

2 August 2010

Mr Tom Leuner
Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

By email: AERInquiry@acr.gov.au

Dear Mr Leuner,

AER Issues Paper Approach to Retail Exemptions

The Consumer Utilities Advocacy Centre Ltd (CUAC) is an independent consumer advocacy organisation. It was established to ensure the representation of Victorian consumers in policy and regulatory debates on electricity, gas and water. In informing these debates, CUAC monitors grassroots consumer utilities issues with particular regard to low income, disadvantaged and rural consumers.

CUAC welcomes the opportunity to comment on the Australian Energy Regulator's (AER)'s Issues Paper Approach to Retail Exemptions (Issues Paper). CUAC notes that the range of embedded networks varies from small arrangements in caravan parks and rooming houses, to apartments, small businesses, large industrial parks and off-grid situations. It is therefore difficult to have a "one-size-fits-all" regulatory approach to such a diverse range of scenarios.

CUAC agrees that exemptions must not be used for conventional energy retailing activities where the retailer is registered with the Australian Energy Market Operator (AEMO) for wholesale market purposes. The regulatory framework must ensure that large scale operators who are more appropriately licensed are unable to bypass the retailer authorisation regime of the National Energy Customer Framework (NECF), and instead obtain an exemption. The regulatory framework should also not prevent the continued operation of embedded networks as often such arrangements are the sole means of obtaining supply to customers.

Exemptions for onselling may be appropriate where the cost of full compliance with the NECF outweighs the benefits to the consumer. However, exemptions must be granted subject to appropriate customer protections. There is a need, in particular, to ensure that small customers in onselling situations receive appropriate levels of customer protections as

these groups often face considerable barriers to, or are unable to, access the competitive retail market. Where retailer choice is not possible, there is no competitive pressure on embedded network operators to ensure that they adopt the price-service mix demanded by their customers. Customers in these situations are susceptible to the monopolistic behaviour of the embedded network operator.

On page 16 of the Issues Paper, the AER stated that:

[E]xempt sellers will be accountable for their compliance with the Retail Law and Retail Rules under the same enforcement provisions in Part 13 of the Law as authorised retailers, but will not be subject to the compliance and performance reporting regimes that will apply to authorised retailers under Part 12.

CUAC strongly believes that there is a need to ensure that onselling arrangements are brought within the AER's monitoring and compliance framework, not just enforcement framework. Enforcement by itself is insufficient as such action is taken after the breach has occurred. Further, enforcement will be difficult without effective monitoring of compliance. The absence of a monitoring and compliance framework is a significant weakness in any regulatory framework. Without an effective compliance and enforcement framework, any customer protection provisions or conditions imposed on exempt operators become meaningless and in the worst case scenario, obsolete. CUAC submits that the AER should have a monitoring, compliance and enforcement role with regard to exempt operators. This includes a reporting framework to facilitate the monitoring role of the AER. The monitoring and compliance framework need not be similar to those required of authorised retailers under the NECF but should be appropriate to the circumstances of exempt sellers. Monitoring compliance and enforcement ensures that exempt operators remain compliant. It gives embedded operators the incentive to remain compliant with their obligations and also encourages a culture of compliance. Regulatory oversight is especially important as customers in onselling situations are unable to access, or encounter difficulties in accessing, the competitive retail market.

CUAC's submission does not address all the questions posed by the AER but those areas where CUAC has a particular concern.

The AER's role under the proposed Retail Law and Retail Rules

Sale of energy

Q1: Do stakeholders agree with the AER's interpretation of what constitutes the sale of energy?

CUAC agrees with the AER's interpretation that; "a sale of energy occurs when a person passes on a charge for energy as a separate charge, as opposed to a situation where the cost of energy is absorbed into another charge such as rent."

Policy Principles

Exempt seller and customer related factors

AER exempt selling functions - *Issuing retail exemptions; Imposing conditions on exempt sellers; developing Exempt Selling Guidelines*

Q2: Are there any other matters that should be included in the Exempt Selling Guidelines?

CUAC supports the policy principles set out in section 528 of the draft National Energy Retail Law (NERL) which the AER must consider in carrying out its exempt selling function or power.

- [R]egulatory arrangements for exempt sellers should not unnecessarily diverge from those applying to retailers;
- [E]xempt customers should, as far as practicable, be afforded the right to a choice of retailer in the same way as comparable retail customers in the same jurisdiction have that right;
- [E]xempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under this Law and the Rules.

CUAC notes that currently, jurisdictional arrangements for customers in onselling regimes offer inadequate customer protection. There is also a lack of transparency about energy charges for customers in exempt networks. Many customers residing in premises with exempt networks have little control over their energy purchasing decisions in comparison to retail customers. They are often unaware of the amount of energy they consume and the relevant charges applicable to them. In developing its Exempt Selling Guidelines, the AER needs to ensure that exempt customers have access to a transparent process which enables them to see the exact quantity of energy purchased and all applicable tariffs and charges. This reduces incidents of exempt sellers unfairly profiting at the expense of exempt customers.

