



**DRAFT Decision
to grant an individual
retail exemption
Blue Aurora Pty Ltd**

April 2019

© Commonwealth of Australia 2019

This work is copyright. In addition to any use permitted under the Copyright Act 1968, all material contained within this work is provided under a Creative Commons Attributions 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos
- any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication. The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Corporate Communications,
Australian Competition and Consumer Commission,
GPO Box 3131,
Canberra ACT 2601
or publishing.unit@acc.gov.au.

Inquiries about this publication should be addressed to:

Australian Energy Regulator
GPO Box 520
Melbourne Vic 3001

Tel: 1300 585165

Email: AERExemptions@aer.gov.au

AER Reference: 64334

Amendment Record

Version	Date	Pages
1	18 April 2018	10

Contents

1	Introduction	4
1.1	The nature of retail exemptions & the AER’s role	4
1.2	Submissions received	5
1.3	Reasons for a draft decision	6
2	Draft decision to grant Blue Aurora an individual exemption	7
2.1	Relevant legislation	7
2.2	Matters that extend beyond our assessment and role	7
2.3	Relevant factors	8
2.4	Further information	9
2.5	Summary of conditions	9
3	Next steps	10

1 Introduction

On 7 November 2018 Blue Aurora Pty Ltd (**Blue Aurora**) / ACN 614 888 443 applied for an individual exemption under the National Energy Retail Law (**Retail Law**) to sell electricity through an embedded network at Cairns Beach Resort, Holloways Beach, QLD.

This is our **draft decision** on Blue Aurora's application. We invite submissions from interested stakeholders by 22 May 2019. We will consider submissions when making a final decision on whether to grant Blue Aurora an individual exemption from the requirement to hold a retail authorisation. We also welcome views on the conditions we have proposed should apply to this individual exemption.

Our draft decision is to grant Blue Aurora an individual retail exemption subject to the conditions specified in Schedule 1 of the Draft Instrument.

1.1 The nature of retail exemptions & the AER's role

Energy is an essential service. The Australian Energy Regulator regulates retail electricity and gas markets in jurisdictions that have commenced the Retail Law. Queensland adopted the Retail Law in 2015. Under section 88 of the Retail Law, a person or business who wants to sell energy needs to either have a retailer authorisation or be exempt from this requirement. The AER is responsible for assessing authorisation applications¹ from businesses that want to become energy retailers, and exempting businesses from authorisation requirements.² The AER is not empowered to adjudicate contractual disputes between parties.

There are important differences between retailer authorisations and retail exemptions. An exemption provides relief, subject to certain conditions, from the requirement to **hold a retailer authorisation**. Whereas a retailer authorisation allows a business to sell electricity or gas in all states and territories where the Retail Law applies, a retail exemption usually restricts sales to a defined group of customers at one site. Retail exemptions may be appropriate where the seller has an existing relationship to a particular site and the sale of energy is secondary to other functions that they perform (for example, a caravan site manager selling energy to occupants of a caravan park or a body corporate selling energy to the occupants of an apartment building). Retail exemption holders often purchase all the energy that enters the site from an authorised retailer and then 'on-sell' that energy to the individual occupants through the site's electrical infrastructure or 'embedded network'. A retail exemption does not give a person or business a contractual right to access specific electrical infrastructure in order to sell energy, or compel customers to buy electricity from them. It simply entitles the exempt seller to sell energy on the conditions, and within the scope, of the exemption. It is a means of providing consumers with protections under the Retail Law.

¹ See the AER's Retailer Authorisation Guideline: <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retailer-authorisation-guideline-december-2014>

² In accordance with the AER's Retail Exempt Selling Guideline: <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-exempt-selling-guideline-march-2018>

It should be noted that a person or business does not need a contract with (or authority from) customers or owners to make an exemption application. Any person who seeks to engage in the activity of selling energy to a person for premises can register or apply for an exemption. In this instance, it is also open to the body corporate to register or apply for an individual exemption. In practice only the person who controls the site's embedded network can actually on-sell energy to those customers who live in the premises.

Individual exemptions are required when a seller is ineligible for one of the classes of exemption defined in the AER's (Retail) Exempt Selling Guideline.³ A person requiring an individual exemption must submit an application to be assessed by the AER. The application must be published for consultation. The AER considers the application alongside any submissions received in making its decision whether or not to grant the individual exemption. The AER has the ability to impose conditions on the exemption to ensure that customers of the exempt seller have appropriate protections (similar to the requirements that apply to authorised retailers under energy laws).⁴

The AER has the remit to grant an individual exemption and having received an application from Blue Aurora, the AER has a duty to make a decision on whether to grant or refuse it.

