

## REVIEW OF REGULATORY ARRANGEMENTS FOR EMBEDDED NETWORKS (AEMC No: "RPR0006")

### EXECUTIVE SUMMARY

The Shopping Centre Council of Australia (SCCA) represents Australia's major owners, managers and developers of shopping centres. Our 25 members are listed at the end of this submission.

We welcome the opportunity to provide a submission on the Australian Energy Market Commission's (AEMC) *Review of Regulatory Arrangements for Embedded Networks* (AEMC Project No: RPR0006).

We are aware of the background of the Review, which stems from the request from the Council of Australian Governments' (COAG) Energy Council in December 2016 to undertake a review under the NERL and the National Energy Retail Rules (NERR). This stems from the AEMC's *Embedded Network Rule Change*, which we were involved in, including as a member of the Australian Energy Market Operator's (AEMO) working group.

Noting the: (1) *Terms of Reference*, (2) assessment criteria (section 2.3), (3) issues/questions raised for comment, and (4) national energy objectives; this submission aims to provide productive feedback for further engagement with the AEMC and other stakeholders (e.g. the Australian Energy Regulator – or 'AER'). In summary, it is our strong view that **the current two-tiered regulatory framework is fit-for-purpose, adaptive, and should continue**. There is **no evidence of an existing structural failure, or inherent failure with detailed regulatory mechanisms and conditions**. The framework contributes to the achievement of the national energy objectives, including via specific AER retail and network 'exemption' conditions and the AEMC's rule change. The framework also meets the AEMC's 'assessment criteria' for the review (at section 2.3, page 15 of the paper), including efficient investment and risk allocation. The AER has continued to be responsive and adaptive in exercising its regulatory functions (with version 4 of the 'retail exemption' guidelines, and version 5 of the 'network' guidelines), including the consideration of emerging issues such as customer access to Ombudsman schemes.

The AER also has appropriate powers, and has exercised these through the issuing of *Infringement Notices* (under section 88 of the National Energy Retail Law – or 'NERL').

Exemptions (within conditions) from the need to obtain a retailer authorisation, or network registration, should continue for shopping centre embedded network operators, given that:

1. energy on-selling is incidental (compared with their core business of shopping centre operation),
2. the market is relatively small (~65,000 customers), and within a defined set of customers, and

The current approach has strong legislative underpinnings and detailed obligations, requirements, and mechanisms to protect customers.

There should, however, be a refreshed risk-based approach to 'exemption' regulation, which prioritises and resources to higher-risk (e.g. vulnerable) customers and operators.

This approach should note the different nature of embedded network customers, such as residential versus non-residential customers, and in our market where 'small' customers can in fact be very large businesses/companies.

A key concern is further regulation, which adds cost and risk, to address theoretical or issues that have arisen in other asset classes, rather than diagnosed problems.

In this regard, we believe that individual AER exemptions which were introduced on 1 January 2015, should be transitioned back to registrable exemptions. Our sector has a strong compliance culture, and in our view, presents lower regulatory and market risk, which justifies 'lighter touch' regulation and oversight.

We have made 18 specific recommendations for the AEMC's consideration at the end of this submission.

A key recommendation is the need for harmonisation and consistency across jurisdictions, largely via the AER exemption framework. The current approach, whereby some jurisdictions continue in an ad-hoc, isolated manner (e.g. Victoria – for which there is still no clarity following its 2016 consultation process) creates frustration, inefficiency, and possibly increases the risk of policy gaps and compliance issues.

Our views in this paper largely drawn on several specific policies and frameworks:

- National Electricity Law (NEL), National Energy Customer Framework (NECF), NERL
- AER retail (version 4) and network service provider (version 5) exemption guidelines,

We have also re-reviewed key consumer group inputs such as the South Australian Council of Social Services' (SACOSS) report *The Retail and Network Exemption Framework: Emerging Issues for Consumers* (December 2015).

### THERE IS NO STRUCTURAL FAILURE

As a key and initial point, there is no structural failure with embedded network regulation, nor has a case been provided to demonstrate there is a structural failure, particularly in relation to shopping centres.