No customer should be disconnected solely due to an inability to pay. CUAC submits that the Exempt Selling Guidelines must be robust and as a minimum, oblige onsellors to provide flexible payment options (including payment plans) and hardship assistance to their customers. The Exempt Selling Guidelines should also provide for consumer redress through an accessible, free and effective external complaints handling system. As mentioned above, a regulatory framework for exempt sellers must include both a compliance and enforcement regime. Pricing protection is critical, more so for customers without choice. There must be adequate customer protections around connection, disconnection and reconnection. There has to be obligations regarding metering standards; these impact billing accuracy and customer safety.

CUAC submits that failure to provide these basic protections to exempt customers excludes them from their consumer rights. These matters are discussed in further detail below.

Maintaining and publishing a Public Register

Q3: Are there other particulars and information relating to exempt sellers that should be included in the public register?

Currently, there is a lack of information available on the extent to which embedded networks operate and the types of customers they serve. This is due to the self-assessment application processes and limited registration requirements for exempt sellers in some jurisdictions.

A public register which lists all exempt sellers would provide a complete picture of the extent of embedded networks and the number and types of customers served. Information collated over time could assist in informing the approach to take in regulating exempt sellers in the future. Customers will also be able to access the public register for more information about exempt sellers; a public register which lists all exempt sellers might assist the AER in monitoring compliance

It appears, however, that the proposed exempt sellers' public register will only provide particulars on exempt sellers who are subject to individual or registrable exemptions. For deemed exemptions, CUAC notes that only a list of classes of persons of whom a deemed exemption is in force will be included in the public register. On page 11 of the Issues Paper, the AER has stated:

The Retail Rules also permit the AER to include in the public register other particulars and information relating to authorised retailers, exempt sellers and associated matters that it considers relevant.

Since exempt sellers with deemed exemptions need not register with the AER, it would be difficult if not impossible for the AER to require holders of deemed exemptions to provide the particulars and information listed on pages 11-12 of the Issues Paper. This would result in an incomplete picture of the extent of embedded networks and the types and numbers of customer served. CUAC also questions whether there can be effective monitoring of compliance and enforcement if the exempt seller need not register (that is, exempt sellers with a deemed exemption).

CUAC submits that it should be a condition of any exemption that exempt sellers inform the AER of any changes to the information which must be provided for inclusion into the public register or disclosed to the AER.

Issues for discussion

Apparent growth in onselling

Q4: Is the apparent growth in onselling problematic, and if so, why?

Yes, growth in onselling is problematic. There is a lack of information about how many embedded networks are operating, how many consumers are involved, and in what housing types and tenures. CUAC believes that the current regulatory framework covering onselling is inadequate. Consumers in onselling situations are at risk of exploitation by monopolistic

behaviour of the exempt seller. Also, many of the issues around embedded networks are complex. For instance, issues around metering infrastructure and providing choice of retailers to embedded customers.

Policy Principles

Regulatory arrangements for exempt sellers

- Q5: Is it appropriate for the AER to impose no conditions on large customers of exempt sellers (as is the case for large customers of authorised retailers), or should they be provided with basic customer protections where the existing arrangements prevent them from choosing their own retailer?
- Q6: Should the AER impose a condition on onsellers selling to large customers to ensure that they do not hinder or prevent the customer from choosing their own retailer?

In principle, all customers including large customers should be able to choose their own retailer. Where the existing metering arrangements prevent large customers from choosing their own retailer, and thus subject them to the monopolistic practices of the exempt seller, they should be provided with basic customer protections. Exempt sellers to large customers should not prevent their customers from choosing their own retailer, especially where the metering infrastructure allows retailer choice. Large customers should also be allowed to opt out of the exempt network when their continued participation proves materially disadvantageous to them.

Access to retailer of choice

- Q7: How important is it for customers in onselling situations to have access to choice of retailer?
- Q8: Once network configuration/metering issues are addressed, are there any other impediments to exempt customers having access to choice of retailer for electricity?

CUAC recognises that affording customers of exempt sellers the right to retailer choice is a complex matter. The relative costs and benefits, for instance, present difficulties for exempt sellers to provide practical retail choice to each customer.

Nevertheless, the ability to exercise choice of retailer is important. In terms of customer protection, customers of exempt sellers are worse off than customers of authorised retailers. In principle, CUAC believes that all customers, regardless of their financial circumstances and/or housing tenure, deserve equivalent level of customer protection. In situations where there is access to the retail market, customers must have the freedom to opt out of an onselling situation should continued participation be materially disadvantageous. Where the metering infrastructure is unable to facilitate customer choice of retailer, provided that the customer is separately metered, exemptions should only be granted subject to appropriate customer protections. (We discuss customer protections further in our submission. See our answers to Q10-Q11.)

CUAC recommends that the AER explore options for overcoming barriers imposed by metering arrangements and the costs of metering upgrades. Where metering arrangements exclude customer access to retail competition or where the option of metering upgrades is unavailable or its costs prohibitive, it is imperative that there is effective regulatory oversight and active monitoring of the exempt seller, particularly in regard to pricing and compliance with customer protection provisions. Further, customers who are excluded from full retail competition must have access to an effective and free external dispute resolution mechanism.