1.2 Submissions received

The AER received 25 submissions during the original consultation period, and accepted two late submissions. In summary, the submissions we received were all from lot owners at Cairns Beach Resort. Around half of the submissions objected to the approval of an individual exemption and the other half were in favour.

Those in favour of the application noted in their submissions that:

- the embedded network ensures buying power and ease of administration
- the arrangement has been in place for the last 10 years and has worked well
- the current method to estimate usage is fair and cost effective.

Those against the application raised the following issues:

- the Body Corporate owns the embedded network: it has not given Blue Aurora permission to use it for the supply and sale of electricity
- the supply and sale of electricity is not part of the caretaker's duties
- Blue Aurora does not have lot owners' explicit informed consent to sell them electricity
- Blue Aurora refuses to supply information about who it buys electricity from and how much it pays
- Blue Aurora does not pass savings on to the Body Corporate and is adding undisclosed fees and charges
- the methodology used by Blue Aurora to determine an individual unit's energy bill is unfair

³ <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-exempt-selling-guideline-march-2018>

⁴ National Energy Retail Rules, r.152(3).

- Blue Aurora is not acting in the Body Corporate's best interests.

1.3 Reasons for a draft decision

The number of submissions and considerable stakeholder interest makes this application for an individual exemption atypical. For this reason, and given the contentious nature of some of the issues, the AER has decided to issue a draft decision. By publishing a draft decision the AER is providing stakeholders the opportunity to respond to the AER's preliminary position, that is, to grant Blue Aurora an individual retail exemption with specific conditions, prior to the AER making its final decision. This allows all parties concerned to provide their views. The AER will then consider any submissions received when making its final decision.

2 Draft decision to grant Blue Aurora an individual exemption

The AER's draft decision is to **grant** Blue Aurora an individual exemption from the requirement to be an authorised retailer, subject to specific conditions.

2.1 Relevant legislation

In making its draft decision, the AER has considered the policy principles relating to exempt selling set out in section 114 of the Retail Law, being:

- regulatory arrangements for exempt sellers should not unnecessarily diverge from those applying to authorised retailers,
- exempt customers, should, as far as practicable, be afforded the right to a choice of retailer in the same way comparable retail customers in the same jurisdiction have that right, and
- exempt customers, should, as far as practicable, not be denied customer protections afforded to retail customers under the Retail Law and Rules.

The AER's decision has also been guided by the objective of the Retail Law, the exempt seller factors, the customer related factors, and the assessment approach outlined in the AER (Retail) Exempt Selling Guideline.

2.2 Matters that extend beyond our assessment and role

We carefully considered the content of Blue Aurora's application and the submissions we received. We acknowledge there are ongoing issues in dispute between Blue Aurora and some lot owners at Cairns Beach Resort.

In particular, we have carefully considered the disputed contractual and bill estimation methodology issues raised by some lot owners and how best, within the AER's remit, to provide appropriate customer protections to customers at Cairns Beach Resort.

The contractual arrangements between Blue Aurora and Cairns Beach Resort lot owners are a separate matter from the AER's role in granting a retail exemption. The AER notes that the disputed contractual matter between Blue Aurora and Cairns Beach Resort lot owners is outside of the AER's remit. The issue of authority to sell energy at Cairns Beach Resort is a private dispute between these parties.

By proposing in our draft decision to grant Blue Aurora an individual exemption the AER is not making a decision in favour of Blue Aurora in this contractual dispute. Nor is it approving Blue Aurora's billing estimation methodology. The Retail Law does not provide remedies for these issues and the AER is not empowered to adjudicate this dispute.

The *Body Corporate and Community Management Act (QLD) (BCCMA)* provides the structure for Body Corporate management in Queensland. We understand from our enquiries with relevant stakeholders that the BCCMA likely covers the apportionment of

utility costs for unmetered premises. We also understand that Queensland's Body Corporate Commission has jurisdiction over body corporate disputes.

