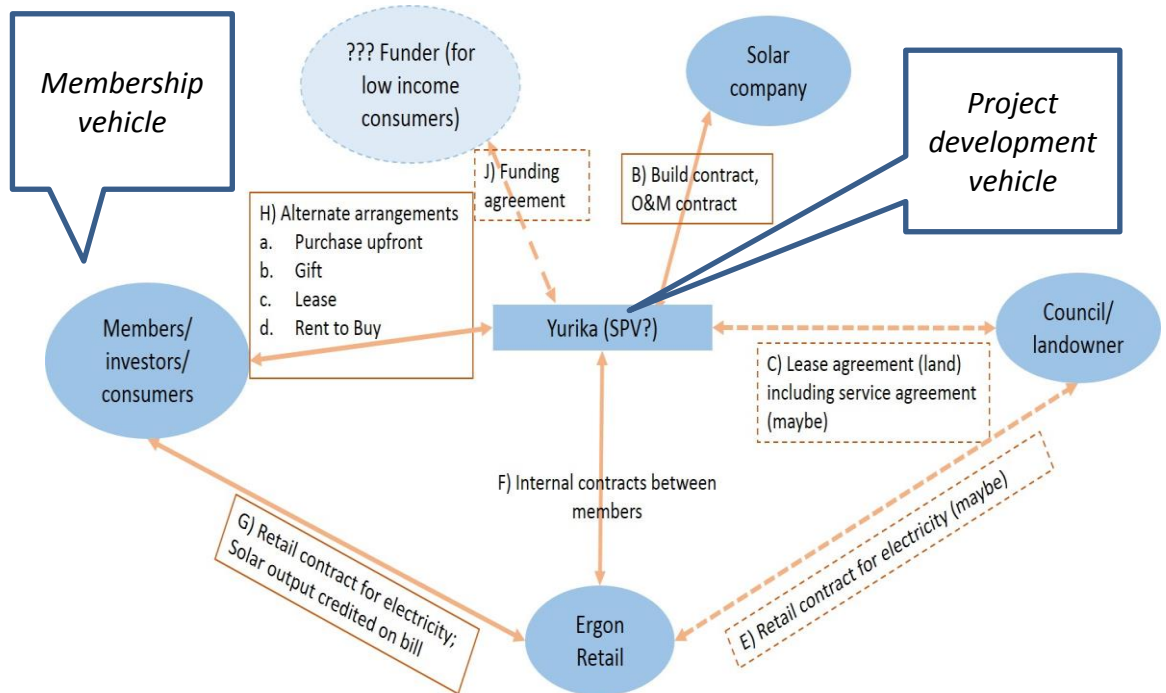
Additional roles may include:

- **Solar company:** to build, operate and maintain solar farm;
- **Council:** to provide land, PPA counterparty, underwriter;
- **Funder:** to support investment for low income households; and/or
- **Customers:** to participate as members, owners, leaseholders.

Note on management entity: We note that under the community-led SASG business model, the CEG could play a management role to facilitate the transaction, while not providing any financial advice, making the fund raising offer or developing the solar farm itself. A services agreement or arrangement could be documented between the CEG / management entity and the membership vehicle or capital raising vehicle to formalise this relationship.

The CEG / management entity may take any legal form and, while it may be a not for profit (i.e. incorporated association or public company limited by guarantee), this is not a requirement. It is assumed that this CEG / management entity may already exist as a community group.

2.2 Retailer-led SASG business model



- (1) Features of a Retailer-led SASG business model include:
 - (a) led by retailer or its development arm;
 - (b) Retailer (or third party) (directly or indirectly) facilitating any capital raising;
 - (c) Retailer (directly or indirectly) owning and developing a solar farm
 - (d) Retailer designs SASG to pass through benefit to customers via electricity bill;
 - (e) Retailer contracting with development arm to on-sell SASG energy output to customers; and
 - (f) Customers are participants in the capital raising scheme.
- (2) Groups pursuing Retailer-led model:
 - (a) Queensland; and
 - (b) potentially Blacktown and Swan Hill

(3) Roles and parties in Retail-led SASG business model

Role	Party
Developer	Yurika
Customer relationship	Upfront payment for share of farm; gifted; lease
Owner	EQ (Yurika) or subsidiary
Operator	Yurika
Bill provider	Ergon Retail
PPA counterparty	Energy Queensland (Gentailer)

Additional roles may include:

- **Solar company:** to build, operate and maintain solar farm;
- **Council:** to provide land, PPA counterparty, underwriter;
- **Funder:** to support investment for low income households; and/or
- **Customers:** to participate as members, owners, leaseholders

3 Overview of potential legal forms for SASG vehicles

3.1 Overview

Key Considerations:

There are three potential alternative legal forms for the relevant vehicle:

- (a) **Public company (unlisted) (established under the Corporations Act);**
- (b) **Private company (established under the Corporations Act); and**
- (c) **Co-operative (established under the Co-operatives National Law).**

Each potential legal form may be used under either the Community-led and Retailer-led vehicle. The managed investment scheme (MIS) is also considered as a structure that may be used but has a high regulatory and administrative burden and is not recommended for SASG.

This section (and the following sections) considers two questions:

- (1) What legal form should the SASG project development vehicle take?
- (2) What legal form should the membership vehicle to the SASG take?

3.2 Key questions in the legal assessment

- (1) Can the key project objectives be achieved?

e.g. does it facilitate bill credits for customers, community participation or a replicable model for future projects?
- (2) What legal considerations apply depending on the form?

e.g. what are the restrictions on the number of members; what are the regulatory requirements for the proposed activities
- (3) What are the practical consequences arising from a form?

e.g. complexity and cost, balance of community participation and efficient decision making

3.3 Structural considerations

It may be possible for the membership vehicle and the project development vehicle to be the same vehicle, however for the administrative, practical and risk / liability reasons set out in this report, it is recommended that separate vehicles are established to deliver its respective objectives.

- (1) Membership vehicle
 - (a) The social enterprise nature of a SASG (based on its key project objectives) suggest that the corporate or managed investment scheme legal forms (both of which are generally for profit legal forms) may not be a natural fit. The co-operative structure, on the other hand, is more closely aligned to a social enterprise business model.

- (b) Legal restrictions on capital raising or the number of shareholders mean that some corporate forms can't be considered e.g. private companies and companies limited by guarantee.
- (c) The most obvious corporate form for a widely held management/fund raising entity is a public company limited by shares, however establishing and maintaining these vehicles can be expensive and require specialised skills not necessarily common in communities and are better suited to larger projects or as a funder of multiple projects. In this respect, a co-operative may have a lower ongoing administrative cost.
- (d) The most appropriate legal form will need to be determined in the particular circumstances of the SASG business model – for a retailer, it may be easier to have one vehicle that invests in multiple local projects; for a CEG, case-by-case vehicles may be harder to implement and have lower economies of scale.
- (e) The ability to pay or make distributions is an important key issue, particularly as it relates to bill discounts.
- (f) The role of investors/community participants in governance must be considered as public companies, in particular, are not necessarily flexible to allow significant day to day member involvement and split board and shareholder decision-making.
- (g) The chosen SASG membership vehicle must be able to efficiently fund the development of the solar farm at a competitive price to deliver the electricity bill benefits to members.

(2) Project development vehicle

- (a) Typically, the Project development vehicle will be a private company SPV.
- (b) A 'clean' vehicle (i.e. without liabilities unrelated to the project) will usually be needed to obtain external debt financing. This may be important depending on the size of the project.
- (c) An SPV will usually be a wholly-owned subsidiary at arm's length to its parent (in this case likely the membership vehicle) – typically with a higher credit rating than the SPV itself.
- (d) The legal relationship between the membership vehicle and the Project development vehicle will need to be considered – including whether the membership vehicle will contribute its capital via equity or debt and the way that funds will flow between the vehicles.

4 Legal assessment of business models

4.1 Overview





Key Considerations:

We provide an assessment of the different legal forms against criteria that project teams will need to take into account:

- (1) **Key Project Objectives** – how effectively can each structure meet the key project objectives and business model requirements for that vehicle?
- (2) **Legal Considerations** – what legal parameters need to be taken into account?
- (3) **Practical and Commercial Considerations** – what broader factors may influence implementation?

