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| To | Terry Curtis |
| From | Allens |
| Date | 8/03/2018 6:58:51 PM |
| Matter No |  |
| Subject | Advice on electricity regulatory issues |
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1. Instructions and Assumptions
   1. You have asked us to advise AG Energy Pty Ltd (*AG Energy*) in relation to regulatory issues facing the establishment of a retail solar energy business. Your instructions are that the business of AG Energy involves the supply of solar-generated electricity to small and medium business enterprises (*Customers*) from solar photovoltaic systems that AG Energy installs on the premises from which the Customers conduct their businesses (*Panels*). AG Energy will also own and operate those Panels over the term of Power Purchase Agreements (*PPAs*) that it enters with each Customer.
   2. In particular you have asked us to advise on the following questions:
      1. Is AG Energy required to register as a Generator under the National Electricity Rules (***NERs***)?
      2. Is AG Energy required to hold Retailer Authorisation?
      3. Is AG Energy required to register as a Network Service Providerunder the NERor otherwise as a network under state law?
      4. Is AG Energy eligible for small-scale technology certificates (***STCs***), and if so, in what capacity is it obliged to create and surrender STCs?
2. Executive Summary
   1. AG Energy's proposed business model is that it will be responsible for the installation, operation, generation and sale of solar electricity to its Customers. In this context, AG Energy is exempt from the requirement to register as a Generator and as a Network Service Provider, and is not required to obtain Retailer Authorisation under each of the applicable NEM, NSW and Victorian jurisdictions but will still need to take steps to ensure that those exemptions apply. This set out in the following table:

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| **Registration type** | **Regulatory framework** | | |
| **National Electricity Law / Rules** | **NSW** | **Victoria** |
| **Generation licence** | Automatic exemption | N/A | Deemed exemption |
| **Retail authorisation** | Registrable exemption (R8) | N/A | Registrable exemption – solar PPA |
| **Network registration** | Registrable exemption (NRO1) | Exempt under statute | Registrable exemption – solar PPA |

The highlighted exemptions in the table denote where AG Energy will be required to register their exemption from the relevant legislative and regulatory requirements.

* 1. Further, AG Energy will be eligible for STCs where it complies with the relevant standards and metrics set by the Clean Energy Council, including the CEC Code of Conduct as updated from time to time.

1. Generator authorisation
   1. It is unlikely that AG Energy will be required to register as a Generator with the Australian Energy Market Operator (*AEMO*). The requirement to register is set out in section 11(1) of the National Electricity Law, which states that:

'A person must not engage in the activity of owning, controlling or operating a generating system connected to the interconnected transmission or distribution system unless (relevantly) the person is a Registered participant in relation to that activity or is otherwise exempted under the NER.'

* 1. The two relevant questions in relation to registration as a Generator are:
     1. whether AG Energy owns, controls and operates a generating system that is connected to the interconnected transmission or distribution system; and
     2. if so, is AG Energy otherwise exempted by the AEMO from the requirement to be a Registered participant in relation to owning, controlling and operating a generating system?

In relation to the first question, on the basis on your instructions that AG Energy will be physically connected to the local distribution network (albeit via behind the meter on the customer's premises and not establishing a new connection point in addition to the customer's existing energy retailer), this requirement is satisfied.

* 1. In relation to the second question, AG Energy most likely will be exempt from registering as a Generator given the size of its generating units. The criteria as to whether AG Energy is eligible for an automatic exemption in the NEM is whether it owns, controls or operates a generating system that:
     1. has a total nameplate rating at a connection point of less than 5 MW; or
     2. is not capable of exporting to a transmission system or distribution system in excess of 5 MW; or
     3. has no capability to synchronise or to operate electrically connected to a distribution system or transmission system; (the ***first limb***)

and either:

