

7 May 2020

Australian Energy Regulator

By email: [AERExemptions@aer.gov.au](mailto:AERExemptions@aer.gov.au)

Dear Sirs and Mesdames,

## APPLICATION FOR INDIVIDUAL EXEMPTION

I refer to the submission dated 17 April 2020 made by the ACT Civil and Administrative Tribunal (**ACAT**) in connection with the application made by Tindo Energy Pty Ltd (**Tindo**) for an individual exemption from the requirement to hold an electricity retailer authorisation under the National Energy Retail Law (**NERL**).

We respond as follows to ACAT's submission:

1. The first point to note is that ACAT has stated that it is not opposed to the grant of the exemption:

*ACAT does not oppose the grant of the exemption from the requirement to hold a retailer authorisation, as this would be unnecessarily onerous on the company given its proposed business model.*
2. Despite having not opposed the grant of the exemption, ACAT has raised a number of concerns. However, in our view, these concerns are either ill-founded or are concerned more with the wider exemption framework under the NERL. Either way, those concerns should not be taken into consideration by the Australian Energy Regulator (**AER**) in its decision on Tindo's application.
3. For example, ACAT states that, if granted, the exemption "would appear to have the effect of removing Tindo from any regulatory obligations under the NERL." That statement is both wrong and ill-founded.
  - 3.1 It is wrong because any individual exemption granted to Tindo should and we anticipate will be subject to conditions – see below – and, under section 112(2) of the NERL, Tindo will be obliged to comply with those conditions; hence, Tindo will have regulatory obligations under the NERL. Furthermore, those regulatory obligations should and we anticipate will be framed by the AER against the policy principles set out in section 114 of the NERL and the exempt seller and customer related factors in sections 115 and 116, and therefore should and we anticipate will be appropriate for Tindo in the context of the business it proposes to carry on and the customers it will have.
  - 3.2 ACAT's statement is also ill-founded because in effect the concern is that the AER should not grant any exemption because, if it does, the exempt seller will not have regulatory obligations under the NERL. Putting to one side the point that all exemptions are conditional, ACAT's concern would leave no room for the AER to grant any exemptions. That is clearly inconsistent with the inclusion of the exempt selling regime in the NERL.
4. ACAT states that:

*Tindo requests an individual exemption from the requirement to hold a retailer authorisation under the NERL because many of the obligations of a retailer authorisation will not apply to Tindo and the group is regulated under other schemes, particularly in relation to its credit licence.*

  - 4.1 Nothing in that statement is correct. Tindo is seeking an individual exemption because, in order to carry on its proposed business, it is required by law to do so: the term of its solar power purchase agreements (**solar PPAs**) may be longer than the 10 years accommodated by the class R8 registrable exemption under the AER (Retail) Exempt Selling Guideline (**Guideline**). The other regulations that other members of the Cool or Cosy group must comply with are no reason at all for Tindo's application.
5. Having said that it does not oppose the grant of an exemption to Tindo, ACAT submits that Tindo's exemption should not be unconditional.

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- 5.1 We have not asked for the individual exemption to be unconditional and, consistent with what the AER says in the Guideline, e.g., at p9, it is our expectation that the AER will impose conditions and that those conditions will appropriately balance the needs and rights of Tindo's customers and the regulatory burden that meeting those conditions will place on Tindo.
- 5.2 In striking that balance, we submit that the AER should place significant weight on how the Australian Consumer Law (**ACL**) will cover the relationship between Tindo and its customers, conferring suitable consumer protections on the customers including: (1) the prohibitions on Tindo engaging in misleading and deceptive and unconscionable conduct; and (2) consumer guarantees relating to matters such as the electricity supplied by Tindo having to be of acceptable quality. The AER is able to place this weight on how the ACL will apply in favour of Tindo's customers since the extent to which the requirements of laws other than the NERL allow appropriate obligations to govern Tindo's behaviour is a relevant consideration under the exempt seller related factor in section 115(1)(e) of the NERL.
6. ACAT has submitted, that, as a minimum, Tindo's exemption should include conditions 24 and 25 from the Guideline.
- 6.1 We consider condition 24 is an appropriate condition for inclusion in Tindo's exemption. Reflecting the point already made that the ACL will cover the relationship between Tindo and its customers, we have no difficulty with being required by the exemption to inform customers about this. We are currently proposing to include the following provision in our solar PPAs with customers, and would welcome the AER's feedback on it:



- 6.2 Condition 25 would prevent Tindo from purchasing electricity in the wholesale market and from being the financially responsible retailer in that market for our customers' premises. We are not planning for Tindo to participate in the wholesale and have no difficulty therefore with the inclusion of condition 25 in its exemption.
7. ACAT has also submitted that Tindo's exemption should somehow make provision for additional conditions as regulation of new and emerging technologies progresses. We are not sure why that should be so. However, in any event, we consider that such a provision is unnecessary since the power the AER has under section 112 of the NERL and rule 158(2) of the National Energy Retail Rules to impose conditions in exemptions is not limited to doing so at the time the exemption is granted; the AER may also impose conditions during the currency of the exemption.

8. As already mentioned, the reason that Tindo has applied for an individual exemption is that the term of its solar PPAs may be more than the 10 years accommodated by the R8 exemption, where that is consistent with the customer's needs and what the customer wants and also allows Tindo to achieve an adequate return on the cost of its solar systems. The only conditions that attach to the R8 exemption are conditions 24 and 25. Given in particular that the electricity sold by Tindo to a customer will be discretionary and supplementary, and the customer in effect will be able to terminate the solar PPA early by paying an agreed termination fee<sup>1</sup>, in our view the longer term of Tindo's solar PPAs does not represent a reason for any additional conditions to be included beyond those attaching to the R8 exemption.

Please do not hesitate to contact me on 0412 696 005 or at [Glenn@coolorcosy.com.au](mailto:Glenn@coolorcosy.com.au) if you would like to discuss this submission.

Yours faithfully,



**Glenn Morelli**

Director, Tindo Energy Pty Ltd

Managing Director, Cool or Cosy

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<sup>1</sup> See point 20 of Tindo's application.