Q9: Where gas is only used for limited purposes, how important is it for customers in onselling situations to have access to choice of retailer for gas?

It depends on the extent to which gas is used in embedded networks. If gas is just used for cooking, it might not be feasible to require individual metering to support choice of gas retailer.

Customer protections

Q10: What core customer protections should exempt sellers be required to provide for their small customers?

Q11: Are the core protections proposed in the draft categories of deemed and registrable exemptions attached to this paper appropriate?

CUAC submits adding the following as a condition on exempt sellers. That exempt customers have the right to opt out of the exempt network, especially when their continued participation proves materially disadvantageous (This would apply in situations where the customer is able to exercise choice of retailer.)

In CUAC's view, the list of protections which the AER has proposed to extend to exempt customers at Attachment 1 is inadequate:

Condition 1 – Information provision

CUAC believes that it is important for an exempt customer to be provided with information about certain matters at the start of their tenancy/residency.

Clause 1(a) of Condition 1 suggests that access to an external dispute resolution scheme for exempt customers is an option (“...including any right...to access the energy Ombudsman scheme and any relevant complaints tribunal...”). CUAC believes that exempt customers need access to an effective, accessible and free external dispute resolution scheme whether the energy ombudsman or otherwise. (Access to an external dispute resolution scheme is discussed in detail in our answer to Q15.)

Clause 1(b) of Condition 1 is inadequate as there is no obligation on exempt sellers to offer flexible payment options or payment plans. Payment plans should be offered to all customers.

Payment plans can be a preventative measure to ensure that a consumer does not fall into payment difficulties or a way to manage bills for a short period. They should not be limited to people who have expressed payment difficulties. CUAC submits that as a minimum, exempt sellers must offer flexible payment options including payment plans which take into account the customer's capacity to pay. Customers residing in caravan parks, boarding and rooming houses etc are often from low income households. Financial hardship is a real concern for these customer groups, exacerbated by the monopolistic practices of exempt sellers. CUAC also submits that some form of hardship assistance should be offered to exempt customers. (See our comments under Condition 8 and also our answer to Q14.)

Clause 1(c) of Condition 1 is essential. Providing information on government energy rebates, concessions and relief schemes will assist vulnerable and low income customers residing in embedded networks to access assistance programs.

CUAC supports clause 1(d) of Condition 1. That is, informing exempt customers about their right, if any, to purchase energy from a retailer of their choice and on the options of metering that would allow this.

Condition 2 – Billing and payment arrangements

CUAC supports Condition 2 which appears to oblige exempt sellers to undertake an actual read each time a bill is issued.

In addition to the listed items at clause 3 of Condition 2, the bill content should include the following:

Customer's account number, supply address, details of available payment methods, anticipated date of next meter reading, indication whether the bill issued is based on an actual reading or an estimate. CUAC understands that some embedded networks have interval meters. Therefore, current and previous meter readings or estimates in clause 3 might not apply.

Condition 3 – Estimation as basis for bills

CUAC submits that exempt sellers should ensure that actual readings of the meter are carried out as frequently as is required to prepare its bills and in any event at least once every 12 months.

Condition 6 – Undercharging and Overcharging

Consumers should not be penalised for the exempt sellers' error. CUAC submits that exempt sellers should only be able to recover amounts undercharged during the previous six months.

Further, the provision for repayment of undercharged amounts by the customer should not be limited to the time frames stipulated in clause 1(d) of Condition 6. Exempt sellers and their customers should be able to agree to longer time frames for repayment of undercharged amounts.

The overcharging threshold (\$50) limits a customer's ability to make choices about how his/her funds are to be used. If there is to be a threshold, CUAC believes that it should be reduced to \$25.

\$25 might be a more appropriate threshold in the context of customers residing in caravan parks and rooming houses, many of whom are from low income backgrounds.

Condition 7 – Pricing requirements

CUAC strongly supports this provision. Information on tariffs and all fees and charges applicable to the customer and the basis in which they are calculated must, however, be presented in a way which is easily understood by customers. A price cap is essential as it gives some level of protection to customers. The standing offer price may be an appropriate price cap for exempt sellers.

Condition 8 – Payment difficulties and disconnection or cessation of supply

No one should be disconnected solely due to an inability to pay their energy bills. The consequences arising from disconnection are severe. All customers must be given every opportunity to avoid disconnection. Therefore, flexible payment plans including payment plans taking into account the customer's capacity to pay, are essential. CUAC submits that this must be an obligation on exempt sellers. Without this obligation, the only route available for customers experiencing hardship is disconnection.

The steps leading up to disconnection outlined in Condition 8 is inadequate. CUAC submits that disconnection for non-payment must not occur unless the exempt seller has taken all necessary steps, which must be identical to those required of authorised retailers under the NECF. At the very least; there should be both reminder and disconnection notices issued prior to disconnection; the exempt seller should also make reasonable attempts to contact the customer prior to disconnection.