* + 1. the sent out generation of the generating unit is purchased in its entirety by the local retailer or by a customer located at the same connection point; or
    2. each of the generating units comprising the generating system is classified as a market generating unit by a market small generation aggregator (the ***second limb***).[[1]](#footnote-1)
  1. The first limb of the criteria is satisfied by AG Energy. You have instructed us that each individual solar 'generating unit' installed by AG Energy at each of the premises will be generating 100KW at its peak. On that basis, the total nameplate rating of each generating unit at a connection point should not exceed 5 MW. We understand from your instructions that all of the sent out generation will be purchased by a single Customer at the same connection point. On that basis, the second limb of the criteria would be satisfied.
  2. The second limb assumes that the sent out generation of the generating unit is purchased *in its entirety* by the Customer. You have instructed that there are no plans to generate any excess electricity, and that should there be any excess electricity generated, either the inverters will be used to manage the amount of electricity generated or alternatively, each customer will need to manage such excess electricity with direct arrangements with their main electricity retailer regarding the purchase of that electricity.
  3. On the basis of your instructions, we have not considered the requirement for generation licences in State or Territory jurisdictions other than NSW and Victoria. In summary, there is no additional requirement under which AG Energy separately must register, either for a generation licence or for an exemption.
  4. In NSW, there is no requirement for generators to register for a separate generation licence. In Victoria anyone supplying or selling energy in Victoria must hold a licence granted by the Essential Services Commission, or be exempt. AG Energy is likely to be exempt from the requirement to hold a generation licence in Victoria on the basis of a deemed generation exemption. The deemed generation exemption requires AG Energy to be generating electricity for sale where its total output (whether or not with another person) using generators connected to the distribution network at a common point is less than 30MW. Note that a deemed exemption means that AG Energy is *not* required to register their exemption with the Commission.[[2]](#footnote-2)

1. Retailer Authorisation
   1. In summary, it appears that AG Energy will be exempt from the requirement to apply for retailer authorisation as it will be eligible for a registrable exemption. The Australian Energy Regulator (*AER*) requires energy retailers to be authorised in order to sell energy, particularly where the retailer's main business and relationship with its customers concerns the sale of energy.[[3]](#footnote-3) However an energy retailer may not need to apply for authorisation if it qualifies for any of three classes of exemptions to the authorisation requirement (deemed, registrable and individual).
   2. The only relevant exemption is a registrable Class R8 exemption for the sale of electricity through PPAs to Customers who are connected to the national electricity grid. However a Class R8 exemption requires AG Energy – as a retailer – to comply with two exemption conditions:
      1. AG Energy must provide the customer in writing a plain English notice explaining that the contract is covered by Australian consumer protection laws and is separate to the customer’s contract with their retailer and distributor which are covered under the National Energy Retail Law; and
      2. AG Energy must refrain from registering in the wholesale market for the purposes of purchasing energy; and not be the financially responsible retailer for the premises (rather, this must be an authorised retailer)'.[[4]](#footnote-4)

The first condition can be met by appropriate drafting in the PPA. In relation to the second condition, you have instructed us that AG Energy will be using the same connection point as the customers' existing electricity retailer – who we assume will be the financial responsible Market Participant.As such, AG Energy is likely to be exempt from applying for retailer authorisation.

* 1. Under the Class R8 exemption, AG Energy is still required to register its exemption with the AER by completing an application form online. The application form allows for joint registration for retailer and network exemption. It is a relatively short and straightforward application but Allens is happy to assist with the completion of the application form if required.
  2. The National Energy Retail Law has been implemented in the jurisdictions of NSW, Queensland, the ACT, Tasmania and South Australia (as part of the National Energy Customer Framework). You have asked for any regulatory hurdles if AG Energy were to operate in Victoria. Victoria is not subject to the Retail Law and instead has its individual regulatory regime administered by the Essential Services Commission. In determining whether to grant an energy retail licence, the Commission must be satisfied that the licence grant will promote the long term interests of Victorian customers, having regard to the price, quality and reliability of energy supply. The grant of energy retail licences is also governed by a number of conditions, including compliance with the Energy Retail Code.
  3. In Victoria, AG Energy will be not be required to apply for an energy retail licence as it is eligible for a registrable exemption under the 'multiple registration exemption categories (solar power purchase agreements and community energy projects)'. This is on the basis that it is generating electricity on premises not owned or occupied by AG Energy and selling electricity to the owner or occupier of the premises on which the generation occurs.[[5]](#footnote-5) Asof 1 April 2018, AG Energy will be required to register this electricity licence exemption online with the Essential Services Commission.