To choose the most appropriate legal form, each project team must undergo a process to take into account the particular circumstances and objectives of each project and the business model adopted.

This section will provide a matrix-style assessment of each of the business models against the criteria above, as explained on the following page, and are indicative only. Each legal structure is assessed against the criteria using the following key:



	= less favourable, difficult to implement, high cost, does not meet criteria
	= somewhat favourable, possible to implement, some costs, meets some criteria
	= favourable, easier to implement, lower cost, meets most criteria
	= priority aim for project teams to consider against SASG business model

4.2 Explanation


- (1) Key Project Objectives
 - (a) **Community involvement** means the ability and extent that individuals from the community can participate in the activities and decision making of the given structure.
 - (b) **Primary benefit** refers to the intended financial and non-financial benefit derived from members of the given structure, and its compatibility with the project's purpose.
 - (c) **Purpose** means the underlying objective by which the given structure conducts its activities.
 - (d) **Fund raising** means the availability of, and access to, funds from members and third parties.
- (2) Legal Considerations


- (a) **Risk and liability** refers to potential losses for members and other stakeholders.
 - (b) **Legal constraints** refers to any limitations on the entity including size and investment thresholds.
 - (c) **Compliance and regulatory burden** means the costs (financial and non-financial) of complying with the relevant legal and regulatory requirements.
 - (d) **Governance** refers to the management and control of the relevant structure including voting rights and decision making abilities.
 - (e) **Transferability** refers to the ability to buy-in to, or exit from, the relevant structure.
- (3) Practical and Commercial Considerations
- (a) **Scalability** refers to the benefits derived from increasing size and scale of the relevant structure.
 - (b) **Replicability** means the practical capability of the relevant structure being used by other projects.
 - (c) **Debt financing** refers to the ease of attracting debt financing.
 - (d) **Administrative costs** means establishments and on-going costs required of the relevant structure.
 - (e) **Ease of issuing dividends / converting to bill discounts** refers to the ability to issue dividends (whether as either cash, or a bill discount such as a rebate).

4.3 Legal assessment: Key Project Objectives

	Private Company (limited by shares)	Public Company (Unlisted, limited by shares)	Co-operative (trading / distributing)	Managed Investment Scheme (Unlisted Unit Trust)
Key Project Objectives				
Community participation 	Passive via shareholdings	Passive via shareholdings	Active member participation Democratic nature	Passive via unitholdings (voting)
Primary benefit	Profit, dividends, capital returns	Profit, dividends, capital returns	Community involvement through one vote one member Can be used to make distributions if distributing co-operative	Profit, distributions, capital returns by unitholdings
Purpose	Shareholder value maximisation ('profit over purpose')	Shareholder value maximisation ('profit over purpose')	Flexible (as per co-operatives defined objectives)	Net asset value maximisation ('profit over purpose')
Member fund raising 	Restricted to 50 members	Virtually 'unlimited' access to public funds	Virtually unlimited access to members; 1 vote per member irrespective of share holding	Units in a MIS can be issued to members of the public, if the scheme constitution allows.
Replicable model	Holding company structure may hold subsidiaries, funds flow via shareholder loans or equity	Easily replicable, share classes, share offer to raise funds. Public holding company structure may hold subsidiaries, funds flow via shareholder loans or equity. Can be used to fund other SASG	Suited to local model, co-operative 'group' subsidiaries to other co-ops	Due to the high establishment and ongoing cost, it is only most cost effective when scaled and replicated




4.4 Legal assessment: Legal considerations

	Private Company	Public Company (Unlisted, limited by shares)	Co-operative (trading / distributing)	Managed Investment Scheme (Unlisted Unit Trust)
Legal Considerations				
Risk and Liability	Limited to shareholdings	Limited to shareholdings	Limited to shareholdings	Limited to unitholdings
Legal constraints (size, investment thresholds)	Maximum 50 non-employee shareholder limit	No membership limit	Minimum 5 proposed members	Minimum 2 unitholders unless specified otherwise in scheme constitution No upper unitholding limit unless specified otherwise in scheme constitution.
Compliance and regulatory burden 	Less costly/onerous obligations (ASIC) Particularly small private companies Need to issue public prospectus prior to equity fund raising No AFSL required*	Reporting, filing and disclosure obligations (ASIC, and APRA for certain companies) Need to issue public prospectus prior to fund raising No AFSL required*	Less costly/onerous obligations (Registrar of Co-Operatives) Need to issue a disclosure document for fund raising but less onerous to produce No AFSL required*	Most costly and highest regulatory burden. Responsible entity, investment manager, custodian and service providers need licence and must comply with AFSL regime. Reporting, filing and disclosure obligations (ASIC) Need to issue Product Disclosure Statement. The responsible entity needs to be registered with AUSTRAC and comply with AML/CTF laws.
Governance (voting rights, decision making)	One vote per share (variable by constitution) Controlled by Board (may be lessened via constitutional mechanisms) Less director limitations	One per share (variable by constitution) Controlled by Board (may be lessened via constitutional mechanisms) Greater director accountability (disclosure,	Democratic (one vote per "active" member) Flexible constitution	Depends on provisions in the scheme constitution, but generally one vote per unit and controlled by Board of the responsible entity of the unit trust.

	Private Company	Public Company (Unlisted, limited by shares)	Co-operative (trading / distributing)	Managed Investment Scheme (Unlisted Unit Trust)
		member approval)		
Transferability (ability to buy-in/exit)	No limitation (constitution may provide director discretion to refuse transfer to non-community based transfers)	No limitation (constitution may provide director discretion to refuse transfer to non-community based transfers)	Transferability on board approval Requirement to refund membership on cancellation, expulsion or resignation.	No limitation unless specified otherwise in scheme constitution.
				

*AFSL issues for the management company do not arise for any structure except for the MIS. AFSL issues for the project development vehicle do not arise if it only enters into a single PPA. If more than one PPA is entered into then an AFSL exemption may be required and must be considered on a case by case basis. The usual exemption is to engage a third party licensee (for a fee) under which it appoints the SPV as its corporate representative for the purposes of the execution for the PPA – see section 7.1 below.

4.5 Legal assessment: Practical and commercial considerations

	Private Company	Public Company (Unlisted, limited by shares)	Co-operative (trading / distributing)	Managed Investment Scheme (Unlisted Unit Trust)
Practical and commercial considerations				
Scalability 	Size limitation (50 member cap)	Economies of scale with size	Potentially more difficult to raise significant amounts, but sufficient ability to raise capital required for the SASG	May be efficient if multiple MISs are intended. One responsible entity can set up multiple MISs.
Debt financing (ease of attracting)	Preferable due to counterparty familiarity (low risk/cost)	Preferable due to counterparty familiarity (low risk/cost)	May have more limited access to financial institutions willing to lend, however, debt terms are available.	Preferable due to counterparty familiarity (low risk/cost)
Administration costs (set up & ongoing) 	Registration, ongoing (annual review, accounting etc.)	Registration, ongoing (annual review, accounting etc.)	Registration	Registration, ongoing administrative costs associated with operation and regulatory compliance (annual review, accounting, asset custody, unitholder registry, etc.) Administration costs associated with AFSL licensing and AFSL and MIS compliance obligations. Also high administrative costs associated with licensing and AML/CTF compliance requirements.
Ease of issuing dividends / converting to bill discounts 	Determined by directors (subject to the Corporations Act)	Determined by directors (subject to the Corporations Act)	Because the aim of a co-operative is to confer a benefit on its members, the community driven benefit is central. In addition, a surplus distribution can be determined and for what purpose distributions may be applied (including retention for co-operative purpose)	Distributions are subject to relevant provisions in the scheme constitution

4.6 Financial services: Summary of licensing requirements and obligations

	Public Company and Private Company	Co-operatives	Managed Investment Schemes (Unit Trust)
Requirement to hold an AFSL	No	No	Yes – responsible entity is required to hold an AFSL that authorises it to operate a MIS. Also, the investment manager and custodian will be required to hold an AFSL with relevant authorisations. It is likely that an SASG wishing to be structured as an MIS will engage third party service providers to perform these roles.
Regulatory obligations as AFSL holder	N/A	N/A	Obligations of responsible entities are set out in Chapter 5C and Chapter 7 of the Corporations Act.
Regulator	ASIC	NSW Office of Fair Trading (or equivalent in each state)	ASIC
Regulatory burden and costs	A relatively high degree of regulatory burden. Not as costly as public company or MIS. Annual financial statements for shareholders.	A relatively high degree of regulatory burden for large co-operatives. Not as costly as public company or MIS. Annual financial reporting to OFT (or equivalent in each state) (large co-operatives subject to same reporting requirements as private companies).	Most heavily regulated and costly – especially if third party service providers are engaged. Third party providers of “responsible entity” services exist. However, if multiple SPVs are intended in the future, this may be more cost efficient
Multiple SPVs (if SASG want to expand and have multiple, separate SASG projects)	Need to incorporate individual companies with own boards.	Multiple co-operatives may create a ‘co-operative group’ as defined in the CNL, where each co-operative member may have up to 5 voting rights in the co-operative group.	One entity with AFSL can be the responsible entity of multiple MISs. One board (that of the responsible entity) has full powers and responsibilities for decision making under the constitution of each MIS. More control if many SPVs are contemplated for the future.

