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Attention: Ms Stephanie Jolly
Acting Executive General Manager, Consumers, Policy & Markets
Australian Energy Regulator

Submission on Draft Retail Exempt Selling Guideline and Draft Network Exemptions Guideline (version 7)

Thank you for the opportunity to comment on the proposed regulatory changes set out in the *Review of the AER exemptions framework for embedded networks Draft Decision,* which incorporates the Notice of Draft Instruments for the *Draft Retail Exempt Selling Guideline* (version 7) and *Draft Network Exemptions Guideline (version 7)*.

At the outset, given the growth in new business, changing residential arrangements, and broader impacts of new opportunities for embedded generation, storage, and other energy services "behind the meter", we agree with the AER that the original exemptions framework is no longer fit for current, emergent or future purposes.

In seeking to address this situation, we commend the AER for its attention to residential customers and particularly vulnerable customers in this review. We also agree, in principle, with the AER's proposal to transition the embedded networks regulatory framework to registered arrangements.

In this submission, we draw attention to the extent to which the proposed regulatory frameworks are able to capture the complexities of emerging changes in on-sale and on-supply of electricity within *and* through embedded networks. We have considered a several hypothetical factual scenarios to illustrate where the guidelines do not provide sufficient clarity for users. We also set out relevant laws and regulations to illustrate our concerns where appropriate.

In our view, there are still a number of fundamental clarifications required to "future proof" the embedded network regulatory framework, to ensure all customers are duly protected relevant to their circumstances, and that all embedded network owners/operators are aware of their obligations. In particular, we flag the need for clarification of new commercial activities involving on-supply and potential on-sale of electricity at child meters within embedded networks.

We also note the AER's recognition of the importance for greater transparency, visibility, and regulatory compliance regarding the emergent "distributed electricity markets" located behind parent meters. However, we submit that a balanced regulatory change approach is called for in addressing such concerns; one that protects consumers *and* supports and promotes innovative new electricity on-sale and on-supply arrangements behind the meter.

We also suggest that it is equally important that the proposed regulatory changes do not unduly burden smaller commercial operators, and stifle or prevent, rather than encourage, the adoption of new renewable energy services, e.g., behind the meter EV charging stations.

At the very least, we submit that the AER's final versions of the *Retail Exempt Selling* and *Network Exemptions Guidelines* set down applicable regulations that are clearly defined and transparent for all of the participants in these situations – service providers, embedded network owners/operators, businesses and residential consumers.

Yours sincerely,

Dr Rowena Cantley-Smith and Dr Anne Kallies

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1. Introduction

The AER recognises, the "exemptions framework was originally designed to regulate a relatively homogenous and simple energy retail market, where the supply and sale of energy in embedded networks was regarded as an incidental aspect of the relationship between a landlord or body corporate and the occupants of an embedded network site".[1]

We agree with the AER that this is no longer the case.

In our view, it is no longer possible to assume that on-supply and on-sale of energy in embedded networks can be regarded as an incidental aspect of the relationship between an embedded network owner/operator (the landlord, body corporate, or other) and the business and/or residential consumers (the occupants) of the embedded network.

For the purposes of our Submission, we have focused on the changing business models associated with the installation and operation of charging infrastructure for electric vehicles in embedded networks.

2. Changing Business Models in Embedded Networks

Embedded network guidelines recognise the on-sale/on-supply transaction between the Embedded Network Owner/operator (parent meter) and the customer at the child meter. The existing guidelines have not been established to regulate more than one level of transaction.

Whereas previously there was a single transaction – parent meter to child meter - new technologies and uses (such as EVs) are introducing new layers of commercial transactions in embedded networks behind the child meter.

The following example considers the typical circumstances, for which the original exemption guidelines were designed. In this example, Company A traditionally:

- Owns and operates an embedded network (a private network behind a parent meter connected to the grid);
- The network can take a variety of forms, e.g., caravan parks, residential village, shopping centres etc;
- Company A on-sells and on-supplies electricity to its customers, who are located at a child meter in the embedded network.
- The network can serve a number of customers, who may be short or long term (permanent) residential customers, or business customers; and.
- Customers in the embedded network are final end-users, e.g., they do not on-sell and/or on-supply the electricity to another party.

This is illustrated in Figure 1 below, which uses the example of an embedded network in a holiday park. We note that the holiday park could be replaced with another business

[1] AER Draft Decision, 2025, page 4.

