7 February 2011

General Manager
Markets Branch
Australian Energy Regulator
GPO Box 520
MELBOURNE VIC 3001

By email: AERinquiry@aer.gov.au – Attention Pip Dodgson.

Dear Sir or Madam

AER Consultation Paper and Draft Exempt Selling Guideline

The Shopping Centre Council of Australia (SCCA) appreciates the opportunity to comment on the Australian Energy Regulator's (AER) second round of consultation in relation to energy on-selling exemptions, which includes the *Consultation Paper* ('the Consultation Paper') and *Draft Exempt Selling Guideline* ('the Guideline'). The SCCA represents Australia's major owners and managers of shopping centres, including regional, sub-regional and neighbourhood shopping centres covering around 460 centres and 11 million square metres of gross lettable space. Our members include: AMP Capital Investors, Brookfield Multiplex, Centro Properties Group, Charter Hall Retail REIT, Colonial First State Property, DEXUS Property Group, Eureka Funds Management, GPT Group, ISPT, Jen Retail Properties, Jones Lang LaSalle, Lend Lease, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland and the Westfield Group.

Energy on-selling is a *key part* of modern shopping centre investment and management. As the AER is aware, some of our members own and operate (including through external providers) embedded networks in their shopping centres and also, in some cases, on-sell electricity to retail tenants, in accordance with existing jurisdictional regulations and rules. Our members take advantage of exemptions to the requirement to be a licensed retailer and are, therefore, 'exempt sellers' in terms of on-selling activities. This includes AMP Capital Investors, Charter Hall Retail REIT, Colonial First State, GPT Group, Lend Lease, Mirvac, QIC, Stockland, and Westfield.

We support the proposal to achieve national harmonisation for on-selling exemptions. We generally welcome the revised approach to exemptions that have been developed since the previous consultation round, which includes the proposed class exemption which covers shopping centre owners; Registrable Exemption 1 – or 'R1' – (although we believe the 2015 expiry timeframe is too short). While we believe that some of the R1 conditions are onerous, we believe the conditions achieve a good balance to meet the overall needs of retail landlords, retail tenants and the AER. With this in mind, however, we would appreciate clarification on how exemptions granted before the commencement of the AER's framework will be transitioned and recognised under the AER's framework. This includes the circumstances where state-based conditions differ to the AER's standard conditions, and issues such as registration with the AER and the AER Public Register.

The transitioning of exemptions granted before the commencement of the new framework has been highlighted as the most pressing issue for our members.

Our preferred position is that exemptions (including conditions and timeframes) granted before the commencement of the AER exemption framework have an option to be automatically transitioned and registered under the AER's framework, without the need to comply with the AER's conditions. We also believe that R1 Exemptions granted before 2015 should be able to operate in perpetuity (and not expire in 2015).

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This submission provides comments and recommendations on the following aspects of the Consultation Paper and Guideline:

- The Retail Exemptions Framework, including the requirements relating to registrable exemptions and the treatment of existing exemptions (obtained under State and Territory regulations and rules) under transitional arrangements.
- The general requirements to register, and apply for, an individual exemption.
- The AER's decision-making requirements (guided by the objectives of the Retail Law) in relation to any decision relating to exemptions (registrable or individual exemptions), including the Policy Principles, Exempt Seller Related Factors and Customer Related Factors.
- The standard conditions for the granting, variation or revocation of an exemption (which for R1, includes 13 conditions – in addition to general conditions consistent with the objectives of the Retail Law).

We respectfully request that our following comments are taken into consideration:

