

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

12 August 2011

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

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

Dear Ms ~~Dodgson~~ 

AER Exempt Selling Guideline and Approach to Network Service Exemptions

The Shopping Centre Council of Australia (SCCA) appreciates the opportunity to comment on the Australian Energy Regulator's (AER) third and final round of consultation in relation to energy on-selling exemptions, which includes the *Draft Exempt Selling Guideline* ('the Guideline') and *Notice of Draft Instrument* ('the Instrument'). This consultation process also includes the first round of consultation on the AER's approach to network service provider exemptions) including the *Draft Electricity Network Service Provider Registration Exemption Guideline* ('the Network Guideline'). We note that the AER intends to finalise the Network Guideline in December 2011. Although a "separate process", we welcome the alignment of consultation and proposed exemptions. Our comments focus on both the proposed on-selling and network exemptions. We have no concern with this submission being made publicly available.

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.

As we have indicated in previous submissions to the AER, some of our members own and operate (including through the use of external service providers) embedded networks as one aspect of modern shopping centre management, including their relationship with retail tenants and external consultants and service providers. Our members are therefore affected parties for the proposed exemption framework and eligible for Deemed exemptions, and potential applicants for Registrable and Individual exemptions. In the spirit of the AER's reforms, our members will continue operating their embedded networks in a compliant and transparent manner, while focused on providing the best service to their retail tenants. We believe the proposed exemption frameworks should reflect that fact that embedded networks are incidental to our member's core business, and incidental to their relationship with retail tenants.

RETAIL/ON-SELLING EXEMPTIONS

As some of our members have embedded networks within their shopping centres and on-sell electricity to their retail tenants, our members (or the operators of the embedded networks – as the person/organisation "doing the selling") are potential applicants for retail exemptions under the proposed exemption framework.

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From the outset, we support the fact that exemptions from requiring a retailer authorisation for on-selling are available, particularly for the case of our members, where on-selling is incidental to their main business (shopping centre ownership and management) and relationship with their on-selling customers - retail tenants. Despite this, we still do not support the AER's position that (as per page 9) "exempt selling is often not in the long term interests of customers", particularly to the extent that it will prejudice the AER's consideration of exemptions. In our view, such a statement might reflect a residential customer situation, but not a retail tenant situation, where it is a business-to-business relationship that is already heavily regulated under state and territory retail tenancy legislation (including access to cost-effective, established dispute resolution), and where retail tenants actively engage with embedded networks as a cost-effective service.

As we have raised previously, we do have some concerns with the multiple types of exemptions our members will be required to operate under, including the proposed Deemed (D7), Registrable (R1 and R5), and Individual (outlined at Part 5) Exemptions and the associated processes and conditions.

We have noted the AER's stated preference (at page 8 of the Guideline) that it "would prefer persons whose only interaction with their customers relates to the provision of energy to seek a retailer authorisation". We are unclear what this statement means, and whether this precludes our members from applying for, and obtaining exemptions. We would welcome clarification on this.

Similarly, we are concerned with the stated position at page 11, that where an individual exemption is required, "the conditions attached to the exemptions are more likely to reflect those that apply to an authorised retailer, particularly with regard to the provision of hardship protections and formal avenues for dispute resolution". Our concern here is that this position is potentially ignorant of the shopping centre sector industry, where under all retail tenancy legislation, there are existing and traditional retail tenancy dispute channels such as the ADT in NSW or VCAT in Victoria. We would be concerned if the AER sought to impose another layer of dispute resolution.

Exempt seller factors (Retail exemptions)

Core versus incidental

The AER has a number of exempt seller factors (as per section 115 of the Retail Law) they will consider in making decisions relating to exemptions.

We welcome that the AER acknowledges (at page 19 of the Guideline) that on-selling within shopping centres is incidental (not core) to their main business of shopping centre ownership and operations, given the principal relationship with the on-selling customers, is the leasing of retail space for retailing purposes (whether on one site, or across multiple sites). Generally, the value of the energy provided, relative to the value of other services provided to retail tenants, is much less than accommodation costs and other costs and services such as statutory charges (e.g. land tax), cleaning and security/access control. The AER does however have a different view where the on-selling is undertaken by a specialist external provider.

Profit intentions

We note the AER's concerns to ensure exempt on-sellers are not exploiting exempt customers, "in particular small business customers and exempt customers that do not have access to a choice of retailer". We note that despite the fact that the Retail Law and Rules do not enable the AER to regulate the prices that on-sellers charge non-residential customers, that the AER, from 2015 (when R1 expires) will (through individual exemption applications) "scrutinise each on-selling situation and consider whether the prices to be charged are in the long term interests of these customers".