Further, there is no inherent failure with the more detailed aspects of the regulatory framework, including customer protections.

We are concerned there may be a misunderstanding by some stakeholders about the 'exemption' framework, insofar they incorrectly believe it is an exemption from acting in accordance with the law, rules and relevant obligations, as opposed to it being an exemption (with conditions) from the requirement to hold a retailer authorisation, or to be a registered network service provider.

As the AEMC is aware, obligations apply to exemptions granted by the AER, such as in the case of 'exempt networks', where there is a requirement under the AER's *Electricity Network Service Provider – Registration Exemption Guideline (Version 5)* for an exempt person to ensure: (1) the network is safe, (2) there is a dispute resolution mechanism, (3) that network pricing is as per the Guideline, (4) that certain meters comply with the *National Measurement Act 1960*, and (5) access to retail competition where it's available in a jurisdiction.

The exemption framework has a strong legislative basis (under the NEL and NERL), which also outlines the AER's powers and functions to grant and revoke exemptions. This includes issues such as Exempt seller related factors (section 115, NERL).

In addition, the AER's *Compliance and Enforcement State of Approach*, whilst applying to wholesale market, is instructive as to its 'culture' of compliance, and monitoring and enforcement activities.

In terms of ensuring appropriate protection, oversight and economics of scale, the AER also has different types of exemptions (deemed, registrable, individual), applicable to various circumstances (residential, non-residential), which all comprise obligations and compliance conditions (including 19 'core' customer protections) that are relevant to the different classes of activities. The exemption framework is also sufficiently flexible to cope with a range of emerging supply and service models (e.g. embedded generation), and technologies.

The AER has also proven to be an active and adaptive regulator, in addressing issues to achieve the national energy objectives. This includes, in traditional regulation terms, addressing perceived market failures such as information asymmetries), and the transitioning to individual exemptions from 1 January 2015 which has enabled increased scrutiny and oversight.

In our view, critiques of embedded network regulation are frequently homogenous, without an appropriate acknowledgement of different circumstances or a detailed articulation or analysis of a specifically identified problem. We make this statement based on our extensive and ongoing involvement with embedded network regulation, and our experience as a regulated sector in other forums – such as retail tenancy and industrial relations/shop trading hours.

As noted above, there may be a misunderstanding or misconception by some parties about embedded network regulation.

The tone of parts of the AEMC's paper is also disappointing, with limited sections acknowledging any positive issues for embedded network customers.

In our market, retail tenants have benefitted from lower tariffs/electricity costs, reduced risk (e.g. through the 2012-13 Queensland tariff reform process), and direct engagement with their shopping centre management when issues arise.

Secondly, there is no disputes or 'protection' issues that have arisen in a systematic manner.

Some of the questions framed by the AEMC are, in our view, possibly inviting submissions to request additional embedded network regulation; without making any substantial case of there being a specific problem, particularly in relation to our sector.

We are concerned about the cost and risk of further regulation – particularly done in isolation of balancing with relief in other areas (e.g. process) – which may be based on theoretical problems or issues presented in other areas.

In this regard, we believe there are **three core issues** (some of which are noted in the AEMC's paper – such as the divergence between 'customers' at page 31) that the AEMC needs to properly flesh out and consider further in relation to the development of its final recommendations, including any recommendations in relation to embedded network regulation.

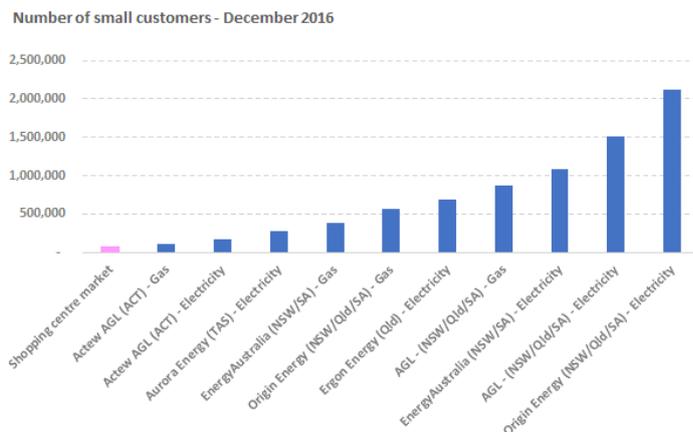
**1. EMBEDDED NETWORK REGULATION IS FIT-FOR-PURPOSE FOR A RELATIVELY SMALL MARKET**

The Australian shopping centre industry comprises around 1,700 shopping centres, and has around 65,000 specialty (i.e. small) shops (i.e. customers).

