

Final Decision to grant an individual retail exemption

South Stradbroke Utilities Pty Ltd

December 2020

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1 Introduction

On 3 July 2020, the AER accepted an application from South Stradbroke Utilities Pty Ltd (**SSU**) / ABN 49 636 726 497 for an individual exemption from the requirement to hold a retailer authorisation under the National Energy Retail Law (**Retail Law**) to sell energy at Couran Cove Resort, Queensland.

This is our **final decision** on SSU's application. We published a draft decision on 9 October 2020 and invited submissions from interested stakeholders by 10 November 2020. We considered submissions in making our final decision on whether to grant SSU an individual exemption from the requirement to hold a retailer authorisation.

Our final decision is to grant SSU an individual retail exemption subject to the conditions specified in Schedule 1 of the Instrument of Exemption. This provides greater protection to exempt customers through conditions that address pricing transparency, metering and dispute resolution. In the absence of an exemption, the supply of electricity would be unregulated.

1.1 The nature of retail exemptions and the AER's role

Energy is an essential service. The AER regulates retail electricity and gas markets in jurisdictions that have commenced the Retail Law. Queensland adopted the Retail Law in 2015. Under section 88 of the Retail Law, a person or business must not sell energy unless they either have a retailer authorisation or are exempt from this requirement. The AER is responsible for assessing authorisation applications¹ from businesses that want to become energy retailers, and exempting businesses from authorisation requirements.² The AER does not have the power to adjudicate contractual disputes between parties.

There are important differences between retailer authorisations and retail exemptions. An **exemption** provides relief, subject to certain conditions, from the requirement to hold a retailer authorisation. Whereas a **retailer authorisation** allows a business to sell electricity or gas in all states and territories where the Retail Law applies, a retail exemption usually restricts sales to a defined group of customers at one site. Retail exemptions may be appropriate where the seller has an existing relationship to a particular site and the sale of energy is secondary to other functions that they perform (for example, a caravan site manager selling energy to occupants of a caravan park or a body corporate selling energy to the occupants of an apartment building). An exemption entitles the exempt seller to sell energy on the conditions, and within the scope, of the exemption. It is a means of providing consumers with protections under the Retail Law.

Any person who seeks to engage in the activity of selling energy to a person for premises can register or apply for an exemption. In this instance, it is also open to the body corporate to register or apply for an individual exemption. In practice only the person who controls the site's embedded network can actually on-sell energy to those customers who live in the premises.

Individual exemptions are required when a seller is ineligible for one of the classes of exemption defined in the AER's (Retail) Exempt Selling Guideline.³ A person requiring an individual exemption must submit an application to be assessed by the AER. The application must be published for consultation. The AER

¹ See the AER's Retailer Authorisation Guideline: <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retailer-authorisation-guideline-december-2014>.

² In accordance with the AER's Retail Exempt Selling Guideline: <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-exempt-selling-guideline-march-2018>.

³ <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-exempt-selling-guideline-march-2018>.

considers the application alongside any submissions received in making its decision whether or not to grant the individual exemption. The AER has the ability to impose conditions on the exemption to ensure that customers of the exempt seller have appropriate protections (similar to the requirements that apply to authorised retailers under energy laws).⁴

The AER has the power to grant an individual exemption and having received an application from SSU, the AER must make a decision on whether to grant or refuse it.

The AER received many submissions in response to SSU's application for an individual retail exemption, so took the unusual step of issuing a draft decision. Publication of the draft decision gave stakeholders the opportunity to understand AER's reasons for proposing to grant an exemption to SSU and the conditions that such an exemption would be subject to. The AER's final decision has been informed by submissions to the draft decision.

1.2 Application Summary

South Stradbroke Utilities Pty Ltd (SSU) has sought an individual exemption under the Retail Law to sell energy at Couran Cove Resort, Queensland. Couran Cove Resort comprises a mix of holiday rental and private units. There is a total of 354 properties.

SSU sought an individual exemption on the grounds that electricity is supplied off-grid, and is unable to comply with core pricing exemption conditions. In particular, no comparable prices are able to be used as a benchmark, as there is no local area retailer.

1.3 Submissions Received

The AER received 20 public submissions on the draft decision. Five submissions were submitted from the same individual supporting the draft decision. These submissions stated that the proposed system was a 'reasonable one and the best outcome for all owners'. A few submissions supported the introduction or concept of individual metering. Most submissions, however, objected to the approval of an individual exemption, expressing concerns about previously raised issues of the applicant's authority and experience in selling energy, pricing and evidence requirements. These concerns related predominantly to the current electricity supply arrangement.

Most submissions did not directly engage with the specific conditions the AER proposed in the draft Instrument of Exemption. However, some of the issues raised relate to the conditions. We have addressed the changes we made to the draft conditions in response to these comments in the **Appendix: Summary of Public Submissions and AER Response**.

