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Ms Sarah Proudfoot
General Manager, Retail Markets
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

By email: AERExemptions@aer.gov.au

Dear Ms Proudfoot

Submission in respect of the Body Corporate for Freshwater Point CTS 35855 Application for Individual Exemption

We act for Locality Planning Energy Pty Ltd (**LPE**).

On behalf of LPE, we make the following submission in respect of the application made by The Body Corporate for Freshwater Point CTS 35855 (**Body Corporate**) for an individual exemption from the requirement to hold a retailer authorisation under Part 5, Division 6 of the National Energy Retail Law (**Retail Law**) for the provision of electricity at 33 TE Peters Drive Broadbeach Waters, Queensland (**Property**) dated 29 November 2016 (**Application**).

Executive Summary

It is the view of LPE that the Application should be refused by the AER on the following grounds:

1. **Misleading Information:** the Body Corporate holds registrable exemptions E-2067 and E-2351 dated 2 October 2015 in exemption classes R2 and R5 (**Registrable Exemptions**). Accordingly, in giving notice to obtain the Registrable Exemptions the Body Corporate has represented to the AER that the embedded network was retrofitted into the Property before 1 January 2015, in circumstances where that network began operating on 26 August 2015. The Body Corporate has given the AER misleading information.
2. **Unsuitable:** the fact that the Body Corporate has sold energy unlawfully, obtained the Registrable Exemptions improperly and "overlooked" its obligations to seek an individual exemption to sell its embedded network electricity all militate to the conclusion that the Body Corporate, with or without the assistance of its consultants, is unsuitable to hold the individual exemption applied for;
3. **Mitigation of customer detriment:** the Application fails to demonstrate that the Body Corporate has taken satisfactory steps to mitigate customer detriment consequent on the retrofitting of the Property to an embedded network, and the Application should not be approved;
4. **Explicit informed consent:** the Application fails to show that the Body Corporate clearly, fully and adequately disclosed all matters relevant to the consent of its customers in respect of the retrofitting before those customers gave their consent to retrofitting the Property. Accordingly, the Body Corporate has not provided evidence that "explicit informed consent" (within the meaning of the current AER (Retail) Exempt Selling Guideline) was obtained;
5. **Comparisons between Body Corporate and retailers:** the Application fails to provide any evidence for its claim that the Body Corporate can purchase electricity from an authorised retailer

and on-sell it to its customers at the Property at a price cheaper than that which any authorised retailer can sell to any individual customer; it also fails to explain how the Body Corporate can compete with the price of any retailer selling to an individual customer through an embedded network; and

6. **Inconsistent with AER guidelines and Retail Law:** the Application is generally inconsistent with the AER's policies and considerations contained in the AER (Retail) Exempt Selling Guideline and the Retail Law. The Application is contrary to the objective of the Retail Law in that it would not be in the long term interests of the customers at the Property for the Body Corporate to be granted the exemption sought.

1. Misleading Information

From 1 July 2015, it has been a requirement for any person retrofitting premises to an embedded network to obtain an individual exemption or retailer authorisation to do so, unless they qualified for a registrable exemption.

The Application reveals that *"the site was physically converted on 26/08/15 and has been billing since this date"*.

The Body Corporate registered with the AER for registrable exemptions E-2067 and E-2351 for exemption classes R2 and R5 (**Registrable Exemptions**). The Registrable Exemptions took effect on 2 October 2015. For the Body Corporate to register for those exemptions the embedded network had to have been retrofitted *before* 1 January 2015. The Body Corporate now says that the retrofit took place *after* 1 January 2015.

In registering for the Registrable Exemptions the Body Corporate represented to the AER that it was entitled to be registered.

Having regard to the current Application, that representation was not true.

The AER should also check whether, when registering for the Registrable Exemptions, the body Corporate previously represented to the AER that the Property was a greenfield site.

It is a ground for refusal of an application for individual exemption if the Body Corporate has provided the AER with false or misleading information.

2. Unsuitable

When the Body Corporate began to sell energy on 26 August 2015, the Body Corporate was not an exempt seller under Part 5, Division 6 of the Retail Law; nor was the Body Corporate the holder of a current retailer authorisation. Accordingly, the Body Corporate was in breach of section 88(1) of the Retail Law when it began to sell energy through the retrofitted embedded network at the Property.

It was not until 2 October 2015 that the Registrable Exemptions took effect.