The overall embedded network 'market' across shopping centres is, therefore, relatively small particularly when compared with the broader energy market covered by authorised energy retailers and registered network service providers.

The AER's *Small Customer Time Series* (as at December 2016) provides a reference for this relative difference.

For instance, Origin Energy has over 2 million small electricity customers (NSW, Queensland, South Australia), and AGL has over 1.5 million customers (NSW, Queensland, South Australia). This compares with 39,800 shopping centre tenants across NSW, Queensland and South Australia (1.14% of Origin and AGL electricity customers in those jurisdictions). This relative difference is illustrated in the chart below:



**2. EMBEDDED NETWORK CUSTOMERS ARE DIFFERENT – AND NOT ALL ARE 'VULNERABLE'**

One of the AEMC's terms of reference expressly relates to vulnerable customers.

In this regard, shopping centre embedded networks are clearly different to residential networks.

In this regard, we also note that the AEMC's central concern about the growth of embedded networks, and thus the increasing number of embedded network customers, is balanced by some of its other commentary (e.g. at page 31) which notes that the characteristics of customers are different; whether 'vulnerable', 'affluent' or indeed commercial customers.

As noted above, we certainly agree that not all customer characteristics (or networks) are the same.

We would also add that, while "risks to consumers are changing", the risk is also different depending on the characteristics of the consumer, and related issues around information provision, dispute resolution and hardship.

We highlight this issue, as much of the feedback from consumer groups (e.g. SACOSS) referenced in the AEMC's paper have a basis in: (1) residential circumstances (e.g. permanent caravan parks and residential parks), and (2) vulnerable and low-income customers.

This is not to overlook the issues that groups such as SACOSS raise in relation to low-income, disadvantaged or vulnerable customers, having also been involved in consumer forums with them, however these are not 'like for like' scenarios with other embedded network customers, such as shopping centre tenants.

It's worth noting that, a key tenant group in our sector, the National Retail Association (NRA), which is a member of the AER's *Customer Consultative Group*, does not appear to have raised similar issues.

Also in relation to our sector, 'small customers' can also be very large companies, including national retailers and ASX-listed companies. Being a small customer is certainly not a proxy for literally being small, or vulnerable.

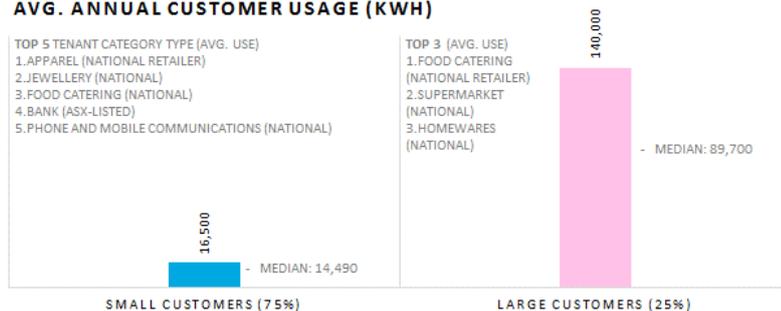
As an example, a 'small' customer in a shopping centre – as defined by their single store energy use – can be owned by a large, multi-national business, which is also not defined as a 'small business' for other government policy purposes, such as having a turnover of less than \$10 million (for corporate tax purposes - ATO), or multi-year contract values of less than \$1 million (for unfair contract terms under the *Competition and Consumer Act 2010* - ACCC).