⁴ National Energy Retail Rules, r.152 (3).

2 Final Decision to grant SSU an individual exemption

The AER's final decision is to **grant** SSU an individual exemption from the requirement to be an authorised retailer, subject to specific conditions.

2.1 Relevant legislation

In making the final decision, the AER has considered the policy principles relating to exempt selling set out in section 114 of the Retail Law, being:

- regulatory arrangements for exempt sellers should not unnecessarily diverge from those applying to authorised retailers,
- exempt customers, should, as far as practicable, be afforded the right to a choice of retailer in the same way comparable retail customers in the same jurisdiction have that right, and
- exempt customers, should, as far as practicable, not be denied customer protections afforded to retail customers under the Retail Law and Rules.

The AER's decision has also been guided by the objective of the Retail Law,⁵ the exempt seller factors,⁶ the customer related factors,⁷ and the assessment approach outlined in the AER (Retail) Exempt Selling Guideline.⁸

2.2 Matters that extend beyond our assessment and role

We carefully considered the content of SSU's application and the submissions we received. We acknowledge there are ongoing billing issues in dispute between SSU and some bodies corporate at Couran Cove Resort, which residents continue to raise.

In particular, we have carefully considered the pricing issues raised by lot owners and how best, within the AER's remit, to provide appropriate protections to customers at Couran Cove Resort.

The billing issues and monies owed under the current electricity charging arrangements are separate to the AER's role in granting a retail exemption. The AER notes that there are matters between SSU and Couran Cove Resort bodies corporate which are to be considered by the courts. By granting SSU an individual exemption the AER is not making a decision or expressing a view on any of these matters.

Submitters have asked that the AER defer making a decision to allow the AER to investigate Couran Cove's power supply arrangements, and to await the Court's decision on ongoing billing disputes. These matters extend beyond our assessment and role and are therefore not relevant to SSU's individual exemption application or grounds for delaying a decision.

⁵ National Energy Retail Objective, s 13, National Energy Retail Law (South Australia) Act 2011.

⁶ Section 115, Retail Law.

⁷ Section 116, Retail Law.

⁸ AER Exempt Selling Guideline, <https://www.aer.gov.au/system/files/AER%20Retail%20Exempt%20Selling%20Guideline%20-%20version%205%20-%20March%202018.pdf>

A number of suggestions and comments on the draft decision further related to matters outside of the Retail Law and do not relate directly to the individual exemption:

- Infrastructure ownership
- Body corporate levies and unpaid debts
- Solar energy installation
- Water and environment concerns
- Conflict of interest

The AER regulates the supply of energy, and does not have remit over solar energy installation, water and environment concerns that are ancillary to SSU's exemption application.

Residents continued to express concerns about the ownership of utility infrastructure at South Stradbroke Island. The AER considers that SSU has demonstrated sufficient control to operate the infrastructure, whether through leasing arrangements or otherwise, and can supply the electricity to residents at Couran Cove Resort.

The cost of levies imposed by the existing body corporate is not regulated by the AER, and unpaid debts relate to matters outside of the AER's remit. Concerns about double charging, however, have been reflected in the revised exemption conditions for the final decision.

2.3 Relevant factors

The following factors informed our final decision:

1. The AER has received one application under section 88 of the Retail Law in relation to the sale of energy at Couran Cove Resort. We have not received any applications from anyone else who might have infrastructure ownership claims.
2. Customers of exempt sellers, should, as far as possible, receive the same protections that they would as customers of authorised retailers. The sale of energy at Couran Cove Resort is currently unregulated. In the event the AER decides to grant SSU an individual exemption, SSU will need to comply with certain conditions. This will give customers access to rights and protections similar to those available to other customers under the Retail Law which they currently do not have.
3. Electricity customers at Couran Cove Resort will have more tailored consumer protections through the AER specifying conditions of the retail individual exemption. See section 2.4 below.
4. Individual exemption conditions generally include a prohibition on charging customers electricity tariffs greater than the standing offer price.⁹ The exception is off-grid exemptions, such as in this case, as there is no comparable local area retailer standing offer on which to base a price cap.

Our view is that sellers should be able to recover their energy generation and supply costs, even though these could result in electricity costs that are higher than the current regulated price for Queensland customers.

⁹ Where the AER determines it is appropriate to impose a condition relating to prices an exempt seller may charge, it must ensure they are no more than the standing offer of the relevant local retailer (152(4) Retail Rules).

5. SSU will need to comply with the conditions at Schedule 1 of the Instrument. The AER may deal with a breach of an exemption condition as if it were a breach of the Retail Rules and is a civil penalty provision.¹⁰ The AER can take enforcement action for breaches of the Retail Law or Rules, including issuing infringement notices. The AER also has the power, in limited circumstances, to revoke a retail exemption.