Condition 9 – When disconnection or cessation of supply is prohibited

Energy is an essential service. CUAC submits that there should be an obligation on exempt sellers not to cease supplying energy to the customer unless the customer has elected to purchase energy from an authorised retailer (in situations where the customer has access to retail competition).

Clause 1(c) of Condition 9 only applies to complaints surfaced to the energy Ombudsman. It should be expanded to include complaints raised with any external dispute resolution bodies, relevant tribunals etc. In addition, there must also be no disconnection where the exempt customer had made a complaint directly to the exempt seller (internal dispute resolution process). The exempt seller must continue to sell energy to the customer pending resolution of the complaint.

Condition 10 – Reconnection of supply

There must be a time frame for reconnection otherwise the customer may be indefinitely left without supply even after fulfilling all the stipulated requirements. CUAC notes that there are distributor service standards for reconnection times in the retail market, which would not apply for exempt networks.

CUAC suggests that once the customer has satisfied the conditions and made the reconnection request, it is reasonable for the exempt seller to reconnect the customer on the same day if the request was made before 3pm on a business day. For reconnection requests after 3pm on a business day, the exempt seller must reconnect by the next business day.

Condition 13 – Contact hours

As some customers are from non-English speaking backgrounds, there needs to be some access to interpreter services available.

There should be a voice bank especially for out of business hours contact; this is important for reporting faults and disconnections.

Condition 14 – Dispute resolution

Clause 2 of Condition 14 should be expanded to include other external dispute resolution bodies.

Condition 17 – Maintaining records

Condition 17 is drafted to apply only to existing exempt customers. Disputes might arise after a customer has left the exempt network. For example, the customer might have relocated or managed to access retail competition. There is therefore a need for exempt sellers to maintain customer records for a period of time after the customer has moved on. Keeping records of previous customers for at least a year would be a reasonable time period.

Records to be kept should also include the customer's account number and supply address. Call logs or customer notes would be useful records especially in the event of a dispute. CUAC understands that some embedded networks have interval meters. Therefore, current and previous meter readings or estimates in clauses 4 and 5 might not apply.

ROLR protections

- Q12: Do stakeholders agree with the requirement for exempt sellers to notify the AER, and their customers, of the possibility of disconnection?
- Q13: Are there any conditions which the AER could impose which might help to mitigate the risk of an exempt seller failing and leaving its customers without supply? Would it be appropriate for the AER to do this?

Security and reliability of supply in embedded networks is essential. CUAC strongly supports requiring exempt sellers to notify the AER and their customers of actual, and the possibility of disconnection, immediately they become aware of this. The AER should explore ways to ensure that in the event of a “mini-ROLR”, customers are able to obtain supply from an alternative source. For example, where the customer has no access to retail competition, the possibility of another onseller stepping in to provide supply could be explored further. The AER should

exercise diligence in granting exemptions. Exemptions should be granted only to embedded operators which have good credit standing. Onsellers seeking exemptions should be required to submit documents proving their credit worthiness.

Hardship provisions

Q14: To what extent can the protections found in hardship policies be applied to customers of exempt sellers operating under deemed and registrable exemptions?

On page 21 of the Issues Paper, the AER has stated that:

...where the tenant is purchasing both accommodation and energy from the same party, a hardship policy may have limited meaning given that tenancy law will determine the consequences of non-payment of rent....

Requiring a hardship policy in these situations may not be particularly helpful to tenants, as the policy would ensure flexible payment options for the payment of energy charges but not for the payment of rent or accommodation charges. The requirements of a hardship policy may involve a potential conflict with tenancy legislation.

CUAC acknowledges the difficulties involved in requiring exempt sellers to offer hardship policies to their customers. Such difficulties should, however, not be insurmountable.

CUAC's view is that exempt sellers operating under deemed and registrable exemptions must offer flexible payment options including payment plans taking into account capacity to pay, and some form of hardship assistance, to their customers. Customers residing in premises with embedded networks, especially those at caravan parks and rooming houses, are often from low income backgrounds; they are from vulnerable socio-economic groups. Where the customer lacks choice of retailer and is therefore exposed to the monopolistic practices of the exempt seller, it is even more important that there are strong customer protections in place. All customers regardless of where they are residing, should have access to flexible payment options and some form of hardship assistance to help keep them on supply.

CUAC expects exempt sellers operating under deemed and registrable exemptions to include a basic level of hardship support: Banning late payment fees for customers on payment plans and those experiencing financial difficulties. Exempt sellers should provide customers with the option of making CentrePay payments towards their energy bills, where this is available. One of the conditions suggested for deemed and registrable exemptions is for the provision of information about government energy rebates, concessions and relief schemes at the start of the tenancy. It would not be too onerous for exempt sellers to provide the same information to customers with payment difficulties or who are experiencing hardship. These are basic customer rights which all customers should be entitled to.

On page 21 of the Issues Paper, the AER has stated that "it is likely to require persons operating under individual exemptions to develop hardship policies." CUAC believes that, in general,

persons operating under individual exemptions should be subject to the same hardship provision imposed on authorised retailers under the NECF.