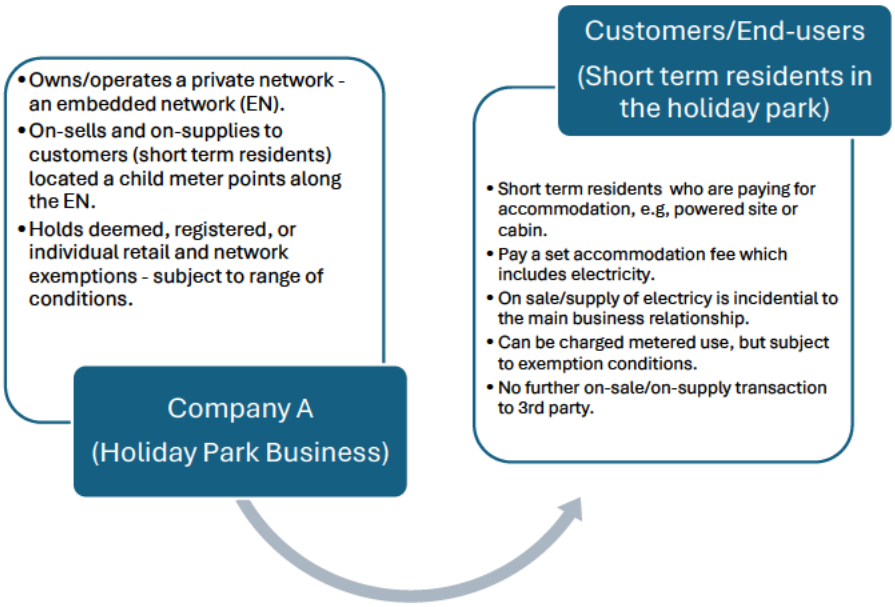


Figure 1 "Traditional" arrangements in an embedded network

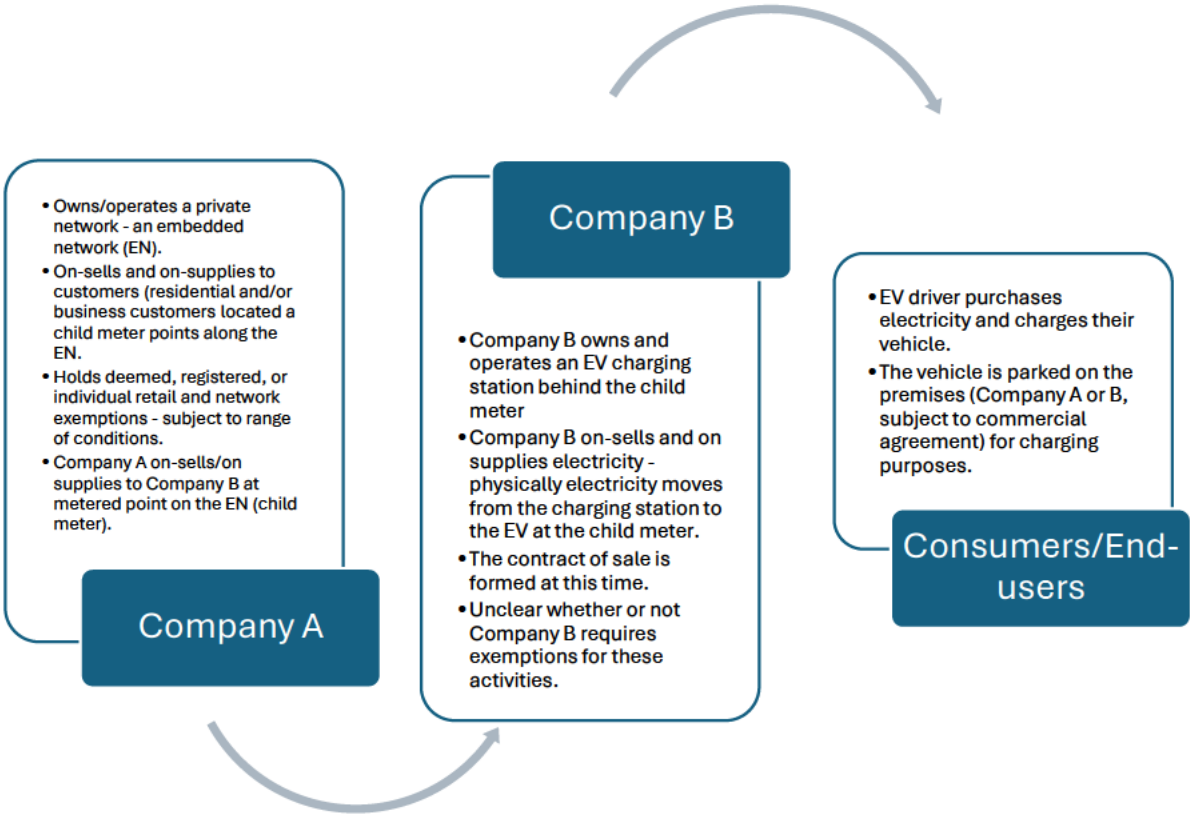
These "traditional" embedded network ownership and operation models are being challenged by new technologies and uses of electricity.

