



2 August 2010

General Manager
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Australian Energy Regulator
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Dear General Manager

Westfield Group submissions - AER approach to retail exemptions, June 2010

Westfield welcomes the opportunity to comment on the Australian Energy Regulator's issues paper entitled *AER approach to retail exemptions June 2010*. Attached is a copy of our submissions.

Should you wish to discuss any of the matters canvassed in the attached submission, please let us know.

Yours sincerely
Westfield Group

Eirene Garnsey
Corporate Solicitor

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Submission of the Westfield Group on *AER Issues Paper: AER approach to retail exemptions, June 2010*

1 Introduction

1.1 The Australian Energy Regulator (**AER**), in its issues paper entitled *AER approach to retail exemptions*, dated June 2010 (**Issues Paper**), invited submissions providing comments on the draft guidelines and issues raised in the Issues Paper. Westfield, as the owner and manager of a number of shopping centres across Australia, welcomes the centralisation of regulation for both electricity distribution networks and electricity retailing.

1.2 Westfield has interests in 44 shopping centres in Australia being:

- 19 centres in New South Wales;
- 8 centres in Queensland;
- 7 centres in Victoria;
- 5 centres in Western Australia;
- 3 centres in South Australia; and
- 2 centres in the Australian Capital Territory,

35 of which are managed by Westfield.

A number of those centres operate as embedded networks within existing regulations where Westfield has responsibility for the electricity distribution network and, in some circumstances, the retailing of electricity to Westfield tenants.

1.3 Westfield believes that:

- Regulation of energy retailing and regulation of network operation ought to be considered together, as the two areas are closely linked;
- Deemed or registrable exemptions ought to be available to onsellors who comply with appropriate consumer protections, regardless of whether those consumers have access to a retailer of choice and regardless of the number of premises to which electricity is on sold (and which may make up an embedded network); and
- Any regulation recognises the complex nature of electricity supply and sale, including fluctuating pricing of energy, the relationships between distributors, wholesalers, traditional retailers, embedded network operators and onsellors, and the potential for other relationships between network operators / onsellors (on the one hand) and energy consumers (on the other) which do not relate to the supply or sale of electricity (e.g., as landlord and tenant).

1.4 For commercial building owners and operators like Westfield, it is important that a consistent approach is taken to the regulation of both of these aspects of electricity supply and sale, taking into account the day to day situation of both tenants who consume electricity, and the owners/managers of those buildings who are responsible for ensuring that appropriate infrastructure is installed and, as a practical matter, that all tenants have access to the means by which they can use electricity.

2 Background to the operation of embedded networks and onselling electricity in commercial buildings

- 2.1 Because of the existing relationship between tenants and commercial building management, tenants often look to shopping centre management to manage a number of matters relating to their tenancies which are not, strictly speaking, a core part of that tenancy relationship. In Westfield's case, these include retailer education programs, a gift card program through which customers can purchase a Westfield branded gift card for use at Westfield tenant stores and also (relevantly) electricity disruption and connection matters, notwithstanding that Westfield may not be the retailer of electricity to a tenant.
- 2.2 In Westfield's experience, the growth of onselling electricity has been welcomed by its tenants, as it is seen as a means of practically aligning the different matters which are required to operate a business in a shopping centre, and minimising third parties who need to be contacted to establish such a business (or to inform those parties when such a business ceases to operate) or to deal with in relation to disputes which may arise as part of the business. Where onselling occurs, tenants typically have a direct contact within the shopping centre management team or an agent of that management team which they are able to contact in respect of any issues which may arise in connection with service or billing, unlike the call centre service offered by large energy retailers to all but their largest customers.