We support the AER's position that a profit can be earned, but note its concerns whether the on-selling is "undertaken as a profit making venture". We do however not support the proposal that the AER does not support the concept of exempt sellers passing on an 'administration' or similar fee in an attempt to "circumvent the requirement that residential customers are charged no more than the relevant standing offer prices", to the extent that this position also extends to shopping centres and retail tenants.

Amount of energy to be sold

We do not support the proposed approach where volume sold under an embedded network which is similar to an energy retailer would warrant the on-seller to obtain a retailer authorisation, rather than an exemption. We believe this should be guided by the first principle as to whether the on-selling is core or incidental.

Co-generation, tri-generation and sustainable energy

We support the proposed approach of considering the above under individual exemptions. These forms of energy generation provide a logical response to market sustainability drivers, and proposed carbon and related legislation, and should not be discouraged under the AER's exemption framework.

Customer related factors

We support customer protections, but highlight that for retail tenants within shopping centres, some protections are offered under retail tenancy legislation and we would urge the AER to avoid duplicating or adding unnecessary burdens to existing requirements including dispute resolution mechanisms.

We support the proposal that some exempt customers may be large customers, and that such issues will be addressed through their lease conditions and may have been largely covered in commercial negotiations prior to leases being signed.

Class D7 (Deemed)

We support D7 and that this applies automatically and does not require an application to the AER for exemption or registration. We support that there are no conditions and the rationale for this.

Class R1 (Registrable)

We support R1, but note that R1 will be closed off to new entrants in 2015 (although we also note that "persons operating under this class prior to 2015 are able to continue operation unless the exemption is revoked by the AER"; page 21), and that after 1 January, 2015, individual exemptions will be required (see comments below). We support the proposed conditions and that the residential related conditions do not apply for shopping centre circumstances. The conditions achieve a good balance to meet the needs of landlords, retail tenants and the AER. R1 exemptions granted before 2015 should operate in perpetuity (unless revoked for a breach of conditions). We note however that the exemption is not transferable in the event that a shopping centre changes hands or the management of the centre and on-selling changes. This will potentially add an element of uncertainty to these transactions and associated valuations.

Class R5 (Registrable)

The R5 exemption will be relevant to some of our members given they on-sell to large customers. We note that, unlike the R1 exemption, there is no expiration date for R5 (which we support). We seek clarification on how R1 and R5 will interact, namely to ensure that there is alignment with the application, consideration and approval process (e.g. to prevent one application for exemption being granted while the other is declined).

Individual Exemptions

Individual exemptions may be required before 1 January 2015, but most likely will become more prominent for our members once the Class R1 exemption expires from that date. We have some concerns about the proposed application process and consideration of policy principles, exempt seller factors and exempt customer factors. Some of our concerns on these factors are addressed above, and largely relate to the AER's stated position / preference which might prejudice applications for exemption, and divert attention from the true merits of an application for exemption.

NETWORK EXEMPTIONS

We broadly support the proposed framework outlined in the *Consultation Paper* and *Draft Exemption Guideline* and consistent with our comments in our previous submission, we support the alignment of the retail / on-selling and network service provider exemption classes. We wish to emphasise that for most of our members, there will be a requirement to register under multiple categories for both the retail and network service provider exemptions. This therefore adds to the compliance burden. We would welcome measures to streamline this process, particularly as we are keen to avoid (for instance) a scenario where one application is approved whilst another is declined for the same entity and property. In the event that applications are approved, we would be keen to avoid duplicative conditions. We would be keen to discuss this further with the AER.

Deemed / Registrable exemptions

We note at page 14 that a deemed exemption applies automatically to a network service provider (NSP), and that "typically, deemed exemptions apply to small networks within...shopping centres". However the proposed ND7 does not seem to reflect this stated position, in that the proposed exemption would not be applicable to the whole aspect of the network, just the common areas. (We appreciate that ND7 is aligned with the retail exemption D7). We believe that there should be a deemed exemption to reflect the AER's stated position, which applies to the whole network. We would welcome clarification on this matter.

The proposed general approach for shopping centres is covered under NR1, which, similar to the retail exemption framework, expires on 1 January 2015. The exemption NR5 will also be relevant, given that some of our members are engaged in on-selling metered energy to large customers.