First, we generally support the Retail Exemptions Framework (at section 2 of the Consultation Paper), however we seek clarification on how existing exemptions will be treated under the Framework's **transitional arrangements**. We maintain that companies with exemptions granted before the commencement of the AER's framework should have the option to be automatically transitioned as a registrable exemption under the new framework. But we are confused on the relationship between the statements at section 2.8 of the Consultation Paper – which relates to the Joint Implementation Group (and AER's) work – and section 2.1.2 and Part 3 of the Guideline, which relate to the proposed registrable exemptions (including R1) and existing exemptions obtained under State and Territory regulations and rules. Section 2.8 ("Transition of existing State and Territory exemptions") provides that a Joint Implementation Group (JIG) has been established under the Ministerial Council on Energy to deal with national transitional matters arising from the implementation from the Customer Framework and to coordinate jurisdictional transition work. It also states that the AER will work with each jurisdiction to ensure that the transitional arrangements for each State and Territory's pre-existing on-selling arrangements are accommodated either in their application legislation or in the determinations of deemed and registrable exemptions. The main concern is the suggestion (and uncertainty) that either State and Territory enabling legislation or the AER's Determinations of deemed and registrable exemptions will comprise the appropriate transitional arrangements. While this proves certainty in terms of potential instruments that will deal with transitional arrangements, there is no certainty on what the transitional arrangements will actually be.

However, Part 3 of the Guideline effectively provides that registrable exemptions are appropriate for "activities may have commenced under State and Territory class exemptions prior to the implementation of the Customer Framework" (which, we understand, is scheduled to commence on 10 December 2012, as determined by the Ministerial Council on Energy).

One of hand, we interpret that the treatment of existing exemptions will be caught up with the JIG process. On the other hand, we interpret that existing exemptions will be automatically transitioned to registrable exemptions (in our case, R1), when the scheme commences. On this point, we assume that (as per page 6 of the Consultation Paper) the relevant State or Territory based exemption would transfer to an AER registrable exemption once that relevant State or Territory implements the Retail Law (which underpins the proposed exemption process) "between 2011 and 2013". In light of these provisions, we seek clarification on the extent to which our members with current exemptions (and other exemptions granted before the AER framework commences) will be automatically transitioned and the process they will be required to go through. Companies with existing exemptions require certainty as soon as possible, and we would welcome clarification on this matter.

Second, we have some **concerns with some of the AER's positions** in relation to on-selling, and how this position translates to the AER's decision-making for exemptions, bound by the Policy Principles, Exempt Seller Factors and Customer Related Factors. We maintain that the growth of on-selling is not problematic, and is in the long-term interests of consumers (in our industry's case; retail tenants). We have noted the issues raised in submissions and the AER's concerns (at section 3.2.2) with customer protection issues, however we interpret that much of the issues relate to residential circumstances such as caravan parks, as opposed to business-to-business scenarios such as within shopping centres. We are not aware of any major form of complaint provided to the AER from retail tenants, or indeed, on-selling forming the basis of complaints through traditional retail tenancy dispute channels such as the ADT in NSW or VCAT in Victoria. It is in a

shopping centre landlord's interest to ensure that retail tenants are provided optimum and competitive services.

The fact that some retail tenants participate in certain schemes must be acknowledged that on-selling has some level of support from retail tenants. Further, we believe on-selling can provide better quality, and more tailored service than electricity retailers, given the direct relationship with shopping centre management. However the comment (at pages 15-16 of the Consultation Paper) that "on-selling may be problematic where there is an imbalance in the negotiating power between landlord and tenant" is somewhat unreasonable, particularly given (if the same terms are applied) the potential imbalance between a 'small customer' retail tenant and large electricity companies such as Origin Energy (a $AUS 15 billion company, and Australia's largest electricity retailer), AGL (a $AUS 7 billion company) and TRU Energy (a wholly-owned organisation of the CLP Group, a $20 billion company listed on the Hong Kong Stock Exchange). These companies are much larger than a number of commercial property companies (e.g. the only property organisation on the ASX larger than Origin Energy is the Westfield Group). To suggest that an imbalance could only exist between a retail tenant and a landlord, or that there is no related imbalance between a retail tenant and an electricity company, is, we believe, inappropriate. This is particularly the case given there are less 'players' in the electricity market than the shopping centre industry. In the case of shopping centres, where retailing is the core business of both the landlord and tenant, there is a much more natural relationship on this issue, versus a retail tenant dealing with companies whose core business is electricity retailing. How will the AER determine an imbalance in negotiation power in any case?