3 Distinction between retail exemptions and network exemptions

- 3.1 Westfield considers that it is appropriate that retail exemptions and network exemptions are dealt with as part of the same process (as is the case in Victoria under the Order in Council exemptions). While conceptually there may be circumstances where a person seeking a retail exemption is using another person's distribution network, we would consider that there is a large number of embedded networks where the retailing of electricity is closely linked with the operation of the network and that, if the exemption process for retail exemptions is not aligned with the exemption process for network exemptions (or visa versa), a person who has a legitimate need to operate an embedded network, or was acting as a retailer to address a particular consumer need, may be unable to do so because they would be prevented from accessing both exemptions.
- 3.2 As a practical matter, the owner/developer of a commercial building is required to install an electricity distribution network when a building is built to ensure that infrastructure (such as switchboards, risers, cabling and conduit) is available for tenants, whether or not that person goes on to on sell electricity through that network. In particular, in Queensland, South Australia and Western Australia, the type of network infrastructure which has typically been installed has meant that it is not possible for tenants to be assigned a NMI, as a consequence of the manner in which electricity supply to commercial buildings has taken place (although we understand that South Australia has introduced legislation requiring installations of new infrastructure, or overhauls of existing infrastructure, to make choice of retailer available to tenants). This is a longstanding practice in the industry, and consequently no energy retailer or distributor has a direct relationship with the energy infrastructure in shopping centres further than the Gate Meter (other than as a consequence of the new South Australian regulations). Because of this, commercial building owners such as Westfield make a significant investment in network infrastructure which they are legitimately entitled to recover.
- 3.3 Consequently, Westfield considers that there is a need to consider both aspects of electricity provision together, to ensure that appropriate consideration is given to their complex interrelationship.

4 Core vs incidental activities

- 4.1 Westfield agrees with the AER's position that exemptions should be allowed where selling energy is 'incidental' to a business, but does not agree with the AER's determination of the difference between core and incidental activities of a business, and in particular does not agree with the statement that *"[w]here 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."*¹

¹ Issues Paper, page 26

- 4.2 Activities which can be avoided can be incidental to a business. For example, the core of Westfield's business is the ownership and management of shopping centres. However, Westfield undertakes a number of activities which are incidental to that core business including the production of centre specific catalogues containing Westfield tenant products, providing a gift card facility for use by customers with Westfield tenants, providing charged car parking, and providing support to tenants in distress in relation to business planning and other tenant education programs. These are activities which sit alongside Westfield's core business, and in certain circumstances Westfield does earn an income from these activities, but Westfield's core business would continue substantially unchanged if these activities did not take place. However, these activities, like energy onselling, provide benefits to both Westfield and Westfield tenants.
- 4.3 Consequently, Westfield considers that an appropriate test of what is a core activity of a business is whether that business would continue **but for** that activity taking place. Where onselling is, in this sense, incidental to a business Westfield considers that a deemed or registrable exemption (even on conditions as to retailer access and consumer protection) ought to be extended to an onseller because requiring individual authorisation would be unduly onerous and introduce uncertainty which would, in effect, remove any incentive to provide such a service to tenants.