To cite a specific example, a large national retailer, operating in Australia and overseas across 17 countries, and with a total of over 1,000 stores, can be deemed as a 'small' energy customer in each of their stores. However, given their scale of operations, they are clearly not a 'small business' – or akin to a small residential customer – requiring the same level of regulatory protections as a genuine small business that lack the size and sophistication of a large chain, with multiple electricity contracts in multiple jurisdictions.

The following chart outlines an example shopping centre (Victoria – applying the 40MWh small/large customer threshold), and highlights the average usage for the centre's small customers (75% of total tenants) and large customers (25% of total tenants).

Also noted is the top respective 'customers' based on tenant categories (based on the *SCCA Sales Reporting Guidelines* – available on our website at [www.scca.org.au](http://www.scca.org.au)), and type of company.

**EXAMPLE SHOPPING CENTRE  
AVG. ANNUAL CUSTOMER USAGE (KWH)**



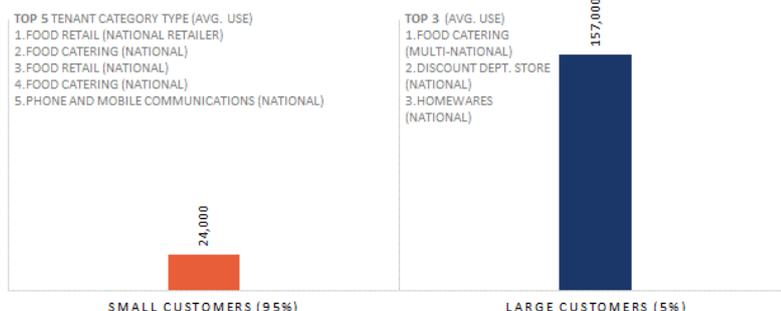
Using the above retailer/tenant categories, applying available industry benchmarks (Urbis) highlights that the average occupancy cost, in a comparative centre, is as follows:

TENANT TYPE	TOTAL ANNUAL OCCUPANCY COST (AVG.)	ESTIMATED ANNUAL STORE TURNOVER (AVG.)
APPAREL	\$ 236,291	\$ 1,100,000
JEWELLERY	\$ 222,054	\$ 1,700,000
FOOD CATERING	\$ 159,655	\$ 900,000
PHONE AND MOBILE COMMUNICATIONS	\$ 163,319	\$ 1,200,000
HOMEWARES	\$ 207,519	\$ 1,700,000
<b>AVERAGE</b>	<b>\$ 197,768</b>	<b>\$ 1,320,000</b>

This highlights that for the above retailers, the overall occupancy cost, per store, is reasonably high, with an average occupancy cost of \$197,000, and an average turnover of \$1.3 million.

Similar to the above example, the following chart outlines an example Queensland shopping centre (applying the 100MWh small/large customer threshold), and highlights the average usage for the centre's small customers (95% of total tenants) and large customers (5% of total tenants), and also the top usage based on tenant categories.

**EXAMPLE#2 SHOPPING CENTRE  
AVG. ANNUAL CUSTOMER USAGE (KWH)**



Like the Victorian example, the largest users in the 'small customer' categories include food retail (e.g. bakery) and food catering (e.g. café/restaurant) and comprise large national retailer groups.

These retailer groups, with national (and multi-national) operations cannot be considered to be small, or as having the same risks as small residential customers that are potentially low-income, disadvantaged and vulnerable.

In addition, and as noted by the AEMC, tenants in our sector have detailed tenancy legislation which includes low-cost mediation and tribunals with significant financial jurisdiction (e.g. NSW 'NCAT' dispute thresholds increase from \$450,000 to \$700,000 from 1 July 2017), and rectification and order powers.

In relation to the AEMC's desired assessment of 'customer experiences', it is also important to note the context of energy use for retailers, including small and large customers.

The Productivity Commission noted in their report into the *Relative Costs of Doing Business in Australia: Retail Trade* (2014) – in relation to a (shop) retailer's occupancy costs within shopping centres, including electricity costs - that "*The overall impact of these occupancy cost increases on individual retailers would differ according to such factors as their cost structure, the length of lease and bargaining power*" (Productivity Commission, 2014).

