

ENERGY RETAIL CODE: DRAFT DECISION, OBLIGATIONS FOR EXEMPT SELLERS UNDER THE GENERAL EXEMPTION ORDER 2017

1. ABOUT US

The Shopping Centre Council of Australia (SCCA) is the national industry group for major owners, managers and developers of shopping centres. Our members own and operate embedded networks, as an ancillary aspect of their shopping centre operations.

2. COMMENT

Thank you for the opportunity to comment on the Essential Services Commission's (ESC) *Draft Decision, Obligations for Exempt Sellers Under the General Exemption Order 2017 (5 July 2018)*, which outlines the provisions of the Energy Retail Code that are proposed to apply to exempt sellers.

We appreciate the opportunity to discuss the Draft Decision with the ESC during the consultation process.

It is noted that 'exempt sellers' are those that are exempt from the requirement to obtain a license under section 16 of the *Electricity Industry Act 2000*, as prescribed under the *General Exemption Order 2017 (GEO)* which commenced on 1 April 2018 (noting that clause 11 commenced on 1 July 2018).

We also note that Division 3 of the GEO expressly provides that compliance with the provisions of the Retail Code, or Distribution Code, as specified by the ESC, is a condition of an exemption.

We have reviewed the proposed framework and specific obligations under the Retail Code, and have several issues we'd like to discuss with the ESC. This includes interpretation issues, as well as how certain issues relate to the 'equivalent' provisions under the Australian Energy Regulator's *Retail Exempt Selling Guideline (Version 5)* – which we note that the ESC has sought to align with on certain issues.

3. ISSUES

We are pleased to raise the following issues:

General comment

We strongly recommend that the ESC develops a simplistic, stand-alone guide, which can be relied upon by *exempt persons* in terms of key aspects of the new framework, and its application.

One issue is the complexity of navigating various instruments (e.g. the GEO, the Code, the Act), and requirements and obligations, to be clear when the Retail Code applies, and what provisions are relevant.

This could include, for instance, clarity on the hierarchy of instruments (Act, GEO, Code), the application of the Code (i.e. small customers), the key threshold issue of '*Explicit informed consent*', and then operational issues such as billing, payment and disconnection – and also key transitional arrangements.

This could also include, for instance, clarity whereby (our interpretation) that '*explicit informed consent*' under the GEO does apply to large customers, but under the Code it only applies to small customers.

Complicated documents only increase the likelihood of (non-intended) non-compliance. Our members are keen to have clarity around their compliance obligations.

Application of the current Retail Code

As a matter of clarity, we are keen to ensure there is no issue with the potential application of the current Retail Code to exempt persons.

We note that clause 26 (Transition Provisions: Compliance with the Retail Code) of the GEO provides that:

Despite clause 8, until the Essential Services Commission specifies in the Retail Code the provisions applicable to an exempt person of a category or class, it is a condition of an exemption under Division 1 of Part 2 that the exempt person must comply with all applicable provisions of the Retail Code as if the person were a licensed retailer.

The current version of the *Energy Retail Code (Version 11b: 1 July 2018)* does not expressly activate obligations for exempt persons.

Application and interaction with landlord contract / lease arrangements

We are concerned that there may be unintended consequences of the interaction with the requirements of the proposed code changes and existing landlord contractual arrangements (and legalisation). One of the key differences between exempt customers is that there is already a contractual relationship between the exempt seller and the tenant (which is not the case for normal electricity retailers where this code normally applies).

For example:

Clause 40 (security deposits) – we need to ensure that these provisions do not interact with security provided under our leases.

Clause 51-52 (Liabilities and indemnities) – similarly we need to ensure that this doesn't interact with existing contractual relationships between the tenant and landlord.

Clause 27 (apportionment) – payments for electricity bills are often issued as part of the lease charges (and many other related charges) and this proposed clause potentially conflicts with existing contractual arrangements.

Application of the proposed revised Retail Code

We seek clarity in relation to the new clause 3B (6) (a) which provides that – in terms of the application of the Code - a reference 'to *retailer* in any clause includes *exempt persons* to the extent they engage in the relevant category of activity in relation to *small customers*'. It's our interpretation that it is the intent of this provision is to be 'self-contained', insofar that it refers to where exempt categories are expressly referenced in such a clause.

We are concerned, however, that the current wording could give rise to interpretations, and hence expectations, that *exempt persons* are *retailers*, and should hence have similar obligations.

Potential duplication issues

We are concerned about potential duplication issues between the GEO and the Code.

To cite one example, the definition of 'explicit informed consent' in the GEO, is different to the definition (at clause 3C) in the Code which expressly applies to a *retailer*, and is also more expansive. Despite this, the definition at clause 3C then has a new subsection (3) which clarifies that 'this clause applies to exempt persons in the following categories: VD1, VD2, VD7, VR2, VR3 and VR4'.

Noting the issues we've also identified below, it is confusing how the 'explicit informed consent' obligations in the GEO align with those in the Retail Code. For example, it's our interpretation that the 'explicit informed consent' obligations under the GEO applies to exemption categories VR1 and VR5 (which will be typical exemption categories for shopping centres) – yet the 'explicit informed consent' obligation under the Code will also apply to VR1 exemptions (noting the Code only applies to 'small customers' – see below) but not VR5 exemptions as this category relates to the sale of energy to large customers.

In addition, the Code has a requirement for record keeping, which isn't noted in the GEO.