Dispute resolution mechanisms

Q15: In jurisdictions where the Ombudsman or dispute resolution schemes do not extend to exempt sellers, what dispute resolution processes should the exempt seller provide to its customers?

CUAC notes that changes in the Australian Energy Market Agreement (AEMA) are required for the AER to require exempt sellers to provide dispute resolution mechanisms to their customers. CUAC is pleased to see that the AER has raised this issue with policy makers.

CUAC submits that exempt customers must have access to an impartial and independent external dispute resolution system such as the energy ombudsman to ensure consumer redress. Exempt customers are in a vulnerable position, especially when they lack retailer choice and when both accommodation and energy is provided by the same entity. Exempt customers face significant barriers to making complaints, and negotiating and resolving complaints through the exempt seller, as well as through external dispute resolution processes and tribunals. The application fees of tribunals can also be prohibitive for customers. CUAC has been informed by the Tenant's Union of Victoria (TUV) that residents in marginal tenures such as caravan parks and rooming houses are reluctant to make complaints because they are afraid that any complaints will result in their eviction. In addition, the small scale nature of these exempt networks means that customers making complaints are likely to be in regular contact with, and in close physical proximity to, their onseller. Retaliation by an exempt seller in response to a customer exercising their right to make a complaint to an external dispute resolution process or a tribunal is therefore a real consideration. Retaliation by onsellors in such situations can range from verbal and physical harassment to eviction. CUAC believes that all customers must have access to a free and effective external dispute resolution body which offers impartial and independent dispute resolution services.

CUAC suggests that the AER examine which external dispute resolution body is best placed to provide such a service to exempt customers. CUAC notes the difficulties associated with the energy ombudsman's annual membership fee model and the fee-for service model mentioned in the Issues Paper. CUAC recommends that the AER undertake further research on funding options (including alternative funding options) for energy ombudsman providing dispute resolution services to exempt customers. For instance, whether a registration fee based on the size of the exempt seller's network, might be viable. It is the jurisdictions and the energy ombudsman schemes which determine whether to extend their schemes to exempt sellers. Thus, the AER should consult with the energy ombudsman schemes and various jurisdictions to obtain their views.

CUAC submits that exempt sellers should also have their own internal dispute resolution process to handle complaints from their customers. Exempt sellers should direct customers who are dissatisfied with the outcome of their complaint to the external dispute resolution body or energy ombudsman.

Internal complaints handling by exempt sellers

- Q16: Should exempt sellers operating under an individual exemption be required to base their dispute resolution processes on *Australian Standard AS ISO 10002-2006*, as amended and updated from time to time?
- Q17: Should this requirement be extended to exempt sellers operating under a deemed or registrable class exemption, or to all exempt sellers selling to more than a certain number of customers? Why or why not?

In principle, CUAC believes that exempt customers should have access to both an internal dispute resolution process, as well as an external dispute resolution process.

CUAC submits that exempt sellers operating under an individual exemption must be required to base their dispute resolution processes on *Australian Standard AS ISO 10002-2006*, as amended and updated from time to time. CUAC acknowledges that small embedded networks operating under a deemed or registrable exemption might not be able to meet *AS ISO 10002-2006*. The necessity for them to comply with *AS ISO 10002-2006* needs to be assessed on a case-by-case basis.

Exempt seller related factors

Exempt seller ‘incidental’ requirement

- Q18: What sort of tests should the AER use to determine whether the sale of energy is incidental to a business?
- Q19: Is the approach taken to the ‘incidental’ requirement in the categories of deemed and registrable exemptions appropriate?

CUAC notes that the deemed and registrable exemptions categories are limited to onselling situations where the exempt customers do not have metering that enables access to retailer of choice. This assumes that in such situations, onsellers are selling energy “incidental” to their business; that is, the sale of this energy is unavoidable. Metering infrastructure, however, should not be the only determinant as to whether the sale of energy is “incidental” to a business.

CUAC supports the factors suggested by the AER in determining whether the sale of energy is “incidental” to a business: whether the proposed onselling is avoidable (as determined by metering infrastructure); whether the exempt seller intends to profit from the activity; resources dedicated towards the onselling operations. CUAC believes that these factors are indicative and should be considered together to ascertain whether sale of energy is “incidental.”

Other factors such as the volume of energy supplied, as well as the number of customers supplied, are relevant considerations as to whether the sale of energy is “incidental” to a business. Onsellers (who are also property developers) may build large developments with

metering infrastructure which does not allow retailer choice. In such scenarios, it is arguable whether sale of energy is indeed so “incidental” to their business operations. There is a need to discourage new developments with metering types which do not facilitate customer access to retailer choice. At worst, defining “incidental” supply exclusively by metering infrastructure might encourage on-sellers to remove individual metering to avoid granting customer access to retailer choice.