5 Structuring options

5.1 Overview

This section sets out a brief description of the different legal forms that SASG business models may adopt for the membership vehicle and project development vehicle, on the basis of the questions raised under section 3.

5.2 Co-operatives

Description and characteristics

Co-operatives are democratic, member owned organisations where a group of individuals come together to pursue a common purpose, the “primary activity” of the co-operative which benefits members. A co-operative may be operated for profit or not for profit. In the case of a not for profit, they represent a socially responsible form of business enterprise because their focus is not on maximising profits for investors but on maximising benefits through the provision of goods or services to members.

The Co-operatives National Law (“**CNL**”) and Co-operatives National Regulation (“**CNR**”) are currently in force in NSW, Victoria, SA, NT and Tasmania. WA has adopted “consistent co-operative laws” with these legislations. The Qld Cooperatives Act 1997 (Qld) (“**CA**”) and the Cooperatives Regulation 1997 (Qld) (“**CR**”) are substantially similar, noting that there is no categorisation of small and large co-operatives under the CA.

There are certain principles which co-operatives must follow including “voluntary and open membership”; “democratic member control”; and “member economic participation”, leading to distinguishing characteristics:

- (1) active membership requirements (set out in the co-operative’s rules i.e. a requirement for each member to have an electricity account with the nominated retailer);
- (2) 1 vote per member irrespective of shareholdings;
- (3) majority of directors must be members;
- (4) limited transferability of membership / shareholding, with transfer only to occur upon board approval (co-operatives’ mission or purpose may be safeguarded with super majorities);
- (5) refund of the share amount paid by its members when the member resigns or is expelled or has its membership cancelled (the co-operative has one year to make this repayment and may issue debentures or CCUs in satisfaction of the amount if repayment would adversely affect financial position of the co-operative); and
- (6) certain other onerous obligations including the ability to force compulsory loans from its members with special resolution.

Items (4)-(6) in the above may be amended via the constitution of the relevant co-operative with the approval of the applicable regulator, however these characteristics are expressly provided for under the CNL.

It is possible to have a co-operative structured as a:

- (1) distributing co-operative with share capital; or

- (2) non-distributing co-operative without share capital; or
- (3) non-distributing co-operative with share capital.

In a distributing co-operative, members choose what to do with profits – whether distributing among members, reinvesting in the business or giving to the community. A non-distributing co-operative cannot make external distributions, regardless of the purpose. As a membership vehicle, a co-operative could be structured as a distributing co-operative with share capital, where only members would be able to purchase shares and raise capital.

A co-operative is a small co-operative if it satisfies at least 2 of the following subparagraphs:

- (a) the consolidated revenue of the co-operative and the entities it controls (if any) is less than \$8 million for the financial year;
- (b) the value of the consolidated gross assets and the entities it controls (if any) is less than \$4 million at the end of the financial year; or
- (c) the co-operative and the entities it controls (if any) had fewer than 30 employees at the end of the financial year;

and for the financial year the co-operative does not satisfy any of the following conditions:

- (d) it issues shares to more than 20 prospective members during that year and the amount raised in that year by the issue of those shares exceeds \$2 million; or
- (e) it has securities on issue to non-members during that year, other than:
 - (i) shares in the co-operative; and
 - (ii) securities issued in respect of the co-operative's obligations under section 163 of the CNL.

A large co-operative is any co-operative that is not a small co-operative.

Key legal considerations

The co-operative model allocates control rights to active members on the basis of one member one vote irrespective of shareholdings. Whilst this democratic principle may align with community involvement, we note as a practical point that there is a risk with the use of this corporate structure that a group of well-co-ordinated individuals each with minimal or little shareholdings, may come together with the purpose of taking control of the co-operative.

The reporting obligations of the co-operative will depend on the size of the co-operative. Large co-operatives must prepare a financial report and directors' report. They must also have an audit and obtain auditor's report in accordance to Division 3 of Part 2M.3 of the Corporations Act, making large requirements subject to the same reporting requirements as a private company. A small co-operative only needs to prepare a financial report and directors' report if members or the Registrar directs it to do so. Similarly, an audit and obtaining an audited report are only necessary where there is a member direction. Where there is no member direction, the co-operative must prepare the financial statements listed in Regulation 3.10 of the CNR.

Application to SASG

If the membership vehicle takes the form of a distributing co-operative with share capital:

- (1) members of the community would apply to become a member and pay for the minimum allotment of shares pursuant to a regulated disclosure statement (plus any membership fees prescribed by the co-operative rules);
- (2) these monies can be used to fund the development of the solar farm;
- (3) the board of directors would manage the business of the solar farm; and
- (4) each member would receive electricity discounts proportionate to their shareholding or interest in the co-operative.

5.3 Private Company

Description and characteristics

Private, or proprietary, companies are entities registered under the Corporations Act whose shares are privately held, and by a small number of persons, being no more than 50 non-employee shareholders. This entity structure is limited by shares, meaning that members contribute capital in exchange for shares and their liability is limited to their holdings only.

Private companies are the most commonly used type in Australia and benefit from fewer regulatory obligations. Benefits include, amongst others:

- (1) significantly reduced reporting and auditor requirements (no financial and directors' report requirement); and
- (2) fewer board requirements (only requires 1 resident director, no requirement for a secretary, no notice requirement for material interests).

Accordingly, this is the most flexible, and therefore usually the preferred legal form for a for-profit business enterprise.

Key legal considerations

A private company's main limitation is the cap on the number of members. It would need to be converted to a public company if it exceeds the 50 member threshold

Another consideration with a corporate entity structure is how the community driven objectives such as community participation and benefit can be achieved. Australian corporate law separates the management of an entity (vested in the directors) and ownership (i.e. shareholders).

While greater member involvement can be achieved through the company constitution or a shareholders agreement formal involvement of shareholders in decisions can be cumbersome.

Application to SASG

A project development company or membership vehicle structured as a Pty Ltd would operate as follows:

- (1) shares would be issued to members at the subscription price pursuant to a regulated prospectus;
- (2) capital raised can be used to fund the solar farm;

- (3) the board of directors (which may or may not comprise of members) would manage the business of the solar farm;
- (4) each member which held an electricity account with the nominated retailer could receive electricity discount benefits; and
- (5) each member may receive dividends in line with their interest in the company.

5.4 Public Company

Description and characteristics

Public companies are bodies corporate that are able to issue securities to the public and typically have more than 50 non-employee shareholders. This structure is recommended where the benefits of access to public capital outweighs the additional obligations.

Public companies may be either unlisted or listed. Listed companies have their securities quoted on the ASX. Public companies are also differentiated by how shareholder liability is limited including relevantly:

- (1) entities limited by shares; and
- (2) entities limited by guarantee.

Key legal considerations

Additional obligations imposed on public companies include the requirement to have an external audit and to lodge financial statements and a directors' report.

A company limited by guarantee is often used by not for profit organisation and sporting organisations. However it is not appropriate in this context as companies limited by guarantee cannot issue additional shares nor issue dividends.

We expect that where funds are sought from over 50 members a public company limited by shares is the most likely vehicle to be used.