We would be grateful for clarification on this issue, particularly to ensure clarity for the purpose of compliance, noting that the GEO is the 'higher-order' obligation as a gazetted instrument, made by the Governor.

Lack of alignment with the GEO and Retail Code

In addition to the above, we believe there is a potential lack of alignment between the GEO and the Retail Code – and possibly the Act – and seek clarity from the ESC on this basis.

The GEO provides (at clause 8) that it is a condition of an exemption, under Part 2 of the GEO, that an exempt person must comply with the Retail Code.

However, clause 3B (1) of the Retail Code provides that 'this Code applies to small customers only' – which is defined in the Code as 'a domestic or small business customer under section 3 of the Act (and a person whose aggregate consumption of electricity purchased from an exempt person has not been, or is not likely to be, more than 40 MWh in any calendar year)'.

Further, clause 3B (6) has a proposed new provision which clarifies the Code applies to an exempt person, 'only in respect of that exempt person's activities in relation to small customers'.

This gives rise to a few potential issues.

Firstly, section 3 of the Act a 'domestic' or 'small business customer' is defined as 'a person, or a member of a class of persons, to whom an Order under section 35 (5) applies'. However, the GEO is an Order made under section 17 of the Act.

Secondly, it's our interpretation (as noted in the section above) that the Code does not apply to large customers, however we would appreciate assurance that this is the case.

Transition to 1 January 2019

We note the proposed 1 January 2019 commencement.

We are, however, unclear under what circumstances the proposed 1 January 2019 commencement will apply. We would welcome an opportunity to discuss this with the ESC.

As an example, will the Code and obligations only apply to 'new' embedded networks (e.g. greenfield, brownfield conversions), or will it apply to existing embedded networks and if so, will it only apply to new customers within those networks?

On the key issue of 'explicit informed consent', it's our position that consent should not be required for any existing customers within an embedded network. To seek explicit informed consent for existing customers would be impractical. It should be noted, however, that such customers are still granted current protections such as access to the EWOV scheme, in accordance with the GEO.

In addition, we believe the ESC should provide guidance about practical transitional issues, such as (for instance) the potential issuing of bills for the period the end of 2018 and the start of 2019. This may also require communication with EWOV.

Definition of 'customer'

Under the Code, we support the proposed definition of 'customer' to include customers of an 'exempt person', in addition to a 'retailer'.

Clause 20 definition of metering data – this clause refers to the metering data that ties back to the NEM rules (and hence) implies that metering must be full market specification metering provided by a registered metering provider in the market. The vast majority of meters in embedded network are unlikely to meet this explicit requirement, and may require exempt operators to install new meters for all customers. We request that this definition is amended to reflect the current position rather than requiring a large capex outlay for exempt operators.

Definition of 'exempt person'

We support the proposed definition of 'exempt person', which references the GEO.

Exemption categories

We note and support that the *Retail Exemptions* and *Network Exemption* categories under the GEO, and the categories outlined at Schedule 8 of the Draft Code, generally align with the AER Guideline categories (e.g. VR1 is akin to R1 – selling to 10 or more commercial / retail customers).

Explicit informed consent

We are familiar with the principle of explicit informed consent, as this has been enshrined in the AER Guideline for some time.

We note the variation between the proposed approach under the GEO/Retail Code, and the approach in the AER Guideline. Under the AER Guideline, this includes the different approach whereby an individual exemption application can be progressed where explicit informed consent cannot be obtained. We also note the different approaches in terms of some of the specific obligations.

We note that the GEO provides (at section 9) that it is a condition of a Division 1 exemption (i.e. a deemed or registrable retail exemption) an exempt person must obtain the consent of the customer to an arrangement for the sale of electricity to that customer.

'Explicit informed consent' is defined separately at section 3 of the GEO, noting that that the exempt person has adequately disclosed all relevant matters to the customer, and that the customer has given their consent (e.g. in writing, or verbally, or electronic communication) to the exempt person.

We also note the separate 'explicit informed consent' requirements under clauses 3C and 3D of the Code.

It is unclear how this obligation will apply to exempt persons currently registered on the ESC's website. It would be our expectation that exempt persons should not need to obtain explicit informed consent from customers that are already customers before 1 January 2019.

In addition, we believe that the Code should also be amended, to provide that:

- Where a customer is agreeable, that explicit informed consent be provided to an exempt person in a timely manner,
- That customers cannot unreasonably withhold their consent, and
- Where consent has not been provided – including in a timely manner - an exempt person would not be in breach of their exemption if they have taken all reasonable steps and made best efforts to obtain explicit informed consent, and can demonstrate these efforts to the ESC.

Obligation to supply

We note that the proposed new clause 17 (Exempt Persons and obligations to sell electricity) largely reflects the similar provision in the AER Guideline.

Payment difficulties

We note the proposed approach to payment difficulties; however this is not relevant for our members as it relates to residential customers.

Billing

We note and support the alignment of billing obligations with the AER Guideline, including billing estimation, and that customers should receive bills at least every three-months.

Liabilities and immunities

We note the proposed amendment to section 51 of the Code, which provides that a retailer (which can include a reference to an exempt person – as noted above) must not include any term or condition in an *exempt person arrangement* (as defined) with a small customer that limits the liability of the retailer for breach of the contract or negligence by the retailer. We would welcome an opportunity to discuss this provision, and our interpretation, to ensure clarity and there no unintended consequences.

5. CONCLUSION

We would gladly discuss the above with the ESC, including practical transitional issues.

6. CONTACT

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