Subject to the above concerns, CUAC agrees that individual exemptions are more appropriate in situations where the on-selling activity is avoidable (that is, the metering infrastructure allows retailer choice). It is reasonable to assume that energy is a core business activity for entities which sell energy in circumstances where it can be avoided. Entities seeking individual exemptions should be subject to the whole suite of NECF provisions authorised retailers are subject to, except for those provisions which obviously cannot apply (for example, registering with the Australian Energy Market Operator [AEMO], in relation to wholesale markets).

Exempt seller’s circumstances

Q20: Are there any additional circumstances to those identified above (and in other parts of this issues paper) that would warrant the AER issuing an exemption rather than a Retailer Authorisation?

CUAC agrees that the number of customers served, total volume of energy supplied, the mode of operations of the exempt seller, the practicability of registering as a participant in the relevant energy wholesale market are relevant factors to consider.

Profit intention of the exempt seller

Q21: How should the AER judge an exempt seller’s profit intentions?

Q22: Will the proposed pricing protections adequately protect exempt supply customers?

As mentioned previously, exempt sellers must be subject to some pricing cap to restrict the prices in which they can charge customers. CUAC believes that setting the standing offer price, as the maximum amount an exempt seller can sell energy, offers a degree of pricing protection to exempt customers. A price control mechanism would also be appropriate for exempt sellers, supplying large customers who lack retailer choice, since they will be subject to the monopolistic practices of the exempt seller.

Where the metering infrastructure currently excludes exempt customers from accessing retail competition, and where the option of metering upgrade unavailable or the costs prohibitive, it is imperative that the AER maintains effective regulatory oversight of, and actively monitor, exempt sellers, especially with regard to pricing and compliance with customer protection provisions.

On page 26 of the Issues Paper, the AER has stated that:

The AER does not support the concept of exempt sellers passing on an administration fee or similar fee (for example: a charge for meter reading) to their customers to cover any costs incurred in their operations. Any reasonable administration costs should be recovered as part of the energy tariffs. The draft determination of deemed and registrable exemptions attached to this paper requires that the exempt person must not impose any other charge on any exempt customer in relation to the supply of energy.

CUAC supports the above; administrative fees should not be passed on to customers to cover operation costs. If there are administrative costs, these need to be “reasonable.” For transparency, the exempt seller needs to particularise the administrative cost component in the customer’s bill as a line item. If the administration cost is unreasonable, the customer may raise this with the exempt seller and if dissatisfied with the exempt seller’s response, the external dispute resolution body.

CUAC refers to Attachment 1 of the Issues Paper, in particular, Condition 2 (Billing and payment arrangements) and Condition 7 (Pricing requirements). Clause 2(3)(i) and (j) of Condition 2 provides that the exempt seller must include “tariffs and charges” on the bill and the basis upon which they are calculated. Clause 5 of Condition 7 prohibits an exempt seller from imposing “any other charge on an exempt customer in relation to the supply of energy.” Both clauses appear to be contradictory. CUAC suggests that the AER clarifies the wording used in these provisions.

The ‘significance’ of the exempt seller’s activities

Q23: What additional information might the AER have regard to when considering the significance of the energy likely to be sold by an exempt seller?

On page 27 of the Issues Paper, the AER stated:

The AER also notes that in the attached draft determination of deemed and registrable exemptions, onselling to more than 25 premises requires registration. The AER considers it appropriate to require registration in this situation due to the larger scale of such operations.

As mentioned previously, there is currently, a lack of information available on the extent to which embedded networks operate and the types of customers they serve. This is due to the self-assessment application processes and limited registration requirements for exempt sellers in some jurisdictions. The AER has, on page 34 of the Issues Paper acknowledged the benefits of registration of exempt sellers:

Requiring registration of an exempt seller may have two benefits in terms of accountability. Firstly, the exempt seller will be aware that its operations are known to the AER and thus that it is not operating ‘under the radar’. The mere awareness that a regulatory framework applies to it may be enough to encourage the exempt seller into greater compliance with its obligations. Secondly, registration of an exempt seller may result in the exempt seller having a greater understanding of its obligations; once the AER becomes aware of the existence of an exempt seller, by means of registration, it may be able to provide the exempt seller with

information regarding the exempt seller's obligations. Registration of exempt sellers will also facilitate more targeted regulatory oversight of their activities by the AER. Finally, registration will give the AER an idea of the scale of the exempt activities and the types of customers affected. This will enable the AER to make more informed regulatory decisions regarding exempt selling, particularly in relation to the types of conditions that are appropriate, and the circumstances in which an individual exemption or retailer authorisation may be more appropriate than a class exemption.

CUAC has serious reservations about deemed exemptions; for the reasons set out above. CUAC believes that most exemptions (especially, the proposed class 1 category – owners, occupiers and operators) should be registered. CUAC is concerned with limiting registration to onselling situations where there are more than 25 premises. If most exempt selling situations fall outside the requirement, it would be difficult to discover the extent of exempt selling in Australia, as well as the number and types of customers. This information is necessary for informing the approach in regulating exempt sellers in the future.

In addition, it is unclear how the AER will obtain information to be published on its public register if there is no requirement to register all onselling situations. There are also some exempt sellers selling to less than 25 premises but selling a voluminous amount of energy. These exempt sellers may be more appropriately regulated through an individual exemption.