Application to SASG

A project development company or membership vehicle structured as a public company would operate as follows:

- (1) the company would seek to raise funds from the public by way of a regulated prospectus under a public offer;
- (2) shares would be issued to members at the subscription price;
- (3) capital raised can be used to fund the solar farm;
- (4) each member which held an electricity account with the nominated retailer could receive electricity discount benefits; and
- (5) the management and governance would be structured similarly to a private company.

5.5 Managed Investment Scheme

Description and characteristics

The membership vehicle could be structured as a Managed Investment Scheme (**MIS**) under the Corporations Act. However, as stated above, we consider that MISs have high establishment and ongoing costs of administration, operation and regulatory compliance and should not be considered.

Also known as 'managed funds', 'pooled investments' or 'collective investments', the characteristics of an MIS are:

- (1) members contributing money or money's worth to a scheme with a shared purpose;
- (2) members getting an interest in the scheme in return for contributing money or money's worth;
- (3) members' contribution is pooled or used in a common enterprise to produce benefits for members;
- (4) a trustee (known as a "responsible entity") operates the scheme; and
- (5) members have no day-to-day control over the operation of the scheme but are entitled to a benefit produced by the scheme in consideration for their contribution.

Legal considerations

The most common type of MIS used in Australia is the public unit trust. A unit trust is not a separate legal entity. It requires a trustee to act on behalf of the trust. The responsible entity will need to ensure that the Unit Trust complies with ongoing obligations under Chapters 5C and 7 of the Corporations Act and will have fiduciary duties to the investors (such as the duty to act in their best interest).

An MIS has high upfront and ongoing regulatory and administrative costs, meaning an MIS would only be appropriate at scale and with the right member base. A regulated retail product disclosure statement would need to be prepared for any fund raising from the community. If the SASG membership vehicle takes the legal form of a company or a co-operative then it will not be at risk of legal characterisation as an MIS.

Application to SASG

If the SASG membership vehicle took the form of a public unit trust:

- (1) each community member would buy units in the unit trust for a purchase price pursuant to a regulated retail product disclosure statement. In return, the investor would get units in the unit trust;
- (2) members' money is pooled together in the trust to fund and own the solar farm;
- (3) each member which held an electricity account with the nominated retailer could receive electricity discount benefits; and
- (4) a licenced trustee is required to operate the unit trust (and make its day to day decisions) and act on its behalf.

5.6 For-profit and not-for-profit

This report does not evaluate in detail the different legal forms for not-for-profit entities. For commercial reasons and flexibility, it is assumed that most structures (whether the membership vehicle or project development vehicle) will take a for-profit form. SASG projects may be delivered via a for-profit or not-for-profit form, however this must be

assessed against the appropriateness of a not-for-profit against the objectives of the SASG, relationships with third parties (i.e. retailer, council, financiers) and eligibility for any tax concessions (which this report does not consider).

The main forms of not-for-profit entity include incorporated association, public company limited by guarantee and non-distributing co-operative.

Our report envisages a for-profit (distributing) cooperative for the SASG. As outlined above, there are two types of co-operative:

- (1) distributing cooperatives (or trading cooperatives). Distributing cooperatives are not suitable for not-for-profit as they provide benefits to their members in forms already set out in this paper; and
- (2) non-distributing cooperatives (sometimes called community advancement cooperatives). To be a not-for-profit the cooperative must be non-distributing.

A company limited by guarantee cannot issue dividends to its members. Instead, directors may distribute earnings or profits back into the organisation's purposes, this will usually be formed by way of a not-for-profit company. However some companies will form a hybrid and combine both to achieve their aims.

We have set out below some of the advantages and disadvantages of a not-for-profit cooperative:

Advantages	Disadvantages
There are exemptions, concessions and benefits for eligible NFPs (i.e. tax)	Profit cannot be distributed to owners, individuals and shareholders (cannot occur in NFPs)
There may be the possibility of greater access to government grant programs and philanthropic bodies	Not entitled to receive a personal benefit from the profits, i.e. dividend, money on sale of share, payment from profit
Only certain organisations may apply for registration to conduct certain fundraising activities (i.e. charities)	

5.7 Management entity

The membership vehicle is distinct and separate from the project development vehicle and shares are not interchangeable. It is envisaged that the membership vehicle will own the project development vehicle which will build, own and operate the solar farm project. A services agreement or development arrangement between the management entity and the project development vehicle may be required to put the project development vehicle at arms' length (for risk, financing and investment purposes) from the membership vehicle, while delivering administrative and management activities for a fee.

5.8 Practical considerations

An important factor in developing an appropriate SASG business model is the practical aspect of establishing the vehicles and meeting ongoing administrative and reporting obligations.

Public and private companies are very common legal forms that most professional service providers have extensive experience dealing with and advising. Conventional institutional financiers and other key third parties in each SASG business model (such as retailers, councils and contractors) are also more familiar with public and private companies as counterparties to contracts or for investment purposes. From a regulatory perspective, the Commonwealth agency ASIC is very well resourced and equipped to deal with inquiries and lodgement for incorporation and ongoing reporting requirements under the Corporations Act.

For co-operatives, SASG project groups need to be aware that this is a far less common legal form with limited professional service providers and experts. From a financing perspective, mutual, co-operative or community banks would be more suited to financing co-operatives than conventional institutional financiers. Co-operatives are regulated on a state basis and state government agencies may have limited resources to facilitate the establishment and support of co-operatives. For example, in NSW we understand there are three officers in the Office of Fair Trading that oversee co-operatives and written requests have a two week response time.

6 Further legal and commercial considerations

Key considerations:

- Choose the appropriate size and scale of the SASG. Aggregated SASG may have economies of scale and reduced administrative and compliance costs, while being an effective platform to raise funds.
- Crowd Sourced Funding may lower disclosure costs and facilitate fund raising
- Establishing the electricity 'benefit' pass through has practical and economic considerations and contractual arrangements to be implemented effectively.
- SASG may include innovative features such as debt financing, facilitating low interest loans to members and partnerships with solar developers.

In this section we consider further legal and commercial features that could be taken into account under either SASG business model to achieve different priorities and project objectives. In particular, we raise the option of an aggregation model and provide a high level review of delivering electricity benefits to members.

6.1 Aggregation

Scalability and replicability are key project objectives of the SASG. A commercial issue (and ultimately a practical / economic issue) is the ability for the SASG "package" and vehicle options to be delivered to local communities and effectively communicated to relevant third party counterparties and stakeholders (who will inevitably bear some risk of the SASG, see risk assessment below).

A key consideration is whether the SASG model will be an aggregator, with a stand-alone capital raising platform or a bespoke platform delivered at the local community level – applicable to either SASG business model.

As an aggregated model, the SASG would have the following features:

- (1) single vehicle managed independently – likely public company, co-operative group or MIS, depending on the scale;
- (2) for a MIS, a single financial services licence would be held by the single vehicle;
- (3) local CEGs / retailers would partner with the single vehicle to raise funds, allowing local principles for eligibility and the single vehicle could provide a loan or equity to the project development company; and
- (4) administrative and ongoing compliance costs would be reduced because local CEGs would not have to establish bespoke platforms and economies of scale could be realised, including potentially for the acquisition of solar assets and equipment (to the extent that the single vehicle feeds down to aggregated projects).

An aggregator platform may also have more attractive financials in the longer term to community members as against smaller community level vehicles.

It is possible for multiple co-operatives to be set up and those co-operatives may come together to create a 'co-operative group' – with each co-operative being a member of that group. One consequence of having a co-operative group is that the CNL permits the co-

operative rules to provide any member of that co-operative group to have up to 5 votes at a general meeting.

6.2 Billing models

A key project objective of SASG is to provide customers or members with electricity equivalent to the output from their share of the SASG, as a credit on their electricity bills. We understand the intention is to create a 'benefit' for customers or members as though solar was installed on their roofs. This is a complex arrangement that in practice will involve a number of contractual arrangements.

To deliver this electricity 'benefit' model, SASG project groups will need to consider:

- (1) Is there a requirement that members of the membership vehicle are customers of the same solar generator being funded?
- (2) Does the electricity benefit need to be derived from the specific solar generator or substitute generators? (In practice, retailers will be billing and pricing based on electricity generated and sold into the pool.)
- (3) Will, and if so how will, distributions (or earnings) from the project development vehicle be passed through to the customer? What are the parameters for the retailers involved?
- (4) How will the quantity of the 'benefit' that a member is entitled to be calculated? Will it be proportional to the value of the shareholding or will the 'benefit' be equally distributed across all members (i.e. one share equal [x] kilowatt hours' worth of electricity or [x]% discount for all members)?