Accordingly, the Body Corporate supplied energy unlawfully for the period 26 August 2015 until 2 October 2015, with advice from consultants Energy Options and facilitated by Meter2Cash.

For the reasons detailed above, the Body Corporate provided false information to the AER when registering for the Registrable Exemptions.

From 2 October 2015 until 29 November 2016 the Body Corporate "overlooked" the requirement for an individual exemption. To be clear, the Application does not reveal that the Body Corporate considered that it ought "upgrade" from the Registrable Exemptions to an Individual Exemption.

Rather, the Body Corporate says that it overlooked the requirement for an individual exemption, which is clearly stated in the Guidelines and which the Body Corporate had to have reference to when notifying the AER of the Registrable Exemptions. Those requirements were "overlooked" for a period of almost 14 months.

The records of the Body Corporate show that on 22 January 2016 Watt Utilities advised the Body Corporate that Meter2Cash required a revised contract *"due to changes in legislation, be approved and*

signed" which the body corporate resolved to sign on the same date; see minutes attached. It was then that Meter2Cash and Watt Utilities acted as agents for the Body Corporate during the period of Body Corporate breaching the Retail Law. That occurred for a further 11 months exposing the Body corporate to significant potential penalties.

Meter2Cash, Energy Options and Watt Utilities all provided advice during the period of unlawful selling. Meter2cash's record is further besmirched by the fact that, while acting as a billing agent for electricity at another community title scheme, Meter2Cash sought to recover the energy debt of a tenant occupier from a lot owner; see Q1 [2011] QBCCMCmr 478 (31 October 2011).

At best, the Body Corporate has demonstrated a poor compliance record.

At worst, the Body Corporate has knowingly sold energy under wrongfully obtained Registrable Exemptions, for more than a year.

The consultants and service providers acting as agents on behalf the Body Corporate, have shown a significant lack of understanding of the relevant obligations, and should not be taken into account when the AER is considering the Body Corporate's capacity to qualify for the exemption.

The Body Corporate has demonstrated that it is unsuitable to hold the individual exemption sought,

3. Mitigation of Customer Detriment

The Application fails to provide any evidence at all of the following crucial matters that the AER seeks evidence of:

- (a) Retail contestability and competitive offers;
- (b) Customer dispute resolution services; and
- (c) State legislative restrictions.

Further, in the case of customer dispute resolution services, the Application is fundamentally inconsistent with the law governing bodies corporate in Queensland.

Retail contestability and competitive offers

The Application provides no evidence of:

- (a) advice sought from the distributor whether (and how) non-consenting energy customers can be left out of the network conversion; and
- (b) ongoing cooperation with retailers and distributors to facilitate access to competition.

The Application does not engage with these matters at all, and in that way is fundamentally deficient.

The Application claims that it "hopes to mitigate" the costs it admits are attendant on any customer of the Property wishing to source energy elsewhere. However, no detail is provided as to how this mitigation is intended to occur.

Customer dispute resolution services

The Application states that the Body Corporate will be the on-seller of the energy. Accordingly, a dispute between a customer at the Property and the Body Corporate as on-seller will be a dispute for the purposes of the *Body Corporate and Community Management Act 1997 (Qld) (BCCMA)*. Indeed, unpaid energy accounts will be "body corporate debts" and if owed by an owner of a lot (as distinct from a tenant) the lot owner will be "un-financial"; i.e. unable to vote except on resolutions without dissent and ineligible to be elected to the Body Corporate committee.

Energy disputes in a body corporate with an individual exemption will be governed by the mandatory scheme of Chapter 6 of the BCCMA; with the attendant delay and expense. The BCCMA, including its mandatory dispute resolution processes, cannot be contracted out of, and its dispute resolution provisions are exclusive once engaged.

Although the Application refers to Queensland body corporate law to seek to bolster its case, the Application makes no mention of the impact of the mandatory dispute resolution mechanisms of the BCCMA and indeed the incompatibility of those mandatory mechanisms to the on-sale of energy by the Body Corporate.

For example, before obtaining a dispute resolution recommendation for adjudication or mediation, applicants first must demonstrate attempts at self-resolution and submit to conciliation. Such mechanisms are clearly not appropriate for disputes "at the margins"; such as very minor, or very major, disputes. Likewise, the powers granted to conciliators, mediators and adjudicators under the BCCMA have been designed to address disputes about community living, not the sale of energy.