Whether an exemption would provide appropriate governance of the exempt seller

- Q24: Will the obligations imposed through proposed exemption conditions (see attached) and existing state/territory tenancy legislation be sufficient to avoid requiring the exempt seller to obtain a retailer authorisation?
- Q25: Are there any instances where state/territory tenancy and related legislation comprehensively addresses onselling, such that the conditions proposed in the attached draft determinations of deemed and registrable exemptions should not be applied?

As previously mentioned, an exemption must be subject to appropriate customer protection provisions. The regulatory framework must have an effective monitoring, compliance and enforcement regime. (See our previous comments on compliance, customer protections, hardship and dispute resolution.)

The cost of obtaining a retailer authorisation compared to the benefits to the exempt seller's customers

- Q26: What methods might the AER adopt to determine the costs of obtaining a retailer authorisation compared to the benefits to customers of being serviced by a retailer rather than an exempt seller?

On page 28 of the Issues Paper, the AER has stated:

However, it will not always be practicable to require exempt sellers to develop the hardship policies and other protections that retailers must have in place. A cost benefit analysis assessing aspects of customer service and protection against the cost of applying for a retailer authorisation is challenging.

In CUAC's view, there are core customer protection provisions which must be a requirement before an exemption is granted. As previously mentioned, this includes flexible payment options including payment plans taking into account capacity to pay, hardship assistance, access to an external dispute resolution process etc. While exempt sellers may not be in the position to provide the full range of hardship assistance authorised retailers are obliged to under the NECF, there should be able to provide some form of hardship assistance.

Any other relevant exempt seller related matter

Treatment of unmetered supply

- Q27: Should the AER create a class of deemed exemption for persons engaged in the sale of unmetered energy where that is not prohibited by jurisdictional legislation? If yes, what conditions should be attached to that exemption? Should it be limited to existing dwellings and those that are currently in the planning stages?
- Q28: Are there situations where it may be appropriate for the AER to grant an individual exemption to a new development that does not allow for individual electricity metering of dwellings?
- Q29: In what situations would it be appropriate for the AER to grant an individual exemption to a new development that does not allow for individual gas metering of dwellings?
- Q30: Are there concerns about situations where there is no meter, and the consumer is not billed separately for electricity/gas? Although the consumer 'pays' for the energy indirectly (most likely through higher rent or body corporate fees), are stakeholders aware of particular concerns regarding vulnerable consumers?
- Q31: Are stakeholders aware of situations where there is no meter, but customers pay an itemised charge for electricity/gas on terms negotiated as part of the purchase or leasing arrangement?
- Q32: Would electricity metering that is not compliant with national metrology procedures suffice in situations where it would be expensive to retrofit an existing dwelling?

CUAC supports the AER's comments below (page 30 of the Issues Paper):

The AER may refuse to provide exemptions for future developments or redevelopments where electricity use of individual dwellings is unmetered. This is to ensure both adequate consumer protection arrangements and also to ensure that consumers receive appropriate price signals for their energy usage. For existing buildings where the electricity use of individual dwellings is unmetered, the AER will take into account the costs of retrofitting meters when considering whether to include a sunset date in the relevant exemption.

Billing tenants or residents of rooming houses and caravan parks for energy where there is no separate meter is prohibited by the Victorian *Residential Tenancies Act 1997* (RTA) (see sections 53(1)(b), 108(1)(b), 163). A term of a lease which includes payment of utilities as part of a lease arrangement where there is no separate meter is an invalid term because it purports to exclude the application of a provision of the RTA (section 27). CUAC understands from the Tenants Union of Victoria (TUV) that despite the clarity of the RTA on this matter, there are still examples of tenants being wrongly billed in this situation.

Owners corporations, boarding houses and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utility services, maintenance and consumption contained in relevant legislation. CUAC submits that the AER could play a role in clarifying these issues.

In principle, CUAC believes that customers should have retail choice. CUAC recognises, however, that it might be costly to have individual metering for limited gas usage (gas cooking) and that many owners corporations absorb the gas costs into their owners' corporate fees. Whether it is appropriate to grant an individual exemption to a new development that does not allow for individual gas metering of dwellings, depends on the extent to which gas is used.

CUAC has concerns about electricity metering which is non-compliant with national metrology. Metering standards are important. They determine the accuracy of billing; there are also safety concerns.

Treatment of off-grid supply arrangements

- Q33: Is it appropriate for the AER to require energy suppliers in off-grid networks to seek individual exemptions?
- Q34: Are pricing protections necessary for off-grid customers? If so, what conditions could the AER impose on off-grid suppliers to limit energy prices?
- Q35: What other seller related factors might the AER consider in addition to those outlined in the Law?

CUAC agrees that off-grid cases are best addressed by individual exemptions and assessed on a case-by-case basis. Off-grid customers also need some pricing protection otherwise they can be charged any price by the onseller. To ascertain the type of customer and pricing

protections required, CUAC suggests that the AER undertakes research on the extent of off-grid supply, number and types of customers served and the prices charged.