The retailer plays an important role to enable such 'benefits' to be delivered to customers – in effect, the main service retailers offer is billing.

Conceptually, SASG is attempting to convert the equivalent of a dividend or distribution to a member / shareholder from the sale of electricity into a credit or discount on that same member / shareholder's electricity bill as a retail customer. Commercially, the project development vehicle must be able to generate relatively cheap electricity (which may be difficult due to low economies of scale for local projects) and expect a low to no return on investment, while still generating sufficient revenue to cover operational costs and maintain the generation asset.

In this sense, we consider that the benefit will need to be 'stapled' to the electricity generation and pass through mechanism via the retailer. In practice, this may involve the following contractual arrangements:

- (1) power purchase agreement (**PPA**) between the project development vehicle and the retailer – this sets the price and arrangements for the sale and purchase of electricity and would need to be for a minimum term to be financially viable;
- (2) retail supply agreement (or electricity contract) between the retailer and the customers – this will typically be the standard electricity contract with a pricing offer for the electricity 'benefit';
- (3) disclosure and offer documentation issued by the membership vehicle may specify criteria for eligible members (i.e. being a customer of the nominated retailer) and membership may expire or be withdrawn if a member fails to meet this criteria (e.g. changes retailer); and
- (4) optional services agreement between the project development vehicle and the retailer to guarantee the delivery of the 'benefit' pass through to customers that

meet specified criteria. A services or funding agreement may also be required between the membership vehicle and the project development vehicle.

Additional contractual arrangements will likely be required depending on the other third parties involved i.e. councils or external funders etc.

SASG project groups may also need to take into account commercial considerations:

- (1) calculation of supply and demand through the retail supply agreement and whether the 'benefit' will be for an equivalent amount of energy;
- (2) service charges that the retailer may request to deliver the billing service and any network charges; and
- (3) operating costs of the combined management vehicle and project development vehicle need to be at an appropriate level to ensure electricity discount is achieved.

6.3 Crowd Sourced Equity Funding

A regulatory regime for crowd-sourced equity funding (CSEF) has recently been introduced via amendments to the disclosure and reporting obligations for small to medium sized unlisted public companies under the Corporations Act. The CSEF regime aims to create a more flexible and low-cost path to capital and reduce the regulatory requirements for making public offers while still maintaining adequate protections for retail investors via certain exemptions to the Corporations Act. Under the exemption, eligible companies may make offers of ordinary shares to retail investors through an AFS licensed CSEF intermediary's platform, using a CSEF offer document (rather than a full prospectus). Eligible companies can raise up to \$5 million in any 12-month period under the new CSEF regime (the "issuer cap").

For a company to be eligible, it must:

- (1) be an unlisted public company with less than \$25 million in assets and annual revenue, with a majority of its directors residing in Australia; and
- (2) not be an investment company (if a substantial part of its business involves investing in other companies, entities or schemes, then the company is not eligible). We consider that an SASG structured as a public company will not be an investment company if it is a social enterprise that reflects the key project objective described in section 1 of this report.

For the CSEF offer to be eligible:

- (1) it must be made by an eligible company;
- (2) the funds raised in the offer must not be used for the purpose of investing in other companies, entities or schemes (including related parties) or to provide a loan to a related party; and
- (3) it must comply with the issuer cap.

A CSEF intermediary which holds an AFS licence with the required authorisation to provide a crowd-funding service must be engaged to host the CSEF arrangement.

The CSEF model may be applicable to SASG. We note that the CSEF regime is separate to publicly available crowd fund raising platforms such as Go Fund Me etc. CSEF is only available to unlisted public companies limited by shares – so it will not be available to co-operatives.

Below we set out the key points of differences between fund raising under the public company CSEF regime and a co-operative share offer.

	Public company CSEF	Co-operative share offer
Minimum subscription per person	Minimum subscription as stated in the offer	Minimum subscription of shares as provided by the co-operative rules
Maximum subscription per person	\$10,000 per investor (Note: there is a 5-day cooling period for investors)	20% of the nominal value of the issued share capital of the co-operative
Aggregate cap	No more than \$5m in any 12-month period	No cap
Use of funds	<p>Not be used to raise funds to:</p> <ul style="list-style-type: none"> • invest in other companies, entities or schemes; or • loan to related parties. <p>Therefore, funds cannot be used to fund a SPV project development entity (the company itself will have to build the farm)</p>	No restriction on the use of funds
Disclosure requirements	<p>CSF offer document which includes:</p> <ul style="list-style-type: none"> • general risk warning statement; • information about the company: <ul style="list-style-type: none"> ○ company details; ○ business and organisational structure; ○ main risks; ○ capital structure; ○ financial statements; ○ directors and senior managers; and ○ details of certain convictions, penalties or administrative actions against the company and its directors or senior managers • information about the offer: <ul style="list-style-type: none"> ○ the rights associated with the shares on offer; 	<p>A disclosure statement which contains “information necessary to ensure prospective members are adequately informed of the nature and extent of a person’s financial involvement or liability as a member of the co-operative” including:</p> <ul style="list-style-type: none"> • the active membership provisions of the co-operative; and • the rights and liabilities attaching to shares in the co-operative

	<ul style="list-style-type: none"> ○ the offer period and the minimum; and ○ maximum subscription amounts under the offer; and how the funds raised will be used; and • information about investor rights: <ul style="list-style-type: none"> ○ the cooling-off period; ○ the effect of the reporting and corporate governance concessions; and ○ the effect of the communication facility on the CSF intermediary's platform. 	
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6.4 Strata model

Under strata arrangements, tenants must pay an annual levy for capital works and common property upgrades. The amount is determined based on the forecasted works for the following period and split across all tenants. Capital works levies are permitted in accordance with the Strata Schemes Management Act 2015 which allows for levies to raise funds for different time periods and amounts as determined by the strata body corporate.

Such a regime for SASG would only be applicable in strata buildings and would usually only be used if a solar asset were to be installed on the strata itself (rather than off-site). Due to the limited capacity for strata to install solar at scale and the complex governance requirements of passing a resolution amongst the strata body corporate, it is unlikely that the strata model would be an effective capital raising tool for SASG.

6.5 Low or zero-interest loans

Low income households may be supported to participate in the scheme via low or zero-interest loans, whether administered by a Council, retailer or independent third party or low or zero-interest loan provider. Factors such as eligibility, payback periods, credit worthiness of the borrower etc. are factors to be considered, as well as the scale of the reduced loan scheme. It would be advisable to have only a portion of capital raised provided via low income investors as this limits default risk and the ability to attract debt financing. In NSW, the Home Energy Action Program facilitates low or zero-interest loans for low income households to invest in energy efficiency or solar.

Council administered rates payback schemes may also allow low income households to pay a levy on Council rates in order to payback the investment in SASG. In NSW and Victoria, Environmental Upgrade Agreements offer a rate payback for energy efficiency improvements, mostly for the commercial and industrial sector. Electricity retailers could also introduce a similar payback scheme by using state government administered energy rebates to invest.

6.6 Local membership

As described in the corporate structuring section, local shareholders or membership may be possible based on different types of share classes. Excluding shareholders or members based on geography is easiest in a co-operative, where criteria for members can be written into the constitution. For public companies, an offering with geographic criteria may be

more difficult, but possible if identified in the prospectus and offer documentation. Under MIS, the trust deed may establish criteria for unitholders to participate in the scheme.

An issue with geography as a prerequisite is the impact on transferability. This could mean that a share, unit or membership would have to be sold or transferred if the holder were to move outside the prescribed boundary. There is an ongoing management burden to maintain the register up to date and enforce such a forced exit.

6.7 Debt / underwriting

Generally, underwriting and debt finance should be an important consideration, particularly for the Community-led SASG business model. Even if a CEG is to capital raise, a development loan or grant from a third party may be required for upfront development costs for the project. In addition, any shortfall in community-raised capital may be sought via debt finance, in which case the creditworthiness of the SASG will be reviewed, as well as the viability of the revenue stream from a PPA.

