

18 January 2016

Ms Sarah Proudfoot  
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Australian Energy Regulator  
GPO Box 520  
MELBOURNE VIC 3001

And by email: [AERinquiry@aer.gov.au](mailto:AERinquiry@aer.gov.au)

Dear Ms Proudfoot

**Further amendments: Draft AER Retail Exempt Selling Guideline – Version 4**

Thank you for the opportunity to comment on the *Amendments to the AER Retail Exempt Selling Guideline v.4.0: Specific sections for additional consultation only* which was released for comment on 17 December 2015.

This submission complements our submission dated 10 November on the Draft Retail Exempt Selling Guideline and accompanying Notice of Draft Instrument.

We understand that the proposed Amendments arise from concerns raised during the consultation process, where it is suggested that (ref: Background, page 2):

- *"the consultation process for individual exemption applications is not well understood or used by stakeholders", and*
- *"Stakeholders raised a related concern about how exempt sellers consult with affected customers when retrofitting an embedded network".*

Our industry and members have always strived to operate within both the spirit and objective of embedded network regulation.

To the extent that the AER's individual exemption application process is not well understood by stakeholders (in this context, for our members, we understand this to primarily be intended to refer to tenants), we support moves to ensure that this process being better understood. However, we are concerned that an overly complex notification and consultation process may in fact cause confusion rather than clarify any concerns raised.

We are keen to work with the AER to ensure that there is clarity and confidence around how exempt sellers consult with affected customers when retrofitting an embedded network.

**Proposed changes**

We are pleased to comment on the two proposed amendments as follows:

**1. Section 4.4: Other Situations: retrofitting**

Section 4.4 of the current Draft Guidelines (page 10) is as follows:

**4.4 Other situations: retrofitting**

If you plan to retrofit an embedded network you will not be eligible for any deemed or registrable class exemptions unless you have the full consent of all the affected residents or tenants. If you are unable to obtain full consent, you will need to apply for an individual exemption (further details are at Appendix A-1, Tables 1 and 2).

We understand that the AER proposes to insert the following statement:

*As part of your application you will need to advise affected tenants or customers about your proposal to retrofit, in particular, what this will mean in terms of accessing a retailer of choice, and to provide us with evidence that you have consulted tenants or customers.*

We have no major concerns with the proposed additional statement at section 4.4.

## **2. Appendix B: Information required for individual exemption applications (other than PPA providers)**

We understand that the AER proposes to insert at Appendix B, under the 'General information requirements' (page 42), the following additional information:

### **Appendix B** *If you are planning to convert a site to an embedded network*

- 16 *As part of your application to sell energy through a planned brownfield embedded network please confirm the following:*
- a) *you have advised tenants / customers that you are planning to retrofit the site as an embedded network. You must include a copy of the advice to tenants / customers including details about how this will affect the tenants' / customers' ability to access a retailer of choice.*
  - b) *you have informed tenants / customers that the AER consults on individual exemption applications and provide them with information about how to make a submission to the AER's consultation process.*
  - c) *you will advise tenants / customers when the application is published for consultation and when the consultation period ends.*
- 17 *We may require you to provide evidence of tenants' / customers' explicit informed consent for applications involving retrofitted embedded networks.*

We have no major concerns with the proposed additional information requirements that an embedded network owner needs to provide to the AER for individual exemption applications. However, we would like to advocate for a consistent and tenant/consumer-friendly approach and, in this regard, we would like to make two points about the proposed new conditions.

Firstly, we are concerned about the potential for confusion amongst tenants if they were to receive multiple communications in respect of embedded networks, which is only one of many aspects which are relevant to their business and their tenancy. Small retailers, in particular, would benefit from a streamlined and consistent approach to communications, rather than a multiplicity of communications over a period of time which have the potential to confuse rather than clarify any concerns about the consultation process.

The communications required (or potentially required) to be provided to tenants under the new Guidelines are at a range of stages in the implementation of an embedded network, including pre-lodgement of an exemption application and during the application review/consultation process (times when it is uncertain whether an embedded network will be implemented and where there may be a comparatively high level of tenant turnover), post the application review/consultation process, and during the sales process and implementation of an embedded networks. These bear little connection to the stages of engagement in the relationship between landlord and tenant which is when a tenant typically receives information and turns their mind to that information.

It would be preferable to streamline these communications so as to minimise any confusion for the tenant as to the purposes of these communications. In any event, we note that given embedded networks are only one of many aspects which are relevant to a tenant, their business and their tenancy, we would not expect extensive participation in any consultation process from the majority of tenants, with the exception of major tenants which already engage with the AER and consultation processes.

Secondly, we believe that the AER, as regulator and controller of the consultation process, is best placed to provide the content of any information to be provided to tenants/customers. It would be counter-productive, for instance, if embedded network owners were to comply with the new information requirements and provide information they believe to be correct at the time (e.g. a copy of the advice to customers including how this will affect their ability to access a retailer of choice or information about the consultation process), only to have the AER reject this advice or information on the basis that (for instance) the advice, or the form of the advice, was considered inappropriate or non-compliant by the AER, or that the AER's process has changed. In this regard, we hope the AER would take a consultative approach and we would welcome any general guidance on this issue. Our members are happy to facilitate the communication of information about the AER's process, to the extent appropriate.

As stated previously, our industry and members have always strived to operate within both the spirit and objective of embedded network regulation. We believe that any consultation and communication regime ought to apply to both the Network and Retail Exemption

#### **Unreasonable withholding of consent**

In light of the AER's proposed new approach to in relation to consultation and consent in relation to embedded networks for customers, we reiterate the recommendation in our previous submission that the AER needs to enshrine a principle that a current or potential embedded network customer cannot unreasonably withhold their consent to an embedded network owner or operator, or impede an owner in seeking to undertake such an embedded network conversion. This is particularly the case whereby an embedded network owner has complied with the AER's requirements, and we believe it is fair and reasonable that an embedded network owner should be able to rely on the AER's requirements for increased certainty.

As always, feel free to contact me on 02 9033 1930 or [anardi@scca.org.au](mailto:anardi@scca.org.au).

Yours sincerely,



obo Angus Nardi  
**Executive Director**