Customer related factors

Characteristics of the exempt customers

Q36: What specific customer characteristics or circumstances make it appropriate for them to be served under an exemption rather than a Retailer Authorisation?

On page 32 of the Issues Paper, the AER has stated:

The AER has therefore taken the preliminary view that where an exemption is granted for the sale of energy to large customers, no conditions will be imposed. However, the AER has sought views on whether it is appropriate to impose a condition preventing an exempt seller from hindering a large customer from accessing the retailer of their choice

As previously mentioned, exempt sellers to large customers should not prevent customers from choosing their own retailer, especially where the metering infrastructure allows retailer choice. Customers should be allowed to opt out of the exempt network when their continued participation proves materially disadvantageous to them. CUAC is concerned with the blanket statement “no conditions will be imposed” where the sale of energy is to a large customer. Provisions relating to frequency of billing, bill content, meter reading etc would still apply to large customers.

Any other relevant customer related matter

Q37: What other customer related factors might the AER consider in addition to those outlined in the Law and those discussed in section 4.2.3?

Please refer to our comments on monitoring, compliance and enforcement above.

Proposed Exemptions

Deemed class exemptions and Registrable class exemptions

Q38: Do stakeholders agree with the AER’s registration threshold of 25 premises with a single site? Why or why not?

On page 34 of the Issues Paper, the AER has stated:

While registration has many benefits, the AER considers that it is not practical to require a blanket registration of all exempt sellers. This would place a large administrative burden on small exempt sellers in both physically registering and understanding why they need to register in the first place.

In principle, CUAC believes that all customers should be able to access affordable supply and that exempt sellers should therefore be subject to registration (especially, those under the proposed class 1 deemed exemption category – owners, occupiers and operators). The registration process could be streamlined and made as easy and accessible as possible to reduce any inconvenience to exempt sellers. As previously mentioned, CUAC is concerned whether the registration threshold of 25 premises (registration requirement for sites with more than 25 separately metered small customer premises) would mean that many embedded operators are left unregistered. Without registration of at least the majority of exempt networks, it is impossible for effective regulatory oversight of exempt selling. See our answer to Q23, under the heading “The significance of the exempt seller’s activities.”

Class exemption categories

- Q39: Do stakeholders agree with the AER’s proposed Class 1 deemed exemption? Why or why not?
- Q40: Do stakeholders agree with the conditions outlined in the attached draft determination that will apply to this class of deemed exemption? Why or why not?

CUAC notes that Class 1 deemed exemptions are intended to apply to owners, occupiers and operators engaged in onselling at an individual site with 25 or less separately metered small customer premises, where access to retailer of choice at those premises is *not* available.

As previously mentioned, CUAC has serious concerns about deemed exemptions. See our answers to Q23 and Q38.

Regarding the conditions outlined in the Attachment 1 of the Issues Paper, see our comments under the heading “Customer protections.”

- Q41: Do stakeholders support the AER providing a blanket exemption (the Class 2 deemed exemption) to cover situations where energy is passed through without a separate charge? Why or why not?
- Q42: Do stakeholders agree with the AER’s proposal for this exemption to be issued without conditions?

On page 36 of the Issues Paper, the AER has stated:

A deemed exemption is also proposed where a person passes on the cost of energy in a charge for rent, accommodation or other services, provided that there is no separate itemised charge for energy. This exemption will apply where energy charges are absorbed into other charges and are not disclosed to the customer.

There should be transparency in energy charges. Energy charges should be itemised and not bundled together with rent in tenancies including rooming houses and caravan parks. Also, as previously mentioned, billing tenants or residents of rooming houses and caravan parks for energy

where there is no separate meter is prohibited by the Victorian *Residential Tenancies Act 1997* (RTA).

CUAC acknowledges that owners corporations do pass on energy charges for common areas to property owners in the form of owners corporate fees. In the case of hotels or student hostels, energy charges are also likely to be included in the accommodation cost. In these situations, it would be appropriate to have a deemed exemption.

Q46: Do stakeholders agree with the AER's proposed classes of registrable exemptions? Why or why not?

Q47: Is the approach of allowing a transitional deemed exemption that will be replaced by a registrable exemption appropriate? Will the proposed expiry date allow sufficient time for the relevant exempt sellers to register?

As previously mentioned, CUAC is concerned with limiting registration to sites more than 25 separately small customer premises. Please refer to our answers to Q23, Q38-Q40. In relation to onselling to large customers, some customer protections are required. Please refer to our answers to Q5-Q6.

Individual exemptions

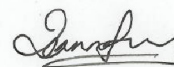
Q48: Should individual exemptions be time-limited?

CUAC agrees with the AER's preliminary view that individual exemptions should generally be issued for a time-limited period. This is important as the circumstances of the exempt seller might change and it might be more appropriate for the exempt seller to seek retailer authorisation instead of an exemption.

Again, thank you for the opportunity to input to this consultation process. If you have any queries on this submission, please contact the undersigned.



Jo Benvenuti
Executive Officer



Deanna Foong
Senior Policy Officer