COMPLIANCE QUARTER

SUBMISSION ON THE AER'S RETAIL AND NETWORK EXEMPTION GUIDELINE REVIEW

COMPLIANCE QUARTER | 7 JULY 2021

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Prepared by
Compliance Quarter

Introduction

Compliance Quarter was established in 2017 to provide regulatory support to energy sellers operating across the National Electricity Market (**NEM**). Compliance Quarter assists energy sellers in obtaining retail authorisations, establishing compliance programs, and reviewing and responding to proposed and new regulatory obligations. We provide our clients with access to expertise, regulatory technology solutions (including the Compliance HUB) and resources, including guidelines and checklists.

Compliance Quarter is the pre-eminent provider of regulatory compliance services to the energy industry and welcomes the opportunity to comment on the proposed changes to the AER (Retail) Exempt Selling Guideline (**exempt selling guideline**) and the Electricity Network Service Provider – Registration Exemption Guideline (**network guideline**).

In Part 1 of our submission, we address the questions posed by the AER in its Consultation Paper. In Part 2, we suggest further changes to the guidelines and provide examples of specific issues that the AER may wish to address or consider further. In our experience, embedded network operators have differing views on these issues.

Part 1 - Consultation Questions

Question 1: Do stakeholders agree that responsibility for meeting certain network exemption conditions should be restricted to one person, for example, the network owner or controller? If stakeholders agree, which person should be the sole registrant, noting this person should have the capacity to resolve customers' complaints?

We agree that responsibility for registration should rest with one person, the operator. That person may or may not also be the network owner. The registration process should capture the details of the party or parties who own, control and operate the embedded network.

Obligations related to the operation of an embedded network, including customer-facing requirements, should lie with the operator. This mirrors the National Energy Retail Law (**NERL**), where the distributor (being the operator) must comply with the operational requirements under the National Energy Retail Rules. These obligations include those relating to life support, complaints handling, pricing, and access to retail competition.

We note that it may be appropriate for the network owner to be the person with ultimate responsibility for the quality and reliability of the network infrastructure itself. For instance, the obligation to comply with the General Requirements in 4.1(1), 4.1(3) and 4.1(4) of the existing Guideline should continue to lie with the network owner.

We note that ownership of an embedded network is not always easy to determine. It is common to find operators who assist in the establishment of an embedded network by arranging for the installation of infrastructure. Despite the installation work carried out by the operator (and their purported ownership under the operating contract), parts of the network infrastructure may be considered a fixture and property of the landowner at law. Where an owner rather than operator is subject to certain obligations, disputes may arise as to the party with responsibility for compliance.

We draw the AER's attention to s 51 of the *Electricity Supply Act 1995 (NSW)*, which clarifies that for regulated transmission and distribution systems, electricity works are owned separately from the land on which they are located.

We submit that the embedded network operator should be the person with primary responsibility other than in relation to obligations covering quality and reliability (conditions 4.1(1), 4.1(3) and 4.1(4)) where there is a separate owner of the embedded network infrastructure who the operator has nominated during the registration process.

Question 2: Ombudsman membership is an example where designating responsibility is likely to be helpful. Are there other examples?

See our response to Question 1 for our view on this, along with which registrants should be responsible for particular conditions.

Question 3: Should we clarify the meaning of controlling and operating an embedded network?

We appreciate that changes to the National Electricity Law and NER are beyond the scope of this review. However, we consider that the distinction between 'controlling' and 'operating' a network is unnecessary.

We would welcome further clarification from the AER on the meaning of these terms. We note that similar terms are used in the Victorian regulatory framework and that they appear to have been given a particular meaning by the Essential Services Commission.

Question 4: Do stakeholders consider there is a need to regulate SGAs under the network exemption guidelines?

No.

Question 5: Do stakeholder interpret SGAs as being captured under the NER?

Yes. We respectfully disagree with the AER's approach of placing great weight on the fact that the word 'customers' in Chapter 10 of the NER is a plural. This definition was drafted in contemplation that electricity networks convey electricity to customers generally. Furthermore, the generated electricity is purchase by a wholesale customer and ultimately conveyed to customers in the NEM.

We accept that there is no risk of customer detriment in this type of arrangement. However, the preferable position from the AER would be a statement of no action until the necessary legislative changes have been made.

Question 6: What do stakeholders consider a reasonable timeframe to procure and appoint an Embedded Network Manager?

40 business days from the day the obligation is triggered, or from the day the network commences operating (whichever is earlier) with provision for this to be extended if necessary - with appropriate notice to the AER and customers.

Question 7: Do stakeholders agree the appointment of Embedded Network Managers should be deferred in regional Queensland and legacy unmetered sites?

Yes.

Question 8: Do stakeholders agree that the appointment of Embedded Network Managers should be deferred in if they are no longer required, for example when all on-market customers have reverted to off-market? Are there other situations when Embedded Network Manager services are no longer required?

Yes.

Question 9: Do stakeholders agree to removing the 'eligible communities' and counter offer provisions from the network exemption guideline?

Yes.

