AGL Energy Limited
ABN: 74 115 061 375

72 Christie Street
St Leonards NSW 2065

Locked Bag 1837
St Leonards NSW 2065

T: 02 9921 2999
F: 02 9921 2552
www.agl.com.au

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The Australian Energy Regulator (AER)
Level 35, 360 Elizabeth Street
Melbourne, VIC, 3000

Attention: Jacqui Thorpe, Acting General Manager, Retail Markets Branch
AERInquiry@aer.gov.au

Regulation of alternative energy sellers under the National Energy Retail Law: Issues Paper

Thank you for the opportunity to discuss this important consultation.

AGL has carefully reviewed the AER consultation paper and its proposals as it is generally believed that the minimisation of any regulatory framework is a desirable outcome. In its review of this consultation AGL has concluded that consumers are unlikely to be properly protected if the full range of consumer and market regulations does not apply to alternative sellers.

Exempted sellers and alternative sellers are not necessarily analogous and AGL is concerned at the discussion paper's emphasis that they are. It concerns AGL that the purpose of alternative sellers that is apparent in the AER's proposal is to employ the existing generation and transmission infrastructure to create a product to sell to a customer. This concerns us because this is currently the role of a Retailer in the market, to which exemptions from the consumer protection framework are not authorised.

In light of this and further considerations, AGL's conclusion is that the current framework is both sufficient and necessary to all sales of energy, and does not represent an unnecessary barrier to entry. However we are attentive to the conclusions of the Power of Choice Review, and therefore AGL provides the following specific responses to the consultation.

Should you have any further questions in relation to this matter, please contact David Markham, Senior Regulatory Adviser on (03) 8633 6510 or at david.markham@agl.com.au.

Yours sincerely,

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Nicole Wallis
Manager Retail Markets Regulation

What, if any, other alternative energy selling business models are stakeholders aware of (apart from those listed in section 3), and what future business models do stakeholders consider could emerge?

Business models for the sale of heating and cooling, which are the two largest components of domestic energy consumption, already exist elsewhere. Models that decouple the supply of heating or cooling from the sale of energy consumed for heating and cooling should also be considered by the consultation on alternative sellers.

The charges for these services may in the future relate to the weather, using a deemed value for energy for example, as the weather is the driver for heating and cooling. This may further allow demand side participation (DSP) by aggregators who could control heating and cooling to meet their consumers comfort and contract conditions, and optimise the DSP provider's broader market positions.

Energy only products that allowed for a consumer to pay for their energy use by another method than measured consumption (ie, a fixed monthly fee for a potentially interruptible or restrict-able supply) would enable both DSP and better cost management by consumers, using cheap and current technologies. This may be comparable to the British Gas plans to offer of "free Saturdays", where Saturday consumption between 9am and 5pm is not charged. Centrica already offers such tariffs in the US, which it says are attractive to low income high consumption families, who can shift energy intensive activities such as washing and drying clothes to the weekend; whilst simultaneously easing peak period consumption on the grid and at a generation level creating value as DSP.

Alternative energy selling business models such as Micro-grids do not appear to be that well considered by the consultation. At their smallest, a Micro-grid is created when a solar PV customer sells excess energy to their neighbour by throwing an extension cord over the back fence. In this example the customer at the other end of the extension lead may power their refrigerator, in return for a dollar a day. For all practical purposes refrigeration is sold; consumption is not measured. NUOS charges are avoided, and the whole transaction is "off market". Of course more elaborate arrangements are also possible – with a range of models. Indeed, several homes could get together and create a total energy centre with solar PV, gas generator, a few batteries and only one connection to the grid for frequency/voltage regulation. We wonder at what authorisation or exemption could be proposed to boondoggle this arrangement between consenting parties?

On a larger scale, electric passenger vehicles may comprise a substantial proportion of the passenger fleet by 2030; or they may not. However if you extend the concept of EVs being sold with free energy for the life of the car (such as the Tesla) you could do the same with in-appliance sub-metering; with numerous appliances having such an arrangement in the home. Or the consumption could be a deemed consumption rather than metered. We should bear in mind that EV's are estimated to consume around half of current average consumption, at 2.4MwH pa. Whilst this may be a small component of the electric vehicle contract cost, it is not an insignificant energy use.