1. Network Registration
   1. You have instructed us that in respect of at least one Customer, AG Energy will be installing Panels on the rooves of multiple sheds at a single address, and connecting each of those arrays together. While the installation of multiple Panels on a single roof does not appear to create a regulatory issue, if multiple rooves are connected by wiring– through which electricity will be supplied to the Customer – AG Energy may be considered to be operating an electricity network. If so, AG Energy is required to register as a Network Service Provider (*NSP*) )with the AEMO if that network is connected to the distribution system.
   2. An electricity network exists where the owner or controller of electrical wiring on a site supplies electricity to third parties. Operators of a network must either be registered as a NSP or otherwise be eligible for a deemed, registrable or individual exemption. A transmission or distribution network that is not registered as a NSP with the AEMO is a private network and by definition, must be exempt.[[6]](#footnote-6) Under the NER, all private networks are defined as 'embedded networks', and an embedded network is defined as:

'[a] distribution system, connected at a parent connection point to either a distribution system or transmission system that forms part of the national grid, and which is owned, controlled or operated by a person who is not a Network Service Provider'.[[7]](#footnote-7)

* 1. The three relevant questions are:
     1. whether AG Energy is operating a network;
     2. is that network connected to the distribution system, and if so,
     3. is AG Energy eligible for an exemption from registration as a NSP.
  2. You have instructed that AG Energy will have the rights of control over the physical assets of the network – the Panels, wiring, inverters and connection point – during the term of the PPA.[[8]](#footnote-8)In relation to the first question, it is very likely that AG Energy is operating an electricity network on the premises, on the basis that it is a distribution system, its wiring is connected to the NEM and it is supplying electricity to a Customer (i.e. a third party).
  3. Assuming for the purposes of the second question that AG Energy operates an embedded network that is connected to the distribution system, the third question is whether it must register as a NSP or whether it is eligible for an exemption. Our conclusion is that AG Energy is likely to be eligible for the NRO1 registrable class of exemption, which applies to off–market energy generation by equipment owned, operated or controlled by a third–party and connected to the NEM via a private network connection.[[9]](#footnote-9) Off-market energy generation refers to an energy generation option not required to be registered with AEMO as a Generator under clause 2.2 of the NER[[10]](#footnote-10) (as was concluded in respect of AG Energy – see above at section 3). AG Energy must register its network registration exemption with the AER through the application form (the same form as for the retail exemption).
  4. In addition to authorisation or exemption under the national regime, private networks are also subject to state regulation. Each state or territory has its individual legislative and regulatory regime governing the supply of electricity as a network. In NSW, the *Electricity Supply Act 1995* is the relevant statute. If AG Energy is operating in NSW, it will be exempt from the requirement to hold a distributor's licence under NSW law.[[11]](#footnote-11) In Victoria, it is most likely the case that AG Energy, in operating a network as part of its solar PPAs, is exempt from requiring a network licence under the 'multiple registration exemption' category referred to in section 4.5 above and therefore can apply for a registrable exemption in respect of both retail and network licences together.

1. Eligibility for STCs
   1. You have instructed that AG Energy intends to keep and trade any STCs for which it may be eligible, and that the installation of the panels will be conducted by a licensed electrician. The small-scale systems that AG Energy intends to install will be eligible for STCs if it is or will be compliant with the following requirements.
   2. Under the Small-scale Renewable Energy Scheme, AG Energy will be eligible for STCs if it satisfies the following criteria:
      1. be installed no more than 12 months prior to the creation of certificates, and have its panels and inverter listed on the Clean Energy Council list of approved components;
      2. meet Australian and New Zealand standards;
      3. use a Clean Energy Council accredited designer and installer and meet the Clean Energy Council design and install guidelines;
      4. comply with all local, state, territory and federal requirements, including electrical safety; and
      5. be classified as small-scale, meaning a solar panel system that has a capacity of no more than 100kW, and a total annual electricity output less than 250MWh.[[12]](#footnote-12)
   3. The installation process must also follow documented and certified compliance with:
      1. the Clean Energy Council code of conduct for installations;
      2. the Clean Energy Council design and install guidelines; and
      3. the following standards:
         1. AS/NZS 5033, Installation and safety requirements for photovoltaic (PV) arrays,
         2. AS/NZS 1170.2, Structural design actions, Part 2: Wind actions,
         3. AS/NZS 4509.1, Stand-alone power systems, Part 1: Safety and installation,
         4. AS 4086.2, Secondary batteries for use with stand-alone power systems, Part 2: Installation and maintenance,
         5. AS/NZS 3000, Wiring Rules,
         6. AS/NZS 1768, Lightning protection, and
         7. AS 4777, Grid connection of energy systems via inverters.[[13]](#footnote-13)
2. Obligation to obtain or surrender additional STCs
   1. As both the legal owner of the eligible small-scale system andretailer of electricity through that system, AG Energy automatically holds the right to create STCs and therefore is obliged only to:
      1. create a number of STCs; and
      2. surrender only the relevant amount of those STCs created – to be determined under the small generation unit calculator.**[[14]](#footnote-14)**

AG Energy is not required to either purchase or surrender any *additional STCs as retailer* beyond those STCs which it must already create and surrender *as the owner* of the small-scale systems. If it wishes, AG Energy as the owner of the system may assign the right to create and sell STCs to a registered agent.