In newer business models we see additional commercial transactions. For example:

- Company A owns and operates an embedded network (a private network behind a parent meter connected to the grid);
- The network can take a variety of forms, e.g., caravan parks, residential village, shopping centres etc;
- Company A on-sells and on-supplies electricity to its customers, who are located at a child meter in the embedded network.
- One such customer is Company B, an intermediary business that engages in further on-selling/on-supplying of electricity to other end-users.

This secondary transaction involving Company B is currently not clearly captured by the existing or draft *Retail Exempt Selling* and *Network Exemptions Guidelines*.

Figure 2 illustrates this situation which includes this additional level of commercial transaction.



Several regulatory matters are unclear under this scenario:

- It is unclear if electricity is on-sold, as understood by the energy retail laws, and if so, whether it is exempted.
- It is also unclear whether this secondary transaction is captured by network exemptions.
- What protections should the consumer/end-user be afforded, if any, in this situation?
- What other laws may regulate this secondary transaction, e.g., will "sale of electricity" as a fuel come under other laws regulating transport fuels, e.g., fuel taxes, licencing etc.

For the sake of recognising and protecting all parties' interests, there is a clear need for the regulatory framework to address these and other complex relationships emerging in embedded networks.

3. Comments on the Draft Guidelines

Several preliminary comments are relevant to providing context to the discussion in this part:

- Firstly, in physical terms, charging an EV involves the supply of electricity.
- Secondly, outside of "free" charging situations (e.g., home charging or freely provided charging at work) charging an EV also usually involves a contract of sale, e.g., buying electricity from an EV charging station operator.

This means that, in practical terms, an EV charging operator is both selling and supplying electricity to an EV owner/driver. Whether and how these activities are regulated is unclear.

Draft Retail Exempt Guideline

The retail exemption guideline seeks to provide a range of exemptions to the requirement to hold a retail authorisation as set out section 88 (1) of the *National Energy Retail Law,* which states:

> (1) A person (the seller) must not, in this jurisdiction, engage in the activity of selling energy to a person for premises unless
>
> (a) the seller is the holder of a current retailer authorisation; or
>
> (b) the seller is an exempt seller.

Whether the activity noted above – sale of electricity by EV charging station owner to EV owner/driver - is captured by s 88 of the NERL turns on how this statutory provision is interpreted, in particular, whether the "activity of selling energy" is "to a person for premises". If the answer is yes to both parts of this section, then the seller must hold a current retailer authorisation or be an exempt seller.

The AER provides that the word premises 'has a broad application' and recommends to 'take a pragmatic approach to interpreting it'.[2] However, this does not address the inherent subjective nature of any such approach, e.g., pragmatic interpretation for whose benefit – the embedded network owner/operator, an intermediary business or the final end-user?

The Draft Guideline further expands on what 'selling for premises' is in its exemption table. Here, the AER offers its interpretation of this statutory provision as follows: 'Energy is used for premises within the limits of a site owned, occupied or operated by the person'.

The question on when something is 'used for premises' has been previously touched on by the AER in the following contexts:

1. In the context of third-party provider fleet charging services, the AER's 2024 updated regulatory sandbox talks about providing EV charging services "to occupants of a premise" as possibly requiring authorisation/exemption.[3] Specifically, it is provided that:

   > Where EV charging infrastructure is located at residential or business premises, and the retailer, exempt seller or EV charging service provider is supplying electricity to the occupier of the premises, the sale of electricity may be regulated by the NERL and National Energy Retail Rules (NERR).
   >
   > The Proponent may therefore require a retail authorisation (or could apply for an exemption) where the EV charge points are located on a business' premises and electricity is supplied to the occupier of that premises i.e. the fleet operator.

2. On the other hand, in the current Network Registration Exemption Guideline (v. 6, 2018), which is being replaced as part of this review, the AER states in a footnote that 'as a vehicle is not a premises, the AER does not regulate the sale of energy for vehicles.'[4] We also note that this reference is no longer included in the new draft guidelines.

Given these inconsistencies, we would recommend that the AER provide more details in their guideline that clarify when energy is sold 'to a person for premises', to ensure that providers of new services within embedded networks have a clearer understanding of their rights and responsibilities under these regulations.

Specific issues to clarify here center on the interpretation of s 88 of the NERL. These are discussed next.

