9 August 2010

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

By email: AERinquiry@aer.gov.au

Dear Sir or Madam

AER Approach to Retail Exemptions Issues Paper

The Shopping Centre Council of Australia (SCCA) appreciates the opportunity to comment on the Australian Energy Regulator's (AER) *Approach to Retail Exemptions Issues Paper* ('the Paper'). 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 Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland and the Westfield Group.

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.

To this extent, we have addressed the issues of most concern to our members, including the legitimacy of embedded networks and on-selling *as a key part of* modern shopping centre investment and management; the proposed classes of exemption (including threshold issues); customer protection requirements; and potential conflicts with retail leases and (State and Territory) retail tenancy legislation. Some of our members have made individual submissions on the Paper. The Property Council of Australia has endorsed this submission (and also has concerns, similar to those raised in this paper, in relation to other forms of commercial property such as office buildings).

From the outset, we have reviewed the Paper with some concern. Whilst a national approach is generally supported, we stress that a considered and consistent approach should be taken to the future regulation of embedded networks and on-selling. We also believe that these issues should be considered together, rather than separately (as is proposed). We are also very concerned about the proposed approach to exemptions. We consider this will undermine existing exemptions obtained in accordance with participating jurisdictional regulations and rules, and therefore, will undermine existing investments and operations. The proposed Class 4 temporary deemed exemption (and the subsequent Class 6 registrable exemption) would make current class exemptions unavailable and therefore require our members to obtain either a specific retailer authorisation or to become licensed retailers. This proposal fails to take into account existing circumstances for no apparent reason, and presents unwarranted uncertainty and risks for our members.

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

First, we generally support the move to **harmonise existing exemption requirements** across jurisdictions, and for the AER to assume responsibilities as the national administrator (with the exception of WA and NT). As a matter of principle, national harmonisation is an important aspect of all regulation that impacts business, particularly for businesses that operate across various jurisdictions (as most of our members do). We are however disappointed that the proposed harmonisation only relates to 'retail' exemptions and won't include 'distribution' or 'network' exemptions (although we note the intention to review Network Service Provider Exemption Guidelines and move to a single application process at a later date). This will mean that our members will have to deal with two different regulators for exemptions in each jurisdiction under the proposed approach.

Second, we must stress that the **ownership and operation of embedded networks is a legitimate activity**. In the case of our members, it is a legitimate activity *as part of* the ownership and operation of modern shopping centres. A shopping centre is not a function of an embedded network. Rather, an embedded network is a function of a modern shopping centre. We do not believe the "apparent growth in on-selling" is at all problematic to the extent that on-selling is in accordance with relevant rules, and serves a key component of shopping centre management (including providing a reliable and competitive service to retail tenants). We note the AER's statement that the increase has occurred "particularly within large residential developments". Indeed, embedded networks (and generation) have been on the agenda of the Ministerial Council on Energy (MCE), "the national policy and governance body for the Australian Energy Market", for a number of years and their benefits to the overall energy market mix have been actively promoted and pursued.

Suggestions that the growth in on-selling is "problematic" are simplistic and reflect a lack of understanding of the operation of modern shopping centres. In principle, the growth of on-selling is no more 'problematic' than the growth of the National Electricity Market (from 1998), full (electricity) retail competition (commencing in Victoria, 2001; NSW, 2002; SA, 2003, Qld, 2004), Green Power (1996) or mandatory renewable energy generation (MRET, 2001). All of these issues have been embraced as critical 'growth' aspects of the Australian energy market, and monitored and refined through emerging rules and regulations.

It is also worth noting that on-selling is welcomed by retail tenants in both competition and shopping centre management terms. This includes where having a 'retailer of choice' is available to them. In particular, this includes small tenants who aren't able to benefit from bulk purchasing. We do not believe that, subject to minimum standards being met, adding to revenue streams or profiting (and thus, enhancing asset values) from on-selling is problematic. Shopping centre owners are also entitled to pursue a return on their investment on network infrastructure (which would otherwise become a redundant asset).

Third, we have concerns with the proposed interpretation of **what constitutes the sale of energy**, which provides (at page 8) 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". Under certain types of leases (e.g. net leases), electricity is charged as a separate charge, whether or not an embedded network is in operation. The proposed interpretation could mean that an exemption could be required for non-embedded network sites, where common area electricity is broken down and recovered from tenants in accordance with lease agreements and other relevant rules and regulations. In this regard, common area charges for electricity are not a charge for electricity per se; it's a charge for access to the common area. This proposal needs to be addressed and requires clarification.