2.4 Summary of conditions

The conditions that the AER proposes to attach to SSU’s individual exemption are set out in Schedule 1 of the Instrument of Exemption, which accompanies this final decision document. The AER has the ability to tailor the conditions of SSU’s individual retail exemption. We consider this is the most appropriate way to address the concerns raised in the submissions we received that fall within our remit.

While some comments raised in submissions were outside the AER’s remit (as noted under section 2.2), we have further modified the conditions proposed in the Draft Decision, as outlined in the following table:

<p>Condition 22 – Maintaining Records</p>	<p>The exempt person must maintain records of the following for each of its exempt customers:</p> <ol style="list-style-type: none"> 1. the name of the exempt customer 2. the address of the exempt customer’s premises 3. the identifier of the meter for the exempt customer’s premises (if applicable) 4. the date that the customer account was created 5. copies of any bills issued for the previous 24 months 6. the date of the most recent meter read for the customer (if applicable) 7. the basis for determining any estimates of consumption for the purpose of billing where a meter read could not be obtained. <p>The exempt person must provide customers with these records if requested by the exempt customers.</p>	<p>We have included a new sub-condition to require that SSU must provide customers with records of their consumption when requested.</p> <p>We have further amended the core exemption condition from:</p> <p>5. Copies of any bills issued for the previous 12 months</p> <p>To:</p> <p>5. Copies of any bills issued for the previous 24 months</p> <p>This addresses a submitter’s concern that records are not provided when requested, and the change in period from 12 to 24 months reflects a longer period aligned with industry standards.</p>
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¹⁰ Section 112(3) Retail Law.

<p>Condition 24 – Metering</p>	<p>The exempt person must install an individual meter to measure consumption at an exempt customer’s premises when requested by the exempt customer. The exempt person may pass on actual costs incurred. The cost pass-through will be no more than the cost of purchasing and installing a new meter.</p>	<p>This condition reflects an amendment to core conditions to require that the costs passed on to customers must reflect actual costs.</p> <p>We have provided further clarification to the draft conditions to explicitly provide that actual costs refer to <i>the costs of purchasing and installing a new meter.</i></p>
<p>Condition 26 - Double Charging</p>	<p>An exempt customer who has paid for the costs of generating and supplying electricity for a specified period through their Body Corporate charges cannot be charged again for those costs.</p>	<p>This new condition has been included to address concerns raised by submissions that residents will be double charged if SSU is granted an exemption.</p> <p>This condition prohibits SSU from recovering electricity costs and charging where residents have paid for electricity costs for a specified period.</p>
<p>Condition 16 – Dispute Resolution</p>	<p>Where the exempt person and a customer are unable to reach an agreed solution to an electricity dispute, the matter shall be settled by commercial arbitration in accordance with the <i>Commercial Arbitration Act 2013 (Qld)</i>. This paragraph does not apply to any dispute that can be resolved by way of a binding determination under an energy ombudsman scheme.</p>	<p>This condition provides protection to consumers as a fall-back provision where consumers are unable to resolve disputes with an energy ombudsman scheme (prior to it gaining jurisdiction in Queensland).</p> <p>Further clarification was provided to the draft condition to remove the phrase ‘by way of a binding determination’ as some decisions made by the Ombudsman are not binding.</p>

Appendix: Summary of public submissions and AER responses

	Submission writer	Subject	Submission details	AER response
1	Anonymous	Opposes the grant of exemption	<ul style="list-style-type: none"> • Conflict of interest concerns • Legal disputes where the submitter alleges there is no proof • Threatened electricity disconnection 	<ul style="list-style-type: none"> - Conflict of interest concerns and legal disputes are outside the AER's remit. - Threats to disconnect electricity relate to the existing electricity agreement, which are not regulated by the AER.
2	Anonymous, Norman and Wendy Pinto, Dave Bowden	Oppose the grant of exemption	<ul style="list-style-type: none"> • High Community Body Corporate (CBC) levies, pricing transparency concerns and double charging • Concerns about the cost of installing individual meters 	<ul style="list-style-type: none"> - In response to concerns about double charging and in recognition of the fees residents have paid to March 2021, we have included a new Condition (Condition 26: Double Charging) below: <ul style="list-style-type: none"> <i>An exempt customer who has paid for the costs of generating and supplying electricity for a specified period through their Body Corporate charges cannot be charged again for those costs.</i> - This condition prohibits SSU from recovering electricity costs up until the date that body corporate levies have been paid. <ul style="list-style-type: none"> We consider that Condition 24 on Metering adequately addresses concerns about the pricing of individual meter installation, as the exempt person may 'only pass on actual costs incurred'. For further clarification, we