5 Consumer protection

- 5.1 Westfield considers that where electricity is not charged for as part of another charge (for example, outgoings), and a person acts as a retailer pursuant to an exemption, it is appropriate that some consumer protections are provided to consumers whether or not meters have been able to be assigned a unique identifier for wholesale market purposes. However, it needs to be recognised that the onseller/customer relationship sits along side other relationships such as landlord/tenant, and that aspects of one relationship may impact on the other.
- 5.2 While consumer protections in connection with electricity onselling can sit alongside other forms of consumer protection, for example in the case of tenants in shopping centres, existing tenancy laws, disputes in relation to electricity retailing will often form part of disputes within a larger relationship between landlord and tenant. Additionally, while Westfield believes it is preferable for there to be visibility in relation to the components which may go to make up the cost of electricity to a consumer (for example, having separate line items for network charges, connection fees, electricity costs and other identifiable fees as permitted) there may be circumstances where to do so is impracticable because, for example, it is not practicable to install a separate meter for part of a licensed area (such as a storage room) and it is more appropriate that those costs are recovered separately. Matters such as these ought to be considered in any discussion as to appropriate consumer protection mechanisms.
- 5.3 Westfield also considers that it is appropriate to make a distinction between the consumer protections afforded to small customers and large customers. Large customers have a much greater ability to negotiate an effective commercial arrangement, and to taken informed and strategic decisions on commercial matters, than small customers due to the increased volume of electricity they take. The majority of Westfield tenants would be small customers, and Westfield considers it is appropriate that those customers are afforded greater protection than large customers particularly in terms of notification of the possibility of disconnect, dispute resolution and being provided with information about their rights and obligations. However, Westfield notes that in shopping centres, some 'small customers' are members of large national chains which themselves have the ability to negotiate 'large customer' benefits for small customer premises in a particular centre.
- 5.4 Finally, Westfield considers that the costs associated with complying with consumer protection mechanisms needs to be carefully considered, as the requirement for hardship policies, particular dispute resolution mechanisms and procedures for dealing with undercharging and overcharging may be prohibitive for some onsellors. This would in effect require those onsellors to apply for retailer authorisations or licences, and would impose additional costs on such onsellors which may reduce their incentive to provide the service, and consequently reduce retail price competition (discussed in section 8 below).

6 Choice of retailer

- 6.1 Where existing infrastructure permits, Westfield believes that consumers should be afforded access to a retailer of their choice. However, Westfield does not agree with 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 onseller where all customers have access to a retailer of choice. Onselling in these circumstances is unnecessary and deprives customers of some protections under the Retail Law and Rules"*².
- 6.2 Westfield believes that access to retail exemptions, on appropriate conditions, serves to enhance retail pricing competition in an environment where energy costs are increasing. In particular, onsellers have the ability to compete with licensed retailers as to price and other consumer benefits (such as customer service, flexibility of contracting and other matters).
- 6.3 As noted above, and on the basis that consumers have access to appropriate consumer protections, Westfield considers that consumers can benefit from aligning their electricity retailer with the practical operator of the immediate network through which electricity is supplied to a consumer, as such alignment will enable consumers to have a more direct relationship with the person who delivers and sells them their electricity and which, we believe, results in better customer service for consumers, notwithstanding the availability of any consumer protection mechanisms set out above.
- 6.4 The price at which an onseller is able to acquire electricity is often at a discount to the price at which small customers are able to acquire electricity. Even allowing for some profit margin, onsellers are often able to sell electricity to small customers at a rate which is less than that which the customer could acquire electricity from a retailer. While members of large retail groups, or large tenants, (who may still be a 'small customer' for premises in a particular centre) have the ability to access national deals from electricity retailers which enable them to buy energy at a discount, small tenants (such as food court or speciality store operators) do not. Onsellers can provide small tenants with the ability to access energy at a discount to that which they are able to acquire from retailers.
- 6.5 Finally, Westfield also has no issue with the AER seeking to ensure that network configuration and metering arrangements for new developments and redevelopments to facilitate customer choice of retailer, provided that these are appropriately staged in circumstances where there is no requirement to remove current, working infrastructure until such time as such infrastructure comes to the end of its working life. To do otherwise would be an unworkable and unfair cost for the owners and operators of shopping centres.

7 Profit intention of the on seller

- 7.1 Westfield considers that network operators and onsellers are entitled to make a profit from their activities, provided that consumers are appropriately informed of basis of any charges and consumers have access to either a regulated or a competitive environment through which an appropriate market price for electricity can be determined. We consider that this is consistent with the AER's statement that the AER *"does not consider it unacceptable for an exempt seller to earn some level of profit which reflects the efficiencies attributable to exempt sellers versus the cost of administering the onselling arrangements (economic profit), but that a balance should be struck between the level of profit earned and the prices charged to consumers"*³. Westfield's position in relation to price constraints for prices charged to consumers is discussed below.
- 7.2 Westfield is concerned about 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"*. Westfield considers that this does not properly recognise the need for onsellers, like retailers, to recoup a number of costs which may be 'administrative' in nature, but which directly relate to the sale of electricity to a customer. For example, network operators and retailers charge a number of fees including fees for connection and disconnection, special meter reading and other fees permitted by the jurisdiction in which they are operating.