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[2] Draft Guideline, page 5.
[3] AER, Energy Innovation Toolkit, *Electric Vehicle Charging* <https://energyinnovationtoolkit.gov.au/article/use-case/electric-vehicle-charging>.
[4] AER, Electricity Network Service Provider Registration Exemption Guideline (Version 6, March 2018) page 52, fn 41.

a) What is the "premises"?

Under general property law, "premises" is a concept, the scope of which differs depending on context. For example, "premises" can refer to a parcel of land or is used in the context of particular spaces or portions of a property leased or rented ('demised premises').

Given the AER's commitment to a 'broad application' – noted above, "premises" in the context of s 88 of the *National Electricity Retail Law* may possibly be considered to include any physical space lawfully used by a person. This may include a person's EV itself, or the portion of a property on which the EV is parked, while being charged, e.g., private or public car park or business premises.

b) What does the "use for premises" mean?

As set out above, it has sometimes been suggested by the AER and other stakeholders that the activity of selling energy to a person to charge an EV is to a car, not "use for premises", and therefore falls outside the scope of s 88. Such an interpretation is, in our view, erroneous. It focuses on how "electricity" is used later after sale, rather than where – the premises - it is sold. The inherent flaw in this approach can be explained by considering other "moveable" goods that are charged at a particular location and used elsewhere, e.g., mobile phones and laptop.

Ultimately, the preferred interpretation of the statute and the activities regulated under s 88 of the NERL hinge on which protections the AER considers necessary for consumers of the services provided. If we take for example, electric vehicle stations in embedded networks, we have a situation where the embedded network owner (company A) on-sells to an EV charging station provider (company B). This commercial activity is recognised within the AER's guidelines, and will likely be captured under deemed exemption class D1 if the energy selling commenced before 1 January 2026 or registrable exemption class R1 after 31 December 2025. Both exemptions come with conditions, such as pricing conditions not allowing the exempt seller (Company A), to charge customer tariffs higher than the standing offer price of the relevant local area retailer. Whether the next commercial transaction - the sale of electricity from the charging station child meter to the charging end consumer - is similarly protected, requires clarification.

Long standing methods of statutory interpretation, including jurisdictional statutory interpretation acts and decisions of the High Court of Australia could assist in resolving the uncertainty surrounding this issue. In our view, this would be of long standing benefit as how these terms are interpreted will have significant impacts on pricing and protections of consumers, as well as the nature and scope of the legal obligations imposed on embedded network owner/operators and intermediary businesses.

We would like to point out that should this sale of electricity from child meter to vehicle considered a transport service, policy considerations for collecting an equivalent of fuel taxes may be considered by future policy makers. We recognise that this question sits outside the scope of AER's responsibilities but raise the need to consider the question of electrification of transport in a more holistic way.

Draft Network Exemption Guideline

Related clarifications should be considered in the context of on-supplying electricity to consumers in embedded networks. Similar to the requirements for retail, s 11 (2) of the *National Electricity La*w provides:

> (2) A person must not engage in the activity of owning, controlling or operating, in this jurisdiction, a transmission system or distribution system that forms part of the interconnected national electricity system or that forms part of, or is directly or indirectly connected to, a regulated stand-alone power system unless--
> (a) the person is a Registered participant in relation to that activity; or
> (b) the person is the subject of a derogation that exempts the person, or is otherwise exempted by the AER, from the requirement to be a Registered participant in relation to that activity under this Law and the Rules.

Again, the question in particularly arises in the context of charging stations. As set out in the example 3 in the draft network exemption guideline is considering the case of on-supplying from an embedded network to an EV-charging station as a deemed exemption (NDO3). Any activities beyond the charging station, such as on-supply to end-users is not expressly covered. In the current guideline (v6), the AER is prescriptive and sets out that 'the supply of electricity from a charging facility to a vehicle is a service to the transport sector, which is not regulated by the AER'.[5] This explainer is no longer included in the new draft guideline.

We recommend that the AER clarifies more expressly whether on-supplying behind a child-meter is or is not within the scope of the AER exemption classes.

The Deemed Exemption Classes – Table 2, states for class NDO3, column Activity: 'Electric vehicle charging stations within an exempt network (for example, a privately owned charging station located in a public area, hotel, shopping centre, university).'

We believe that the phrasing for this exemption should be clarified, for example by including the words '*Supply to an* electric vehicle charging station within an exempt network'. If the AER does not want to capture the on-supply from the charging station to final consumers, this should be expressly included in the guideline.

We also believe that different commercial arrangements will need to be distinguished. For example, if the operator of an embedded network decides to install and operate a charging station themselves, rather than through a third party, would this activity not be considered on-supply under exemption class NDO3, with the requisite conditions applying?

4. About the authors:

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The authors collaborate on energy law publications and research projects.

[5] Ibid, page 52