A rent-to-buy or loan model, will be harder to underwrite as the incoming revenue stream may be less predictable and the upfront expenditure costs will be borne on the project. If community participants were to rent or loan under the SASG, voting rights and decision-making may be limited under a different class of shares or limitations under the shareholders agreement or constitution.

Community members may also offer a debt rather than equity product to the project development vehicle. However, such loans may raise other regulatory issues which have not been covered in this report.

We note as a practical point that compared to other legal forms, it may be more difficult to obtain external debt financing under co-operatives due to the unfamiliarity of the co-operative structure to potential financiers. Conventional institutional lenders may also look unfavourably towards the repayment obligations of the co-operative in having to repay members their shares if they resign, are expelled or have their membership cancelled as this is effectively a liability of the entire issued capital. If a co-operative form is chosen for either the membership vehicle or the project development vehicle (which would be more likely to raise debt financing), alternative financial institutions such as mutual banks and credit unions may be more attractive financiers.

However, under the CNL, a co-operative may also raise funds through the issuance of co-operative capital units (**CCUs**). A CCU is defined as 'an interest issued by a cooperative conferring an interest in the capital (but not the share capital) of the co-operative'. CCUs are flexible instruments in that they can be structured as debt or equity and can be issued to both members and non-members of the co-operative.

When looking towards CCUs as a potential source of funds it is important to note that:

- (1) CCU holders do not have entitlements and rights of members;
- (2) the co-operative rules must allow for the CCU issue and those rules must meet the minimum requirements under s 349 of the CNL;
- (3) CCU issue must be accompanied by disclosure statement; and
- (4) CCU may only be redeemed out of the co-operative profits or the proceeds of a fresh issue or shares or approved issue of CCUs.

The reference to CCUs is to flag an alternative way for a co-operative to raise funds. When looking towards CCUs as a potential source of funds it is important to note that:

- (1) CCU holders do not have entitlements and rights of members;

- (2) the co-operative rules must allow for the CCU issue and those rules must meet the minimum requirements under s 349 of the CNL;
- (3) CCU issue must be accompanied by disclosure statement; and
- (4) CCU may only be redeemed out of the co-operative profits or the proceeds of a fresh issue or shares or approved issue of CCUs.

6.8 Relationship with solar developers

It may be worth considering the role of large-scale solar developers to co-fund/co-develop/develop the solar farm or to provide the SASG product to a solar farm under development. Partnering with solar developers may create the following opportunities:

- (1) cheaper development costs due to economies of scale of construction and therefore cheaper electricity;
- (2) expertise and efficiency in development and construction, resulting in electricity supply potentially sooner than under a community development arrangement (see Community-led SASG business model);
- (3) local community benefit by allowing CEG to facilitate SASG product with solar project in local region;
- (4) social licence to operate for solar developer and community engagement opportunities;
- (5) solar development may have existing PPA opportunity with retailer, which may facilitate a white-label product via the SASG product;

Due to the high level of activity in the large-scale Australian solar market and reducing levelised costs of electricity, working with solar developers may be attractive to expedite implementation of SASGs.

7 Regulatory landscape: Financial services and consumer and energy licensing and regulation

Key considerations: SASG business models will need to comply with financial services, consumer and energy regulations

- The membership vehicle will not require an AFSL unless it is structured as a public unit trust. The project development company may require an AFSL if entering into multiple PPAs.
- The key exemption to the project development company holding an AFSL (in circumstances where it enters into multiple PPAs) are to engage a third party AFSL holder (for a fee) to make an offer to the PPA counterparty to arrange for execution of the PPA by the project development company.
- Under ACL, the membership vehicle may need to comply with ACL if selling electricity directly, however in most cases this will be covered by the retailer.
- If the generator is greater than 5MW, a generation licence exemption should be obtained from the AER; generators less than 5MW, a deemed exemption applies.

This section provides an overview of the licensing requirements under the Corporations Act when dealing in securities or derivatives, and key consumer and energy regulation issues for both the Community-led SASG business model and the Retailer-led SASG business model.

7.1 Financial services regulation: AFSL licensing requirements

Description

The Corporations Act prohibits an entity from carrying on a financial services business in Australia unless it is the holder of an Australian Financial Services Licence (AFSL) or unless it is able to rely upon an available AFSL exemption. AFSL holders are also required to meet regulated license obligations under Chapter 7 of the Corporations Act. Whether an AFSL is required in any particular case requires a factual analysis of exactly what conduct is being engaged in by that entity.

The prohibition needs to be analysed separately for each of the management vehicle and the project development vehicle. A financial service is defined broadly and includes dealing in financial products.

(1) Management vehicle

Where the management vehicle is structured as an MIS, the responsible entity of a MIS is required to hold an appropriately authorised AFSL (i.e. it must be authorised to operate a MIS) and will most likely have to appoint an investment or asset manager, custodian, registry and other service providers to help manage different aspects of the MIS.

Where the management vehicle is structured as a company or a cooperative, then that entity will be providing financial services when it issues its own shares. This is because issuing shares is a dealing activity and shares are an example of a financial product. However, generally, a body corporate (like a company and a cooperative) is exempt from having to hold an AFSL when it issues their own securities, unless the body corporate "carries on a business of investment in securities, interests in land or other investments ... and in the course of carrying on that business, invests funds subscribed

whether directly or indirectly after an offer to the public made on terms that the funds subscribed would be invested”.

In short , if the management vehicle issues its own shares to raise capital for investments – in this case, to invest in solar farms – it will not be exempt from having to hold an AFSL. On our analysis of these rules, if the management vehicle (whether a company or a cooperative) meets the social enterprise character reflected in the key project objectives, then it should not require an AFSL .If a particular SASG membership vehicle (whether a company or a cooperative) was in fact structured and promoted as a for profit investment vehicle then an AFSL may be required. The project development vehicle will only require an AFSL or an exemption for its entry into a PPA only if more than one PPA is entered into.

(2) SPV development vehicle

The SPV development vehicle is likely to enter into one or more PPAs. Under the Corporations Act , the entry into an off-market PPA is considered to be the issue of a derivative by the SPV. This means the SPV will be providing financial services merely upon entering into a PPA.

However, we do not consider that the entry into a single PPA , of itself ,constitutes the SPV carrying on a financial services *business* in breach of the prohibition. If 2 or more PPAs were entered into by the SPV then that may then constitute a business for this purpose. Everything turns on its facts and the SPV should seek legal advice before it entered into a second PPA. An SPV that wanted to enter into multiple PPAs would likely need to rely upon an AFSL exemption. The typical exemption relied upon in these circumstances is to engage a third party AFSL holder to make an offer to the PPA counterparty to arrange for the SPV to enter into the PPA.

7.2 Financial services regulation: Anti-Money Laundering and Counter-Terrorism Financing obligations

If an SASG business model is structured as a public unit trust, it will be subject to Australia’s Anti-Money Laundering and Counter-Terrorism Financing (**AML/CTF**) laws. AML/CTF laws require the trustee/responsible entity to meet a number of obligations including (but not limited to):

- (a) conducting a Money-Laundering and Terrorism Financing risk assessment;
- (b) preparing and implementing an AML/CTF Program;
- (c) conducting customer due diligence (**CDD**) on its investors based on “know your customer” principles– in some cases, enhanced CDD requirements may be applicable;
- (d) keeping records of transactions; and
- (e) reporting suspicious matters and any transaction involving \$10,000 or more in cash to AUSTRAC.

These obligations are quite onerous and costly.

7.3 Consumer and energy regulation: Relevant laws

Legislation	Relevant scope
Australian Consumer Law (Schedule 2 to the Competition and Consumer Act 2010)	The ACL applies nationally. It requires any contract with a consumer to be free from unfair contract terms, unconscionable terms, misrepresentations about the consumer guarantees and false/misleading provisions. If contracts are to be offered to potential

(ACL)	Scheme members unsolicited (e.g. cold calling or door knocking) then the contract must satisfy additional requirements for content and form that apply to unsolicited consumer agreements.
National Energy Retail Law (NERL) and Rules (NERR)	This legislation applies in QLD, NSW, SA, TAS and the ACT. It applies to the retail supply of electricity and imposes certain requirements on contracts between energy retailers and their customers. In Victoria, the Energy Retail Code (ERC) imposes very similar obligations to the NERR.
National Electricity Law (NEL) and Rules (NER)	The NEL and NER apply in all states and territories except WA, and govern the operation of the national electricity market. Relevantly, they require any person generating, distributing or retailing electricity to hold either a licence to do so or an exemption.
State-based legislation	In some states there are state-specific licensing and exemption requirements that apply in addition to the NEL and NER

7.4 Consumer and energy regulation: Australian Consumer Law

From an ACL perspective, retailers are required to be compliant with the ACL, including unfair or unconscionable contract terms. If the Community-led SASG business model intends to sell electricity directly to consumers, contract terms must comply with the ACL. We can review contract terms to ensure compliance with the ACL.