Australia does not have a government imposed EV mandate. However, the fact that targets and mandates for EVs exist in other countries should help to drive technology improvements and cost reductions globally, and help facilitate adoption in Australia over time. In our view a pragmatic and cost effective solution for most private EV drivers charging at home is for their electrician or electricity retailer to install a 10-15 amp plug (as required by the car) and provide a simple timer switch to allow off-peak charging (if this isn't already a standard feature of the vehicle), and to take up a time of use pricing plan, facilitated by a smart meter. The Nissan Leaf already has a timer function that can

start charging during off-peak periods.[1] This requirement hardly triggers a need for regulatory exemption for alternative energy sellers.

What are stakeholder's views on the AER's proposed policy considerations set out in Section 3?

The AER's proposal in our view incorrectly compares exempted sellers with alternative sellers. This is not an appropriate comparison and the discussion paper's policy analysis and considerations are unfortunately flawed as a result. Our reasoning is as follows:

Exempted sellers are more directly comparable to Retailers in that they provide either:

a) Essential services, or;

b) A method of allocating consumption between customers, in instances where the existing network infrastructure does not allow a regular Retailer to perform that service.

In contrast, alternative sellers are not concerned with either of these objects.

Instead, the point of alternative sellers in the AER's proposal seems to be to use the existing generation and transmission infrastructure to create a product to sell to a customer, currently the role of a Retailer in the market. AGL's view is that the current framework is sufficient. The current framework allows an open, competitive market, has the right rules and regulations to ensure logical market behaviour, and has the right incentives to encourage innovation, promote competition and maintain customer choice.

The AER proposal therefore comes down to removing perceived barriers to entry to facilitate non-Retailer participants; theoretically creating competitive products for the supply of energy. It cannot be stressed enough that this comes at the price of dismissing the regulated consumer obligations that apply to other entities either already delivering or capable of performing the creation of competitive products for the supply of energy.

The AER then attempts to explain this waiver of obligations on the basis that alternative sellers do not provide an essential service, are likely new entrants to the energy market or lack sufficient resources, and supply energy as an add-on or supplementary service or as a portion of the total energy needs. This is one possible hypothesis, though not sufficient to explain scrapping the energy consumer protection framework.

In contrast with this hypothesis, there is the higher possibility that the alternative seller will be a large company fully capable of complying with all of the obligations of a Retailer in the market (e.g. Coles, Holden), and furthermore, that the alternative seller could be providing the greater proportion of total energy for a significant part of a customer's essential needs (e.g. heating and cooling, or EV).

A further and perhaps unintended consequence of the AER proposal is that Retailers will be forced to bear the Use of System (UoS) credit risk of such entities energy sales where the 'add on' service is provided. This results in alternate seller services being cross subsidised by the incumbent retailer – which is neither fair nor competitive.

What, if any, other considerations should the AER take into account to regulate the sale of energy under alternative energy selling models?

Generally regulatory intervention will be required where market failures can be identified, and then can only be reasonably overcome by regulatory intervention. In this consultation the belief that further innovation can be stimulated by regulatory intervention seems to be

[1] AGL Applied Economic and Policy Research Working Paper No.27 – Electric Vehicles p.24

driving the consultation (albeit on the back of the Power of Choice Review). There is no apparent market failure.

At the consumer's perspective, consumer protection regimes are designed to ensure the rights of consumers, to ensure free trade, and ensure truth in advertising. They are also there to discourage fraud, and ensure discrete groups of businesses do not obtain unfair advantage over others. From AGL's view it is this unfair advantage over others, particularly where the alternative seller is a seller of energy, which is also of grave concern.

Further, the consultation presupposes that incumbents have an unfair advantage over new entrants, and that consumers would benefit if new entrants are not required to comply with any or part of the elements of the NERR. This is based on the assertion, rather than evidence, that barriers to entry may be unreasonably high.

The AER further suggests that where the seller is exempted, the customer still continues to enjoy the protections of the law as they:

- Still retain their rights to buy energy from a retailer, and to choose their authorised retailer
- Can access the full suite of Retail Law protections through this relationship with the retailer
- Are protected by the AER's RoLR scheme if the retailer fails.

The Power of Choice review contends that regulators ensure that barriers to entry are not created by requiring potential new entrants (many of whom may be small businesses) to meet onerous and unnecessary compliance and accreditation requirements. However an entry barrier is poorly named, and is not an entry barrier, if incumbent firms faced it when they entered the market. AGL agrees that new entrant s or the threat of new entrants is a desirable feature of an effectively competitive market. AGL does not accept that defining an entry barrier as anything that hinders entry and therefore has the effect of reducing or limiting competition is a sensible approach to regulatory policy setting and rule making.