As mentioned above, a central concern is that given the multiple classes, and that one shopping centre may require more than one Registrable exemption, there is some uncertainty if one class is approved and another is not. As an example, one shopping centre may have a deemed exemption under ND7, and then require an NR1 and NR5 (for large customers) exemption and an NRO2 exemption where a cogeneration system is in place. We would welcome clarification on the AER's proposed approach on this issue. We would also welcome clarification on the specific meaning by 'off-market' and 'on-market' energy generation (NR01 and NR02) and how it applies to our members when they have cogeneration or trigeneration systems installed.

We would welcome the deemed exemption classes covering the issue of emergency energy supply.

We also note the other proposed deemed exemptions that could apply to our member's circumstances which includes NDO2 (relating to temporary supply during the construction and commissioning phase of a shopping centre) and NDO3 (relating to electric vehicle charge points).

Network charges / child pricing

We are concerned with the AER's position that external charges be "apportioned by an exempt network operator to each customer in an exempt network in proportion to their metered energy consumption over the equivalent period". This will make cost recovery marginal and therefore impact the viability of embedded networks, and is contrary to the standard practice of charging exempt customers a bundled bill (as described at Table 3, Charge Group A at page 28). In terms of the recovery of external charges, operators of embedded networks should be able to charge shadow prices for external charges, rather than these charges being apportioned.

Child meter data responsibility

We support that embedded networks should have metered supply. We do not believe, however, that meter data agents are necessary as per General Condition 8. This could easily double or triple the costs to operate an embedded network. We believe the AER's objectives can be achieved in other ways. We support having the same meters and billing arrangements.

Meter replacement

We note at General Condition 6 that while the AER will not require pre-existing metering installations to be removed, "meters installed prior to the commencement date may be subject to the terms of an exemption issued by the National Measurement Institute as amended from time to time" (page 9 of Guideline). We do not believe that our members should be required to change their existing meters once the new framework commences, or the NMI issues an exemption "from time to time". This current proposal provides significant uncertainty.

OTHER ISSUES

Transitioning existing exemptions

In our last submission, dated 7 February 2011, we highlighted our concerns (as one of the most pressing issue for our members) in relation to the transitioning of existing state and territory based exemption to the new framework. We are still unclear how exemptions granted before the commencement of the AER's framework will be transitioned and recognised under the AER's framework. This is an issue we raised in some detail in our previous (February 2011) submission. This includes the circumstances where state-based requirements differ to the AER's standard conditions, and issues such as registration with the AER and the AER Public Register. This remains one of the most pressing issues for our members. We would welcome clarification on this issue, including on how it will be managed in a programmatic sense.

Disconnection at retail lease expiry

As raised in our previous submission (in relation to on-selling exemptions), we recommended adding a provision at R1 Condition 7 (now R1, Condition 8) that a shopping centre landlord should be able to disconnect an exempt customer when a retail lease expires. The proposed Condition 8 (3) may be seeking to address this situation, however we would welcome more specific clarification as we do not believe it adequately addresses the issue and provides the required certainty for our members.

Transferring property ownership

For both the retail and network exemption frameworks, there needs to be a mechanism for transferring property ownership, which occurs due to merger and acquisition activity. A transfer of ownership (e.g. taking a half share in a shopping centre) should not require a fresh application, which could risk the asset becoming redundant or require rectification. A mechanism where the AER is merely advised of the change of ownership details would enable simpler administration of the scheme.

DNSP recognition of embedded networks

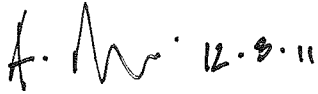
Some Distribution Network Service Providers (DNSP's) still have a negative approach to embedded networks, and there is a lack of clarity around who is responsible for small-user child meters within embedded networks. We believe the AER has an opportunity to help address this issue as it goes to the heart of some of the other changes the AER is seeking to implement through the new framework. We would be pleased to provide some detailed examples on this issue.

Where there are child meters, there needs to be clarification around who installs and manages the data from these meters, as well as the costs of change-over and ongoing maintenance. To facilitate a streamlined national approach to this matter, there needs to be consistency between jurisdictions and greater efforts on the part of traditional energy retailers and DNSP's to provide processes and technology to facilitate retailer of choice. This is another issue we would welcome discussing with the AER in more detail.

Thank you for the opportunity to provide this submission on the proposed retail and network service provider exemptions.

As always, 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. I can be contacted on 02 9033 1930 or anardi@scca.org.au.

Yours sincerely,

Handwritten signature of Angus Nardi and the date 12.9.11.

Angus Nardi
Deputy Director