Question 10: Should the information embedded network owners/operators provide prospective customers be standardised?

Yes. However, similar to the AER's Hardship Policy Guideline, operators should be allowed flexibility to add to the standardised statements, provided the additions are consistent with those statements.

Question 11: Should the network exemption guideline's term 'express written consent' be replaced with 'explicit informed consent', and be provided in writing?

Yes, the term' explicit informed consent' should be used to ensure consistency across both guidelines and the NERL. However, imposing an additional 'in writing' requirement to the network guideline is inappropriate and contradicts the AER's objective to promote consistency in the regulations. The additional writing requirement will cause confusion as to the extent (if any) Part 2 Division 5 of the NERL can be used as guidance for what constitutes or is evidence of explicit informed consent.

There should be a uniform understanding of explicit informed consent across the energy regulation and we prefer the NERL expression over that in the exempt selling guideline.

We submit that the most crucial component of explicit informed consent, is the 'informed' element. The writing requirement merely serves an evidentiary purpose, which is of less importance where the burden is on the regulated entity to keep records of all instances where a customer has provided explicit informed consent (see s 40 NERL).

If the AER replaces the term 'express written consent' with 'explicit informed consent', we urge it to remove the 'in writing' requirement from both guidelines, to bring them in line with the NERL. In the alternative, it should be uncontroversial that consent can be provided electronically (as is the case in the retail market). At a minimum, we ask that the AER clarify that consent by means of electronic signature will be sufficient if there is an 'in writing' requirement- consistent with the broader regime applicable to electronic transactions.

Question 12: Should record keeping requirements explicitly apply to all situations where consent is required under the network and retail guidelines?

In line with our submission above, record keeping requirements, the same as those under s 40 of the NERL, should apply to situations where explicit informed consent is required.

Question 13: Do stakeholders support proposed clarifications to the retail and network exemption guidelines' retrofit requirements? If not, what are reasons for not supporting the changes?

We support the AER's proposed clarifications and the proposed development of standardised statements for disclosure documentation.

The review of applications for retrofits can take considerable time. We understand that there is little consistency between the applications considered by the AER and that the AER can be left waiting on responses to its information requests. This time delay can, where an embedded network would result in consumers paying less, negatively impact on consumers.

We submit that the AER should develop a 'Fast Track Approval Process' to support the implementation of embedded networks in existing sites where consumers will clearly benefit from an embedded network conversion. Such a process will incentivise operators who design and deliver embedded networks that deliver clear consumer benefits. Such applications could be reviewed within a set period of time, i.e. 15 business days.

We submit that the AER should set out the mandatory contents and format of applications for retrofits within the guidelines. The content requirement could be based on whether the application is under the Fast Track Approval Process or the standard process. Where under the Fast Track Approval Process, an applicant could be required to: a) declare that disclosure documentation has been provided to all tenants and that records of marketing and correspondence have been maintained in accordance with the guidelines, c) provide a copy of the disclosure document that is consistent with the guidelines, d) demonstrate that Tenants will be able to exercise power of choice as a consequence of the configuration of the embedded network, and e) demonstrate that retail offers to Tenants will are clearly superior (in other words that Tenants will be provided with energy that is cheaper than they would have been able to access via comparable market offers and that they will continue to enjoy guaranteed discounts). We appreciate that Tenants won't make decisions purely based on price and as such the ability for Tenants to 'opt-out' will be a critical component.

Question 14: Are there any other provisions or requirements that need to be clarified in either the retail or network exemptions guidelines?

Please refer to Part 2 of our submission.

Question 15: Is there any other information exempt sellers should provide embedded network customers to help them access retail competition?

We support the provision of a factsheet. We submit that the factsheet should be in a similar vein to the AER's proposed standardised retrofit information. For example:

> *"While you will still have the ability to seek a retailer of choice, as an embedded network customer, it is possible that you will have difficulty securing energy supply from a retailer."*

Customers are entitled to accurate and realistic information regardless of whether they are already in an embedded network, or deciding whether to support an embedded network conversion.

Question 16: Do stakeholders have a preference – for a broader set of hardship assistance conditions or an exempt seller hardship plan?

We note that any hardship obligations should apply equally under the network guideline and should also apply in respect of chill water.

Our preferred approach would be for the inclusion of a condition requiring exempt persons to adopt a hardship policy/plan. We support the AER providing a hardship policy template for exempt sellers, including standardised statements.

Question 17: What key protections should be included in a hardship policy template for exempt sellers?

We submit that a hardship policy template for exempt customers deserves further consultation, as it goes beyond a general update of the exemption guidelines. Below, are our initial thoughts.

The template should as much as possible follow the AER's Customer Hardship Policy Guideline and have a focus on continued engagement with the customer. However, there should be recognition that customer engagement in many embedded networks may be informal.

The general principle that disconnection for non-payment be a last resort should be expressed, and restrictions on late payment fees should apply while a customer is adhering to a plan.

There must be a clear pathway for an exempt person to remove a customer from the program if they do not genuinely engage with the plan, refuse to engage, and ignore their energy bills.

Question 18: What additional obligations should the core exemption conditions include?