2.3 Relevant factors

The following factors informed our draft decision:

1. The AER has received one application under section 88 of the Retail Law in relation to the sale of electricity at Cairns Beach Resort. We have not received any other applications regarding the sale of electricity at Cairns Beach Resort.
2. We consider it is reasonable to grant Blue Aurora an exemption from the requirement to become an authorised retailer for the sale of electricity at Cairns Beach Resort given the limited and incidental nature of the electricity sale. This is consistent with the requirements set out in our (Retail) Exempt Selling Guideline.
3. Electricity customers at Cairns Beach Resort will have more tailored consumer protections through the AER specifying conditions of the retail individual exemption. We propose to specify exemption conditions to:
 - the particular nature of energy sales at Cairns Beach Resort. For example, as with other exempt sellers, the sale will be subject to a price cap condition in acknowledgement of the barriers customers face in accessing an alternative retailer (see condition 7).
 - address concerns raised in submissions, to the extent possible. For example, we would impose conditions on Blue Aurora that pricing information and usage estimation methods for unmetered energy be clearly communicated (see condition 4) and meters should be installed on request, with reasonable costs of installation able to be passed on (see condition 24).
4. Unlike an application for retailer authorisation, there are no criteria for assessing the capability and suitability of applicants for individual exemption under the Retail Law. In making our assessment therefore, we did not assess Blue Aurora's suitability to sell energy. This is consistent with the assessment approach outlined in our (Retail) Exempt Selling Guideline.
5. Customers in embedded networks, should, as far as possible, receive the same protections that they would as customers of authorised retailers with a direct connection to the local distribution network. The sale of energy at Cairns Beach Resort is currently unregulated. In the event the AER decides to grant Blue Aurora an individual exemption, Blue Aurora will need to comply with certain conditions. This will give customers access to rights and protections similar to those available to other customers under the Retail Law which they currently do not have.
6. Blue Aurora will need to comply with the conditions at Schedule 1 of the Draft Instrument. The AER may deal with a breach of an exemption condition as if it were a breach of the Retail Rules and is a civil penalty provision.⁵ The AER can take enforcement action for breaches of the Retail Law or Rules, including issuing infringement notices. The AER also has the power, in limited circumstances, to revoke a retail exemption.

⁵ Section 112(3) Retail Law.

2.4 Further information

Some of the submissions we received indicated that the regulatory framework for the sale of energy under the Retail Law (including the authorisations and exemptions regime) was not well understood. We have provided some summary information below to help explain some key areas:

- Authorised retailers, such as Ergon Energy Retail, must obtain a customer's explicit informed consent before signing a customer on to a market retail contract. There is no similar requirement for an exempt seller to gain explicit informed consent before they sell energy to a customer in an embedded network. This is typically because of the limited alternative supply options for embedded network customers.
- Under the retail exemption framework, an exempt seller may profit from energy onselling, but cannot charge tariffs higher than the standing offer price of the **local area retailer** or charge fees that would not be charged under the terms of the same standing offer. Tariffs are not capped at the standing offer of the retailer who sells electricity to the exempt seller. The local area retailer for regional Queensland is Ergon Energy Retail.
- There are no obligations under the Retail Law to require exempt sellers to disclose who they buy electricity from or how much they pay.

2.5 Summary of conditions

The conditions that the AER proposes to attach to Blue Aurora's individual exemption are set out in Schedule 1 of the Draft Instrument issued alongside this draft decision document. The AER has the ability to tailor the conditions of Blue Aurora's individual retail exemption. We consider this is the most appropriate way to address the concerns raised in the submissions we received that fall within our remit. The conditions also reflect the unique nature of the sale of electricity at Cairns Beach Resort and include that:

- the exempt seller facilitate the installation of individual meters, where requested
- the exempt seller can only charge for meter reads in certain circumstances
- the exempt seller must not charge tariffs higher than the standing offer price that would be charged by the relevant local area retailer
- the exempt seller must develop and adhere to a dispute resolution and complaints handling procedure, and
- the exempt seller must clearly communicate the basis on which tariff, fees and charges are calculated, including how any unmetered usage has been estimated.

3 Next steps

The AER is seeking submissions on this draft decision from interested stakeholders until 22 May 2019. We will consider these submissions when making our final decision. No late submissions will be accepted.

Submissions should be sent to: AERExemptions@aer.gov.au, attention Angela Bourke.

Alternatively submissions can be sent to:

Angela Bourke

A/g General Manager

Australian Energy Regulator

GPO Box 520

Melbourne VIC 3001

Submissions should be in Microsoft Word or another text readable document format.

We prefer that all submissions be publicly available to facilitate an informed and transparent consultative process. Submissions will be treated as public documents unless otherwise requested. Parties wishing to submit confidential information should:

- clearly identify the information that is the subject of the confidentiality claim
- provide a non-confidential version of the submission in a form suitable for publication.

All non-confidential submissions will be placed on our website.⁶

⁶ For further information regarding our use and disclosure of information provided to us, see the *ACCC/AER Information Policy* (June 2014), which is available on our website: <https://www.aer.gov.au/publications/corporate-documents/accc-and-aer-information-policy-collection-and-disclosure-of-information>