² Issues Paper, page 17

³ Issues Paper, page 26

- 7.3 Exempt onsellers ought to be entitled to charge similar fees separate from the amount of the energy tariff, provided that those fees appropriately disclosed to customers, as these fees are 'transaction specific' fees which relate to the specific circumstances and activities of the customer, rather than a more general cost of electricity. If the AER does not permit an onseller to charge such fees, and that onseller follows the AER's guidance by including the costs associated with such actions in the general energy tariff, there will be less transparency in relation to the costs of electricity and all customers will be required to bear these costs through an increased general energy tariff, making energy onsellers less able to compete with retailers and providing consumers of on sold electricity with less visibility as to the components of their energy tariff.
- 7.4 Westfield also is concerned that the AER's statement that "*the exempt person must not impose any other charge on any exempt customer in relation to the supply of energy*", and the deemed exemptions attached to the Issues Paper, may be construed to mean that exempt energy onsellers who are also embedded network operators are not able to recover **any** costs associated with the operation of an embedded network, including for example any charges which are currently permitted to be recouped under existing legislating or any charges for network access which mirror a proportionate share of those charges incurred by a network operator. For this reason, as well as those noted in section 3 above, Westfield considers that it is important that the retail exemptions are considered concurrently with network exemptions.

8 Price constraints

8.1 Westfield considers that, regardless of whether a consumer can access a retailer of choice:

- any cap on prices ought to be set by reference to the regulated rate at which consumers could buy electricity if they elected to be supplied by the relevant retailer with the regulatory obligation to supply that consumer;
- that regulated rate should be set by reference to the published rate of the retailer with the regulatory obligation to supply that consumer, rather than a particular gazetted rate, to ensure appropriate flexibility in the event of movements in the price of electricity – as is the case in Victoria; and
- a cap should only apply to the price which can be charged to small consumers, as large consumers are able to bargain for themselves – as is the case in all states other than Queensland.

9 Availability of deemed or registrable exemptions, and costs associated with obtaining retailer authorisations

- 9.1 The proposed exemptions do not take into account the full spectrum of existing activities, which as discussed above provide significant benefits to consumers. Westfield considers that denying people access to deemed or registrable exemptions because they provide a more competitive market for consumers (by providing access to retailer of choice) can only be a detriment to consumers, as well as those network operators and onsellers who have made significant investment in infrastructure on the basis of current law.
- 9.2 A large number of shopping centres across Australia currently operate embedded networks and on sell electricity under existing legislative regimes without the requirement for a specific authorisation, in circumstances where there is access to a retailer of choice and also where there is no access to a retailer of choice. In Westfield's experience, there are little or no disputes with tenants about the operation of these networks and onselling activities.
- 9.3 The requirement for shopping centre owners and operators to seek specific authorisation as an exempt retailer under any new regulations, in circumstances where there are exemptions are currently available, would fundamentally change the basis on which investment and operational decisions have been made in an industry where such decisions are made on a long term basis and where significant amounts of money are involved. The onselling of electricity and operation of embedded networks by shopping centre owners and operators is a common practice in the industry, and one which is well understood and accepted, including by tenants. Given this acceptance, and the lack of disputes in

relation to such operations, Westfield considers that such operations ought to be the subject of either deemed or registrable exemptions, rather than a specific authorisation.

10 Conclusion

In Westfield's opinion, the uncertainty associated with obtaining specific individual retailer authorisations, alongside the compliance costs associated with complying with any additional consumer protections required for onsellors, is likely to disincentivise potential onsellors participating in a market, where onsellors have the potential to create a more competitive energy market for consumers. While Westfield welcomes a national approach to regulation, Westfield considers that any regulation ought to take into account the real benefits that onselling, and operation of embedded networks more generally, have for consumers.