In general, we consider that for the Retailer-led SASG business model, the retailer will hold the necessary NEM licences that may be used by the project development vehicle selling electricity to customers. As the Scheme projects are anticipated to be less than 5MW, AEMO registration requirements will be reduced.

7.5 Consumer and energy regulation: considerations

Customer-retailer arrangements and protections for customers under the ACL and the NERR

Both the Community-led SASG business model and the Retailer-led SASG business model envisage that the primary contract for the sale of electricity to customers will be with an existing electricity retailer. Existing retailers are familiar with ACL and NERR protections that need to be included in such contracts. Assuming the relevant retailer bases its contracts on its existing market retail contract (with the addition of a clause addressing the credit to the customer's bill based on their participation in the SASG via arrangement with the SPV), these contracts are unlikely to require material input from us.

We assume the relevant retailer then recoups the credit it applies to the customer's bill through its separate contract with the SPV.

Customers should be able to enter into such contracts simply by switching to the participating retailer and informing them of their participation in the SASG. The retailer should presumably be able to establish the extent of the customer's participation in the SASG by using their National Metering Identifier (NMI). If a customer's participation in the SASG comes to an end, the retail contract should be able to continue on the same terms, but without the credit that would arise from their participation in the SASG.

Customer-SPV arrangements and protections for customers under the ACL

The arrangement between the customer and the SPV must be ACL-compliant. This means it must be free from unfair contract terms, unconscionable terms, misrepresentations about the consumer guarantees and false or misleading provisions. An example of an unfair contract term would be to provide the project development vehicle with the ability to

terminate the arrangement, but not the customer. If these arrangements are to be offered to potential members unsolicited then the contract must satisfy additional requirements.

Since one of the purposes of the SASG is to offer benefits to people in low-income communities, we assume these contracts would be intended to be fair, transparent and reasonably flexible.

National Electricity Market (NEM) considerations

It appears the SPV will be selling the electricity generated by the SASG directly to the relevant nominated retailer via a PPA. We therefore do not envisage there will be a need to consider selling the electricity into the NEM.

Electricity retail licence

Since the person retailing the electricity to customers will be a licensed retailer under both proposed models, there will not be any need for the SPV or any other person to obtain an electricity retail licence under the NEL, NER or state-based legislation.

Network (distribution) licence

People who own or operate a distribution network are required by both the NEL and some state-based legislation to hold a network licence. Whether or not the project development 'owns or operates a distribution network' will depend on the way the physical connection is set up, including who will own which infrastructure. If the SPV owns or operates any equipment used to convey electricity to customers (whether wholesale or retail) apart from connection assets, a network licence or exemption will be required. However, if the SPV will only own the generation and connection assets, with the local distribution network service provider to own the relevant network assets, no network licence or exemption will be required.

Generation licence

If the generation capacity of the SASG will be 5MW or less, it will be subject to a standing exemption from the requirement to register as a generator. There is no need to apply for this exemption.

If the generation capacity of the SASG will be over 5MW, it will need to either:

- (1) apply for a discretionary exemption from the Australian Energy Market Operator (AEMO) (if the capacity is between 5MW and 30MW); or
- (2) apply to AEMO for registration as a generator with AEMO. This is a fairly onerous process.

AEMO will generally grant a discretionary exemption if either:

- (1) the generating system is expected to export less than 20GWh in any 12-month period; or
- (2) extenuating circumstances apply, and the applicant cannot reasonably register as a generator for the generating system,

and, in either case, the operation of the generating system will not adversely impact power system security.

8 Risk assessment

8.1 Overview

Key Considerations:

→ Legal risks:

Exit: Who bears the risk at member exit / turn over affect risk?

Regulatory: What occurs for change in law or regulatory non-compliance?

Counterparty risk: What happens if insolvent or material contract breach?

→ Commercial risks

Development risk: Who addresses default or non-payment by project?

Debt: What are risks of debt finance or underwriter (incl. having none)?

Price: Will electricity price volatility impact economic model / PPA?

→ Commercial risks

Costs: Who bears the risk of cost overruns or shortfalls?

Default: Who is responsible for project non-performance / default?

Developing solar, raising capital via a financial product and selling electricity are activities that incur a number of risks. This section consider key legal, commercial and operational risks and assess these for each of the SASG Business Models and risk allocation between the relevant participants.

8.2 Risk mitigation

(1) Key mitigants

- (a) Technically and financially capable SASG participants
- (b) Appoint appropriate advisors
- (c) Ensure economic model for each SASG Business Model is robust

(2) Legal risk mitigants

- (a) Exit: Ease of transfer in legal form, not leave vehicle exposed or in debt
- (b) Regulatory: Require licenses to be in place as CPs to key contracts
- (c) Counterparty: due diligence parties

(3) Commercial risk mitigants

- (a) Development: Ensure contingency or underwriter to step in to cure default
- (b) Debt: Obtain debt finance or community debt - low ROI / simplicity
- (c) Price: Model hedge price viability

(4) Operational risk mitigants

- (a) Costs: Economic business model and budgeting to stack up, reporting
- (b) Default: Performance securities with third parties, debt financing allows step in rights to cure default

8.3 Risk allocation

Each of the SASG Business Models places risk on the various parties. The aim should be to limit the risk exposure to community investors and protect the project development vehicle.

Role	Risk allocation
Developer	Development risk Investment and disclosure risk of financial product
Customer relationship	Electricity supply risk Retailer interface / price pass through risk
Owner	Development risk, including debt risk Regulatory risk
Operator	Performance risk Operational risks – costs and supply
Bill provider	Price pass through risk
PPA counterparty	Performance / electricity supply risk Credit risk of project SPV
Solar company	Credit risk of project SPV for non-payment
Council	Electricity supply risk (if PPA counterparty)
Funder	Default risk of low income borrowers
Customer	Performance risk Price pass through risk

9 Next steps

We recommend that SASG project groups initiate the following next steps.

- (1) SASG project groups to:
 - (a) consider priority aims for the respective SASG business models; and
 - (b) weigh up legal assessment criteria based on priority aims
- (2) SASG project groups to assess establishment and ongoing costs and run financial model for proposed legal form.
- (3) SASG project group to establish proposed legal form for project development vehicle and membership vehicle.
- (4) SASG project groups to consider risk allocation and mitigants to address in SASG business model.

Appendix 1: Legal Questions and Answers

- (1) Land rights: if council owns the land/building and a company/co-op installs the solar system, how that relationship works legally?

NRF: The Project Company will need to secure adequate land rights to access the land where the project will be installed. These will include grid connection rights for the network company, often an easement. Typically the Project Company will enter into a lease arrangement with the relevant landowner, depending on the size of the system. If it is a smaller rooftop system, and access and licence arrangement may be entered to allow the Project Company rights to install and maintain the system. If it is a standalone system a lease may be entered over the relevant site with access rights by way of licence or easements in place across neighbouring properties as required. The Project Company may also purchase the land.

Depending on the size of the project, the Project Company (or developer) may wish to enter into an option to lease or purchase prior to entering a lease / purchase deed. This gives the Project Company (or developer) exclusivity to lease / purchase the land at a future point and the option can be exercised when the project is funded.

- (2) Can you clarify the specific reasons why a Solar Garden without a membership vehicle is strictly a Managed Investment Scheme? If we took an extreme example of a Solar Garden with a single participant, the major difference between this arrangement and a normal rooftop installation on an owner's premises would seem to be the virtual netting of two metering points. From a billing perspective it would appear to be the same. Or does the requirement come about because of multiple participants or that there is a single metering point for a solar garden that is shared amongst the participants?