AGL is also concerned with the lack of evidence of real barriers to entry. Since 2001, there have been dozens of retail licence applications to State regulators, the great majority of which have been granted. Where the applicant has any small customer facing business, they must demonstrate an incremental capability to comply with consumer law broadly, and present a compliance plan to comply with the NERR. This has not been an onerous hurdle. Whilst different business models exist, both operational compliance and compliance reporting functions can be provided on both an incremental and scalable basis by third parties. Similarly small customer numbers can be managed using easily available software, or contracted out to third parties who specialise in these types of services. Importantly a fundamental question for this consultation has not been asked: if such protections are to be provided to customers on an exceptions basis, then are they really required at all?

If we reasonably assume that regulation exists for a purpose, then where it exists, operational compliance is a cost of doing business, whether a business is complying with the energy law, the food law or financial law. For example, a financial adviser is often a small business but is not exempt from the relevant requirements of an AFSL on the basis that they have fewer customers to advise or are a new entrant; nor is a food manufacturer exempt from the food law on the basis that its production runs are small. It is entirely congruous that where a business is selling energy or energy related services that would usually require compliance with the energy law, then there is no compelling logic that their customers shall require fewer protections because their supplier is smaller, or because energy forms a small proportion of that contract value (even though it may be the greater part of the energy consumed).

AGL contends that where an alternative seller has a customer facing business selling any energy at all, then the entirety of the NERR is applicable to that alternative seller. Suggestions that obligations under the NERR fall entirely to what we currently call the FRMP, means the alternative seller not only avoids compliance costs and credit risk but actually transfers them to an unrelated business. In the consultation paper the FRMP, for example, appears liable for all network charges regardless of whether they were incurred by a third party other than the customer, with whom the retailer has no relationship at all.

What implications, or future implications, could arise for the regulation of alternative energy sellers under the Retail Law, or other consumer protection legislative frameworks?

An alternative seller will be providing the same type of service to the customer as a regular retailer but ostensibly on the basis that the consumption is used for a singular and non-essential purpose, which is not necessarily the case. The real difference between the two entities would only be that the alternative seller will not be paying for UoS charges, and will not be required to comply with the same regulatory framework that establishes consumer protections as Retailers.

Consumers are unlikely to be properly protected if the full range of consumer and market regulations does not apply to alternative sellers, unless the entities that are granted authorisations as alternative sellers are carefully regulated. If Retailer obligations do not apply to alternative sellers, why should such obligations apply to a retailer who is ostensibly providing the same services to a customer? The answer "because they do now" is both unimaginative and unconvincing.

In the event of approved exceptions, then the requirement for alternate energy sellers to inform the customer of how such an arrangement works with the incumbent retailer, distributor, and other parties needs regulating. Such arrangements could be quite involved, and where disputes arise may lead to confusion and additional costs on parties unrelated to the deal. One specific example is Ombudsman costs, where confusion over the relevant energy seller may lead to costs being borne by the retailer rather than the alternative seller.

Finally, future implications are difficult to imagine without reference to today. This may explain why many 1950's renditions of space travel depict space craft interiors reminiscent of a 1950's motor car dashboard and seats. The alternative energy selling models anticipated in section three of the discussion paper tend to reflect this phenomenon, in as much as they are bundling together existing technologies and systems in a comparable manner. As an example, the hire purchase of solar panels combined with an energy purchase agreement may look in hindsight just like retro futurism; combining known technologies and systems as opposed to predicting or allowing for new ones.

In the 1890's, many futurists imagined sticking wings on a steam engine and creating commercial air travel. Fortunately for the future, no-one actually regulated that this is what a plane looked like.

What, if any, conditions should be placed on an individual exemption for an alternative energy seller?

Individual exemptions create a tricky paradigm, because they are invariably developed ad hoc in the first instance and subsequently relying upon precedent. Therefore the principles that should apply to individual exemption should simply be an extension of category exemption. To this end three criteria should apply.

Firstly, where the activities of an alternative seller cause changes in demand and consumption characteristics at the site, or financial agreements for the seller at the supply

point, then an agreement with a distributor is prerequisite and there should be no exceptions to this.

Secondly, where the alternative seller is selling energy direct to a customer or is exporting or importing energy via the customer's supply point for the purpose of the activity of the alternative seller, the prerequisite must be that the alternative seller is either a licensed retailer, or is contracted to the services of a licensed retailer. As such, and without exception, they should comply with the requirements for an agreement with a distributor in scenario one.

And finally, where the alternative seller is a generator on a different site, such as a private networked micro generation system, then the current licensing requirements should apply as they do to existing embedded generation systems and embedded networks.

Of course if none of these criteria are met, then no exemption is required.