In addition, the Application states that the intended billing agent will operate the dispute resolution process and the Body Corporate will have no role. This is not only inaccurate but it is also insufficient, given that the Body Corporate is intended to be the only exemption holder. The Application fails to outline any role in dispute resolution for the Body Corporate as on-seller of the energy. That is contrary to the clear operation of the BCCMA which both prohibits delegation of Body Corporate powers (s97) and prevents the Body Corporate from contracting out of the mandatory dispute resolution processes (s318).

Attached to this submission is Issue 15 of "Common Ground"; a publication of the Commissioner for Body Corporate and Community Management (**Commissioner**). Queensland's population is approximately 4.6 million. About ¼ of all Queenslanders now live in community title schemes. If it is assumed that only those community title schemes having (say) 100 lots or more sought individual exemptions:

1. there would be over 400 applications;
2. more than 67,000 lot owners would be affected;
3. it is inevitable that a proportion of those lot owners would be in dispute with their energy provider at some stage; and
4. even if less than 1% of those lot owners were in dispute with their energy provider, in one year, then the number of dispute resolution applications dealt with by the Commissioner on an annual basis would double.

It is submitted that the views of the Commissioner must be sought on the Application, given the potential impact of the grant of the individual exemption as a precedent for community titles schemes in Queensland.

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Impact of State legislation

The AER (Retail) Exempt Selling Guideline – version 4 – March 2016 states that the fact that, in Queensland, child meters are not accessible to market retailers may alone be enough to reject an application.

The Application provides no evidence as to the Body Corporate's efforts in countering adverse consequences for the customer of the Property from the fact that Queensland law does not allow child meters or why the Application should not be rejected for that reason alone.

In addition, the impact of the State body corporate laws referred to above are not addressed in any way in the Application.

4. Lack of informed consent

Disclosure

The Application fails to show that the Body Corporate clearly communicated with its customers or fully and adequately disclosed all matters relevant to the consent of its customers in respect of the retrofitting before those customers gave their consent to retrofitting the Property.

Lack of informed consent

Failure to provide such information means those customers were not afforded an opportunity to make a fully informed decision about entering into an embedded network. Accordingly, the Applicant has failed to provide evidence that "explicit informed consent" within the meaning of the current (AER (Retail) Exempt Selling Guideline) was obtained.

Body Corporate as primary seller

It is noted that the Application relates to the on-sale of energy by the Body Corporate as the primary seller to its customers. If the energy supply from the Property is disconnected for any reason, the customers will have to incur the cost of being wired-out of the network in order to obtain access to alternative retailers.

5. Comparisons between the Body Corporate and authorised retailers

The Application admits that the Body Corporate will purchase energy from authorised retailers. However, it also states in a number of places that the Body Corporate will provide energy cheaper than any retailer can provide it to an individual person.

This comparison is false. The correct comparison is between the Body Corporate and an authorised retailer providing energy to an individual customer as part of an embedded network, a system which the Body Corporate admits provides the cheapest energy. The economies of scale achievable by authorised retailers are also ignored.

This argument of the Body Corporate should be given little weight.

6. Inconsistency

For the above reasons, the Application is generally inconsistent with the AER's policies and considerations contained in the AER (Retail) Exempt Selling Guideline and the Retail Law.

The application indicates the inherent inability of a body corporate to provide the required level of service to facilitate an individual retail exemption.

The service providers and consultants that advised the body corporate prior to implementation of the embedded network and then through a lengthy period of unlawful electricity selling have clearly shown neglect of and lack of understanding of the requirements of the Retail Law in regard to the obligations of an exempt seller, thus exposing the Body Corporate to potential penalties. The Body Corporate has demonstrated, together with the consultants which it relied upon in support of the Application, that it cannot comply with its statutory obligations.

Further, the Application is contrary to the objective of the Retail Law in that it would not be in the long term interests of the customers at the Property for the Body Corporate to be granted the exemption sought, which should be refused.

Conclusion

The Application should be rejected for the reasons above and for the following:

1. If granted the Application will set a precedent for individual exemptions for community titles schemes in Queensland; and
2. Such a precedent would be dangerous including having regard to:
 - a. the unsuitability and actions to date of the Body Corporate (as discussed above); and

- b. the impact that the grant of such individual applications would have on the Commissioner's dispute resolution services.

Please contact Craig Melrose on 3231 1659 or the writer on 3223 4738 if you would like further information in respect of this submission.

Yours faithfully



PP **Guy Edgcombe**
Partner