In this regard, we are concerned how the AER intends to approach its decision-making in relation to Policy Principles and Exempt Seller Factors such as whether on-selling is considered a core, or incidental business activity. We appreciate that the AER will look at a number of factors in making a decision, but there appears to be various ways in which the AER proposes to deal with this issue alone, and ultimately, it is unclear what resulting conditions would be attached to a decision to grant an exemption (outside, for instance, the 13 conditions for R1). As an example, we support one aspect of the AER's description of 'core versus incidental business', however we do not agree with the position (at section 5.2.1 of the Guideline) that the AER "would generally consider on-selling to be a core activity where the exempt seller's business model involves on-selling over multiple sites", to the extent that it applies to shopping centre owners. We would welcome clarification that shopping centre owners that on-sell at multiple sites are not caught by this provision (given retailing is still the core business activity across those multiple sites). We do however support the provision that if on-selling is not the only service provided to the customer (in our case, retail tenants), or does not constitute a significant aspect of the relationship, on-selling would not be considered to be core business. In such a case, which approach would prevail? We have similar concerns in relation to issues such as 'characteristics of an exempt seller', 'profiteering' and the 'volume of energy sold'. There is a lack of clarity as to how these issues will be considered, and we are concerned with the significant discretion the AER appears to have on these issues.

Third, as stated above, our preference is that **exemptions granted before the commencement of the AER's exemption framework** would have an option to be able to continue operate under an AER exemption, without the need to adhere to the AER's R1 conditions, and on a continued basis (i.e. no expiry date). We generally support the proposed Class R1 Exemption and conditions, which are similar to existing NSW and Victorian conditions. We note that some of the 'general conditions' (section 2.2 and page 22 of the Guideline) are not included or considered relevant for retail (e.g. concessions and rebates, life support). While we believe that some of the R1 conditions are onerous, we believe that on balance, the suite of conditions are fair and reasonable and achieve an appropriate balance to meet the industry's and AER's needs and concerns.

However, we make some requested amendments as follows:

- We believe that this class should be extended to at least 2020 to facilitate planning for future development projects. While the proposed 1 January 2015 deadline might "enable any commercial developments currently under construction to be completed", this would not be sufficient for projects that are currently being planned. Large shopping centre projects, in particular, have long lead times. We do not understand the policy basis of closing this class to new entrants from 2015 and, therefore, removing a class exemption and requiring applicants to apply for individual exemptions from there on.

- At condition 7 – an additional provision should be added which provides that a retail landlord should be able to disconnect when a retail lease expires.

- There needs to be a mechanism for transferring property ownership, which occurs due to merger and acquisition activity in our industry. A recent example is the establishment of the Westfield Retail Trust, listed on the ASX, which has half ownership (with the Westfield Group) of Westfield's Australian and New Zealand shopping centre investments. Other recent examples include Lend Lease's acquisition of former ING Real Estate shopping centres, and the current bid process for Centro's shopping centres. Such a mechanism would enable simpler administration of the scheme.

Fourth, we are concerned with the **public consultation process for Individual Exemptions** (at 4.1.3 of the Guideline), insofar that the AER appears able to publish an applicant's data identified as confidential, if the AER does not consider it be confidential, without the applicant's agreement. There are no proposed terms as to how the AER would make such a determination. An applicant must be able to have an opportunity to revise the information and/or provide agreement in relation to the information that is being disclosed. We believe it would be fair for an applicant to have an opportunity for consultation regarding disclosure and an opportunity to amend or withdraw the application.

Fifth, we note the AER's position (at section 5.2.7 of the Guideline) in relation to **co-generation, tri-generation** and sustainable energy. We support the proposed approach that such systems be covered by an Individual Exemption process, in line with the required conditions.

Sixth, we support the **proposed D6 Exemption** approach to common area charging.

Seventh, we look forward to reviewing retail exemption issues in conjunction with the proposed **network exemptions**, through consultation on the Network Service Provider Exemption Guidelines this year. It would greatly benefit our members to be able to consider these issues jointly.

We would be happy to assist the AER further if required, and would welcome an opportunity to meet with you to discuss detailed issues concerning our members, including existing state-based conditions and transitional arrangements. I can be contacted on 02 9033 1930 or anardi@scca.org.au.

Yours sincerely,

A. Nardi 7/2/11

Angus Nardi
Deputy Director