Submission writer	Subject	Submission details	AER response
			<p>have amended the condition to provide that 'actual costs' are limited to the 'costs of purchasing and installing a new meter'.</p>
3 Michael Hassall	Conditionally supports the grant of exemption	<ul style="list-style-type: none"> • Supports individual metering • Concerns about common area usage and separation from individual lot metering • The feasibility of solar system installation • Ownership of utility infrastructure, switchboards and cables 	<ul style="list-style-type: none"> - SSU previously advised that common areas are not wired from individual dwellings. Any concerns about the current supply arrangement should be raised with the body corporate. - The ownership of utility infrastructure, switchboards and cables is not directly relevant to SSU's exemption application. We consider that SSU has sufficient control to operate the infrastructure, whether through leasing arrangements or otherwise, and can supply the electricity to residents at Couran Cove Resort.
4 Debbie and Peter Fitzpatrick, Anonymous, Bernie and Margaret Woods, Greg Linton	Oppose the grant of exemption	<ul style="list-style-type: none"> • Query SSU's claims on the nature and duration of outages • Dispute the existence of two on-site diesel mechanics • Concerns about double charging as CBC levies have been paid until March 2021 • Infrastructure ownership concerns 	<ul style="list-style-type: none"> - Condition 19 addresses concerns raised about unplanned outages. We consider that the draft exemption condition adequately addresses the management of unplanned outages, as it requires the exempt person to advise customers on the nature of the interruption and estimated time of restoration as soon as practicable. - Condition 19.c states that SSU is to use 'best endeavours' to restore supply, and we do not consider it necessary or appropriate to further specify that on-site diesel mechanics must be available. - Concerns about double-charging – see #2 above.

Submission writer	Subject	Submission details	AER response
			- Concerns about infrastructure ownership – see #3 above.
5	Anonymous	Oppose the grant of exemption <ul style="list-style-type: none"> Water and sewerage fees 	- Water and sewerage fees are outside the AER's remit.
6	Dave Bowden	Oppose the grant of exemption <ul style="list-style-type: none"> Infrastructure ownership concerns, including ownership or access agreements Character of the applicant 	<ul style="list-style-type: none"> The NERL does not require applicants to make infrastructure ownership agreements available for review by residents. This is a contractual matter between the relevant parties. The character of the applicant is not a specific assessment requirement for individual exemption applications. We are aware of surrounding billing disputes and conflict of interest concerns, however, at this stage, we do not consider that these issues directly impact on SSU's application to sell energy on conditions at Couran Cove Resort.
7	Anonymous	Oppose the grant of exemption <ul style="list-style-type: none"> Lack of transparency, appeal process 	<ul style="list-style-type: none"> We have provided interested parties opportunities to comment on SSU's exemption application, and also on our draft decision. We clearly outlined our draft decision and the reasons for making our decision. We will review concerns raised about SSU's compliance with its exemption conditions and investigate further, if necessary.

Submission writer	Subject	Submission details	AER response
8	Norman and Wendy Pinto	<ul style="list-style-type: none"> Query about whether meter reading would actually occur 	<ul style="list-style-type: none"> This concern relates to the current selling arrangement. Condition 25 requires the exempt person to conduct meter readings, and to 'only charge for meter reading once per billing cycle'.
9	Anonymous	<p>Supports individual lot billing</p> <ul style="list-style-type: none"> Agrees with a 'user pays' system <p>Concerns raised about:</p> <ul style="list-style-type: none"> Lack of transparency over invoices under the current electricity arrangement Documentation and record-keeping Representations made in Lachlan McIntosh's submission that the Committee of the Couran Cove Marine Apartments has 'unanimously agreed to support the submission to the AER'. 	<ul style="list-style-type: none"> Concerns about record-keeping, documentation and transparency relate to the current electricity supply arrangement. Condition 22 addresses the maintenance of records. This condition requires the exempt person to maintain records, including the basis for determining any consumption estimates. In response to the concerns raised we have amended the draft condition to require that copies of bills be kept for 24 months, rather than 12 months, to align with industry practices. We have also included a new sub-condition 22.2, which requires SSU to provide copies of records to exempt customers, where requested.
10	Lachlan McIntosh – CCH Developments	<ul style="list-style-type: none"> Proposed system is a reasonable one and the best outcome for all owners 	<ul style="list-style-type: none"> Noted
11	Lachlan McIntosh – Island Resorts	Support for grant of exemption	

	Submission writer	Subject	Submission details	AER response
12	Lachlan McIntosh – South Stradbroke Apartments Pty Ltd	Support for grant of exemption		
13	Lachlan McIntosh – Lach Mc Pty Ltd	Support for grant of exemption		
14	Lachlan McIntosh – Kathlac Pty Ltd	Support for grant of exemption		