We don't have suggestions in answer to this question.

Question 19: Are there other measures that would facilitate exemption holders' taking up membership of ombudsman schemes?

We suggest including this in the AER's proposed standardised statements. This would put exempt persons on notice of the requirement.

Question 20: Do stakeholders support regulation of the sale of energy to chill water?

Yes. However, we question why the AER treats chill water differently than bulk hot water. Contrary to the AER's belief, it is our understanding that 'chill water' or 'refrigerant' is not always billed by reference to energy used. It is often treated in a similar fashion to bulk hot water, whereby the charges are based upon the proportion of the energy used to operate the relevant plant.

We refer the AER to s 18HD of the *National Measurement Act 1960* (Cth).

Question 21: What are the main issues for this type of energy sale and what sorts of conditions should apply.

The primary issue is a lack of transparency in how these costs are calculated or converted. This could be partially remedied by clearly mandated formulas to provide consistency throughout NECF jurisdictions.

While a deemed exemption may be appropriate, we question why these services (and cooktop gas) are not subject to a broader range of exemption conditions. In practice, an exempt person providing these services will also be selling energy under a registered exemption.

With obvious exceptions like the 'choice of retailer' condition, there appears to be no good reason why the conditions applicable to an exempt supplier should differ so dramatically based only on the medium through which it is supplying the energy.

Part 2 – Further Comments

In Part 2, we suggest further changes to the guidelines and provide examples of specific issues that the AER may wish to address or consider further. In our experience, embedded network operators have differing views on these issues.

1. Definition of 'site'

In its consultation paper, the AER notes:

> *"We take a site to mean an address. In some instances there may be several buildings on a site, particularly in the case of shopping centres."*

We submit that there is an opportunity for the AER to define 'site' and provide further clarity on this point. This definition is particularly important in respect of the AER's treatment of large, 'suburban' embedded networks (private networks that cross public roads), which are increasing.

The natural meaning of 'site' is broader than the AER's interpretation, of a location tied to one address. For example, one could argue that a suburban development is one site, with the operator of the large-scale embedded network being entitled to operate under a registrable exemption.

2. Pancaking

There are differing views in the industry on the permissibility of 'pancaking' – i.e. establishing an embedded network within another embedded network. This is another issue linked to the rise of 'suburban' embedded networks, with a common feature of these networks being apartment blocks with embedded networks, located within a larger embedded network.

On one view, pancaking is permissible as it is not expressly prohibited. On another view, it contravenes clause 4.2.2.4 of the network guideline as this arrangement may impede a pancaked customer from accessing retail competition.

We ask that the AER clarify its position.

3. Large Customer Network Contracts

Clause 4.2.2.4 of the network guideline provides that:

> *"A supply contract must not include any charge for early termination of the supply agreement or any condition which unreasonably restricts the ability of a consumer to access an alternative retail market offer…"*

This clause applies to 'consumers' and it therefore arguably prevents operators from entering into enforceable fixed-term contracts with large customers.

This is a necessary and understandable protection for small embedded network customers to ensure they can access retail competition. However, it puts embedded network operators at a severe disadvantage to the rest of the retail market when it comes to contracting with large customers.

It should be noted that it is common for these large customers to have a commercial advantage over embedded network operators in these scenarios.

We propose that this restriction only apply to small customers.

4. Pricing conditions

We regularly deal with electricity pricing disputes and almost all of these occur within embedded networks. Disputes over differing interpretations of various embedded network electricity pricing clauses have been litigated in the superior courts of Australia and New Zealand. See for example *Volumex Nominees Limited v the Attorney-General [2018] NZHC 647*, *Pipe Networks Pty Ltd v 148 Brunswick Street Pty Ltd (Trustee) [2019] FCA 598 (***Pipe Networks Case***)*, and *Silva Portfolios Pty Ltd t/as Ballina Waterfront Village and Tourist Park v Reckless [2018] NSWSC 1343.*

The Pipe Networks Case is noteworthy for its consideration of a pricing clause in a lease agreement similar to the wording in condition 7(1) of the exempt selling guideline. The case highlights the difficulty of relying on a pricing restriction referencing a hypothetical scenario.

We submit that the price cap in the exempt selling guideline should be clear and easy to determine for exempt persons. It is unfair to expect exempt persons to carry out a hypothetical exercise that requires a working knowledge of the electricity market. This condition becomes particularly confusing in situations where the local area retailer could not practically supply a customer. Furthermore, the hypothetical language of 'would' and' if' is unnecessary where definitive price caps are available via the Default Market Offer or other jurisdictional regulated pricing.

We ask that the AER take a new approach to the pricing conditions in the exempt selling guideline. Not only will this provide certainty for exempt sellers, but it will reduce the likelihood of future disputes based on the interpretation of pricing clauses that have been inspired by (or extracted from) the AER's Guideline.

Conclusion

We are grateful for the opportunity to make a submission on the proposed changes and encourage the AER to take this opportunity to provide increased regulatory certainty for embedded network operators.

For any questions about our submission, please contact us by email at [redacted]