Fourth, we support in principle customers of embedded networks being able to access the **retailer of their choice**. However, in accordance with that principle, and in the spirit of choice and open competition, we oppose the AER's position that "it will generally not be appropriate to grant a retail exemption (and particularly a deemed or registrable exemption) to an on-seller where all customers have access to a retailer of choice. On selling in these circumstances is unnecessary and deprives customers of some protections under the Retail Law and Rules". We are not aware of the intent or evidence that sits behind this statement, however the suggestion that exemptions would be "unnecessary" and also deprive customers of protections, appears to be drawing a concerning conclusion on the validity and reasonable operation of embedded networks. Access to retail exemptions serves to enhance retail pricing competition for shopping centre tenants, particularly in the current environment where energy costs are increasing at a rapid rate, with

recent reports and media coverage suggesting that such increases are effectively "unavoidable". A 10 May 2010 Media Release from the Electricity Supply Association of Australia is instructive in this regard, with its CEO Brad Page highlighting that "rising energy prices" is "a phenomenon occurring right across Australia". A 29 July 2010 Media Release from the Energy Users Association of Australia refers to the electricity prices in Sydney increasing by 22 per cent in the last year. Access to retail exemptions also serves to enhance other benefits for shopping tenants, including having a more direct relationship with the person (i.e. centre management) who sells them their electricity, who is also the same person that provides other services within the centre.

Fifth, there should be a distinction between **customer protections** provided to small and large customers. It should be noted that the majority of our members' retail tenants are small customers. In the case of large customers, they have a greater ability to obtain professional advice, make an informed decision and negotiate an effective commercial arrangement than small customers. We believe it is appropriate that small customers are afforded greater protections than large customers, particularly in terms of notification of the possibility of disconnection, dispute resolution and being provided with information about their rights and obligations. In any case, careful consideration should be given to the cost of compliance with consumer protection mechanisms. It should be noted that there is a potential for conflict and unnecessary overlap with well-established dispute resolution mechanisms under retail leases and retail tenancy legislation. This needs to be noted and managed appropriately by the AER when forming views about customer protections for shopping centre tenants.

Sixth, we agree with the AER's position that **exemptions should be available where on-selling is an 'incidental' activity to a business**. However we disagree with the distinction between core and incidental activities of a business, including the statement (at page 26) that "where the sale of energy cannot be avoided it would be considered incidental, but where it can be avoided, it would be considered a core business activity". Our member's core business is the ownership and management of shopping centres, and activities that "can be avoided" can still be incidental to their core business. In the case of an individual shopping centre, on-selling is *part of* shopping centre management, just like common area cleaning (which often reflects the highest operating expense), security, marketing and car parking. It would be absurd to suggest that undertaking these activities would designate cleaning, security or car parking as being 'core business' to a shopping centre. This would be like suggesting that things like magazine subscriptions offered by electricity companies to entice new customers, or providing 'services' such as solar hot water system installation, somehow constitutes publishing or domestic hot water system installation as being core to their business, rather than incidental.

Seventh, we strongly believe that embedded network operators and on-sellers should be entitled to **make a profit**, provided that consumers are appropriately informed as to the basis of any charges and have access to either a regulated or a competitive environment through which an appropriate market price for electricity can be determined. We do not support the AER's statement that it "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". The fact that AER doesn't support *the concept* of covering costs through fees is most concerning, and suggests that it is unwilling to accept the fair and reasonable recouping of costs in operating a network that directly relates to the sale of electricity to a retail tenant. This is particularly the case given licensed retailers can charge such fees. We stress that we are not asking for more than what is available to licensed retailers.

Eighth, where an exempt seller is unable to provide access to a retailer of choice, we consider it is appropriate to set **price constraints** (that can be flexible to meet market movements) in accordance with the published regulated rate in the relevant area. We prefer the Victorian approach on this matter. However, where retailer of choice is available, we do not consider it appropriate, given consumers will have the ability to switch between sellers to take advantage of the best price and conditions available to them in the open market.

Ninth, we believe that **deemed or registrable exemptions** should be available to on-sellers (in accordance with relevant rules), regardless of whether customers have access to a retailer of choice, and regardless of the number of premises to which electricity is on-sold. In this regard, we do not agree with the proposed conditions for a single site, which would effectively require some of our members to seek a retailer authorisation, including in circumstances where they have an existing exemption obtained under a state scheme. We strongly believe embedded networks with existing exemptions should be granted an automatic exemption, or at the very least, considered as an "additional circumstance" that should "warrant the AER issuing an exemption rather than a Retailer Authorisation". The proposed Class 4 temporary deemed exemption does not take such

issues into account – along with the fact that (along with Classes 1 and 5) a principal condition requires 'no retailer of choice' to be in place. To deny current exemption holders, who have complied with existing regulations and rules, an exemption under a national framework would be unreasonable, highly costly, and present a major investment uncertainty and risk. This would directly undermine the fundamentals upon which a number of existing major investments in embedded networks have been made. This is particularly concerning given that existing schemes are operating successfully as a part of shopping centre management, with satisfied retail tenants and a minimum of disputes. There is also an emerging market of specialist external providers to operate embedded networks. It is also arguable that this could reduce competition for electricity retailers, which could lead to a less competitive environment for retail tenants. Further, requiring companies that currently have an exemption to apply to obtain a retailer authorisation would literally swamp the AER with applications; not just from shopping centres, but also from other property asset classes such as office buildings. We urge the AER to ensure that appropriate transitional arrangements are put in place to ensure those companies (and their tenants and investors) with existing exemptions are not unfairly disadvantaged.

We would be happy to assist the AER further if required and look forward to consultation. I can be contacted on 02 9033 1930 or anardi@scca.org.au.

Yours sincerely,

Angus Nardi
Deputy Director