1. Other considerations
   1. AG Energy may be subject to the unfair contracts regime under the Australian Consumer Law. If AG Energy intends to provide standard contract terms to Customers (which is likely to be the case in respect of the PPAs), it is likely that AG Energy will need to ensure that its standard terms are not unfair. While these issues are outside the scope of this advice, it will be important to ensure that the terms of the PPA are compliant with the unfair contracts regime.
   2. During the term of the PPAs, circumstances may arise where the ownership of Panels installed by AG Energy and the supply of electricity to the Customer may be affected by, for example, the sale of a Customer's business or premises. Accordingly, AG Energy may wish to consider how to address such a change in the PPA (for example, with notice and/or consent rights) and to consider the registration of security interests over the Panels on the Personal Property Securities Register.
   3. We note that these issues are currently outside the scope of this advice.

1. AEMO Markets and Strategy & Innovation, *National Electricity Market: Guide to Generator Exemptions & Classifications of Generating Units,* version 2.0(7 July 2017), s 2.3.1 'Automatic Exemptions'. [↑](#footnote-ref-1)
2. See Essential Services Commission, 'Electricity licensing exemptions categories', available at <https://www.esc.vic.gov.au/energy-licensing-and-exemptions/electricity-licencing-exemptions/electricity-licensing-exemptions-categories/>. [↑](#footnote-ref-2)
3. See section 3.1 generally, AER (Retail) Exempt Selling Guideline. [↑](#footnote-ref-3)
4. See: Australian Energy Regulator, 'Classes of retail exemption & applicable conditions: Applicable conditions for exemption class R8', <https://www.aer.gov.au/retail-markets/retail-exemptions/classes-of-retail-exemption-applicable-conditions/applicable-conditions-for-exemption-class-r8>; see also Appendix A-1 of the AER (Retail) Exempt Selling Guideline. [↑](#footnote-ref-4)
5. See Essential Services Commission, 'Electricity licensing exemptions categories', available at <https://www.esc.vic.gov.au/energy-licensing-and-exemptions/electricity-licencing-exemptions/electricity-licensing-exemptions-categories/>. [↑](#footnote-ref-5)
6. AER, *Electricity Network Service Provider - Registration Exemption Guideline* v5 (1 December 2016), p 12. [↑](#footnote-ref-6)
7. Australian Energy Market Commission, *National Electricity Rules* v102 (17 November 2017), Chapter 10: Glossary, p 1204. [↑](#footnote-ref-7)
8. Typically the standard arrangement under PPAs allows the installer and operator to retain ownership of the solar photovoltaic system during the term of the PPA. [↑](#footnote-ref-8)
9. AER, *Electricity Network Service Provider - Registration Exemption Guideline* v5 (1 December 2016), 'Table 4 – Registrable classes of exemption – other situations', p 31. [↑](#footnote-ref-9)
10. AER, *Reasons for Decision – Amended Network Exemption Guideline* v5 (1 December 2016), Glossary, p 6. [↑](#footnote-ref-10)
11. Electricity Supply (General) Regulation 2014, cl 14(2). [↑](#footnote-ref-11)
12. Clean Energy Regulator, *Renewable Energy Target*, 'Small-scale systems eligible for certificates' (last updated 9 October 2017), <http://www.cleanenergyregulator.gov.au/RET/Scheme-participants-and-industry/Agents-and-installers/Small-scale-systems-eligible-for-certificates>. [↑](#footnote-ref-12)
13. Clean Energy Regulator, *Renewable Energy Target*, 'Installation requirements for small-scale systems' (last updated 8 May 2015), <http://www.cleanenergyregulator.gov.au/RET/Scheme-participants-and-industry/Agents-and-installers/Installation-requirements-for-small-scale-systems>. [↑](#footnote-ref-13)
14. Clean Energy Regulator, *Renewable Energy Target*, 'Creating small-scale technology certificates' (last updated 22 August 2017), <http://www.cleanenergyregulator.gov.au/RET/Scheme-participants-and-industry/Agents-and-installers/Small-scale-technology-certificates/Creating-small-scale-technology-certificates>. [↑](#footnote-ref-14)