NRF Financial Services: The MIS regulatory regime is found in Chapter 5 of the Corporations Act. It applies to all 'managed investment schemes' which is a very broadly defined term and each of its definitional elements need to be read broadly. The definition is structure agnostic. This means it is not necessary for there to be a membership vehicle before the regime can apply. Even a direct contractual regime can be subject to MIS regulation if it meets the requirements of the definition of a managed investment scheme. Whether a particular arrangement can be legally characterised as a managed investment scheme will depend upon a close factual analysis of the legal agreements and the way the SASG is "sold" to prospective customers. The MIS regime looks at both form and substance of an arrangement. This is because it is a protective regime. The features of a direct contractual SASG that we consider are likely to result in that SASG being characterised as a managed investment scheme are as follows;

- Interdependency between customers-will a customer have or expect a right to a return (including the discount on their electricity bill) which depends to any extent on the pooling of all the multiple customers? This includes pooling of their individual solar panels into an overall SASG with a scalable single energy output and energy sale price net of the overall shared expenses of operating the SASG?
- Dependency on the SASG- will a customer have or expect a right to a return (including the discount on their electricity bill) which depends to any extent on that customer's solar panel(s) being used as a part of a solar farm? In practise someone or some entity will be "promoting" the SASG to prospective customers. That promoter will be the one who "packages up" the SASG and promotes it to customers. If so will the prospective customer and the promoter have an agreement or understanding that the discounted electricity outcome the customer is seeking will depend upon using their equity contribution along with all other participating customers to build the SASG and for there to be single PPA

entered into with that SASG? We assume that is so.

- Compulsory participation in SASG- will joining a SASG (including the use of customer equity contributions to build the SASG) be compulsory for each customer? We assume so since SASG scale is important. If so this supports an inference that there is a common enterprise.

- (3) Not sure whether it is in the scope of your work, but where a solar garden is installed on a roof-top location, how would the metering function? As I understand it, there is a strict requirement for having a single NMI per address, so the solar installation wouldn't be able to be separately metered with a unique NMI. Can the solar garden be sub-metered and this be netted off with the customers meter, or would the garden have to be metered with a unique NMI meter?

NRF Regulatory: This will depend to some extent on the technical characteristics of the set-up. In an embedded network, all sub-meters (child meters) would have their own NMI. The embedded network manager would be responsible for obtaining these.

For premises connected directly to the grid (i.e. not in an embedded network), there is nothing preventing there being several different meters at the same supply address measuring different things. However, there will only ever be one NMI for the purpose of the functioning of the electricity market.

Note: We are including reference to embedded networks to cover flexibility in the design if project teams were to consider embedded network arrangements.

- (4) Just a follow up on the third-party forcing issues surrounding a cooperative or company and whether we would be able to have a summary of this issue prior to our design workshop. Equally, do third-party forcing issues apply if the managed investment scheme option is pursued – that is can a managed investment scheme be tied to a specific retailer?

NRF Competition: Third line forcing applies to any supply of a product or service which is conditional on the acquirer of the product or service also obtaining a product or services from an unrelated third party. This used to be prohibited outright, but is now only prohibited where it is likely to result in a substantial lessening of competition in a relevant market. Considering the small scale and elective nature of the Solar Access Gardens scheme, we do not consider a substantial lessening of competition to be likely, and as such the proposed conduct does not raise third line forcing concerns.

- (5) Are there any implications for selling in and out of the system when run as a company? This would be particularly the case where customers may expect/anticipate a retailer, council or proponent to buy the shares back.

NRF Corporate: Yes. Share buy backs are regulated under the Corporations Act and it is not straightforward to simply buy back a single shareholders interest (as it involves the use of company funds to pay out a specific shareholder). For instance it may require a shareholder meeting. The logistics of doing so mean this is unlikely to be a realistic option.

- (6) Are there restrictions on a co-operative offering subscription, leasing panels, or pre-selling? (More information on pre-selling – see below)

NRF: The CNL sets out restrictions on the value of assets that may be bought or sold by the co-operative – a special resolution by postal ballot is required to do such activities. In summary, these restrictions include (see s 359 of the CNL and r 3.20 of the regulations (NSW) :

- sell or lease the undertaking (assets) of the co-op as a going concern
- sell or lease the assets that relate to its primary activities and the value represents more than 25% of the total book value of the assets of the co-operative or (in relation to a particular co-op) a greater percentage not exceeding 50% specified in that co-ops rules
- acquire an asset worth more than 5% of the total book value of the assets of the co-operative, if acquisition is for an activity that is not a primary activity

More generally, CNL does not restrict the type of business that can be run under a co-operative or the types of activities that business participates in. We are happy to discuss the pre-selling arrangements in more detail. This seems more like a pre-pay subscription arrangement.

- (7) Would these differ if it is a private company limited by guarantee offering the same products?

NRF: Only a public company can be limited by guarantee. The limitation on guarantee for a public company relates only to the liability of the members (limited by the amounts the members will have to contribute if the company is wound up, usually a nominal guarantee). There are no restrictions on the type of business that can be run under a public company only that profits must be reinvested into company operations and cannot be paid to members or directors of the company.

- (8) All the models developed involve multiple parties sharing sensitive information. What is the third party authority arrangement around access to customer data for retailers, community organisations and other involved parties? How can such data be shared between parties in a way that complies with the regulations?

NRF: This is a privacy question and out of scope. In practice though, a data sharing deed or consent form could be entered between the parties. Customers would also need to have a consent to share information clause as part of any contracts.

- (9) Some models will involve the dependence of one product upon another - for example membership of a co-op may require each member to be a customer of a selected retailer. Are there any foreseeable third line forcing issues around this? How can this be navigated successfully?

NRF: Making it a condition of membership that a customer acquire electricity from a particular retailer is no longer prohibited under the Competition and Consumer Act 2010 unless it has the purpose/effect of substantially lessening competition. Due to the limited nature of this project, we see no competition concerns.

- (10) Can a Non-Distributing Co-op have funders/members buying CCUs? (Co-operative Capital Units)

NRF: Yes. A CCU is an interest issued by the co-op that confers capital in the co-operative and is treated as personal property. Note a CCU is not share capital in the co-operative. Distributing co-operatives have the ability to issue surplus share capital whereas non-distributing co-operatives or not.

- (11) If a distributing co-op pays dividends to its members for their share of a solar farm (rather than giving them an electricity credit) does this raise legal issues, in particular does it mean that it would be considered a Managed Investment Fund? (note this has arisen because two of the prototype teams are considering a structure where members may either receive an electricity credit on their bill, if they

are with the project retailer, or choose to receive a dividend and not use the same retailer).

NRF: As raised in our legal paper, once a choice of structure has been made (i.e. coop) then there is no real risk for that coop to be characterised as a MIS. As above, only distributing co-operatives can issue share capital to members.

We note that co-operatives have requirements around active membership (see part 2.6 of the CNL (NSW)) for both distributing and non-distributing co-operatives. For distributing co-operatives, active members must use an activity of the co-operative for carrying on a primary activity of the co-operative. For non-distributing co-operatives, the payment of a regular subscription by the member that is applied to a primary activity of the co-operative may be used to satisfy the active membership requirement (see s 151 of the CNL (NSW)). As an example, a non-distributing co-operative could require members to pay a monthly subscription amount for the purpose of buying electricity if the primary activity of the co-operative were selling electricity.

Pre-selling: When a consumer co-operative has a need to purchase a productive asset (solar equipment), they can finance that purchase by pre-selling the product of the asset (electricity). Member consumers are investors in this scenario and they agree to pre-purchase their own consumption of electricity for a long way into the future. In return they receive a large discount off the price of the electricity supplied to them by their co-operative.

Members pre-purchase their own consumption, so enabling the co-op of which they're a member to install renewable energy on their behalf (e.g. panels in a solar farm). The members consume the electricity produced by the renewable energy installed using their pre-purchases. This is provided to them by the co-op at a very large discount - probably 50% off. The pre purchases will likely stretch a very long way into the future - probably 20 years. As an investment, pre-payments behave like annuities. However, unlike normal annuities which are payable according to a set schedule, pre payments are only redeemable when the consumer buys the product (electricity).

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