Further, according to the Commission – citing figures from ISISWorld – "*energy and utility costs comprise less than 5 per cent of the cost of doing business for the vast majority of retail subdivisions. They are more significant costs for liquor retailers, supermarkets, hardware stores and grocery stores, comprising between 5-10 per cent of operating costs*".

As noted in our analysis above, this highlights that energy costs, as a cost of doing business, vary across different types of retailer.

### 3. EMBEDDED NETWORKS ARE 'INCIDENTAL'

The AEMC's terms of reference require it to consider the cost of regulation.

Indeed, the AEMC's paper makes reference to the *COAG Energy Council* consultation paper on consumer protection for 'behind the meter' systems. This paper itself noted that 'any consumer protection framework should be appropriate to address consumer harm while not imposing unnecessary compliance costs or stifling innovation' (page 7).

We also note the AEMC's submission to the COAG Energy Council which noted (at page 3) issues such as "*for most products and services, robust competition is the best form of consumer protection*", and "*customer protections are not costless*".

In this regard, it is worth noting that aside from the relatively small customer base, whereby costs cannot be spread across a broad base, embedded network operation is incidental to the core business of shopping centre leasing, management and development. This principle has been well-established in the AER's exemption framework since its initial commencement. In shopping centres, energy is also sold to a defined set of customers within a single building or asset – as opposed to being promoted or sold to customers outside the centre or a broader market.

Exemptions from the need to obtain a retailer authorisation or to be a registered network service provider, which provides relief from technical and other requirements, ensures that costs are kept low relative to the incidental nature, and relatively smaller scale, of embedded networks. Aspects of the AER's conditions under the exemption framework also sensibly acknowledge the need for cost-effectiveness and economies of scale, such as the appointment of an Embedded Network Manager (ENM) (under the AEMC rule change) under certain conditions (refer to sections 4.4 and 4.7 of the *Network Exemption Guidelines*). This includes for embedded networks where the right to access retail competition exists, and where 'trigger' events occur, such as a threshold of 30 customers.

Similarly, from a contracting perspective, while ENMs must be appointed 'per exempt asset', an ENM can be contracted across a group/entity that operates embedded networks across several different assets.

There are also similarities with other 'incidental' operations of our members where regulation has recognised the need to differentiate the level of regulation for certain incidental activities.

To use an example, some of our members are regulated in relation to their car park activities, such as under the NSW *Parking Space Levy Act 2009*. Similar to embedded networks, car parking is incidental, or ancillary, to their core business – but are obviously part of the functioning of a shopping centre.

Further, our members issue gift cards, which are typically considered 'financial products', which are regulated under the *Corporations Act 2001*, the *Australian Securities and Investment Commission Act 2001*, as well as the *Payment System (Regulation) Act 1998*. However, for such incidental activity, it would be both incorrect and unreasonable to define our members as being the equivalent to financial institutions such as banks and credit unions.

**RESPONSE TO ASSESSMENT CRITERIA**

We have the following response to the AEMC's proposed criteria for "assessing the regulatory arrangements for embedded networks to the COAG Energy Council on whether any further work, including the rule change, are necessary to address identified issues".

This is in addition to our responses to the specific issues for comment and questions.

- *Do the regulatory arrangements facilitate competition and consumer choice in energy services and products?*

Yes, by and large. The AEMC's *Embedded Network Rule Change* will deal with market interface issues. The AER's network and retail exemption frameworks both have requirements in relation to 'access to retail market offers'. Some jurisdictions have different regulatory issues (e.g. Queensland), which are well documented. Our members already operate in markets with full retail competition with strong uptake.

- *Are the regulatory arrangements clear, consistent and transparent?*

In relation to the AER's exemption framework, yes. It would assist, and in our view, enable more efficient compliance, if there was a single set of rules across Australia. Clarity and consistency is put at risk when jurisdictions (such as Victoria) continue to proceed with their own separate regulatory framework. There is currently even a lack of clarity in terms of the status of the Victorian review.

- *Do appropriate consumer protections and compliance mechanisms apply within embedded networks?*

Broadly, yes. This should be based on the characteristics of relevant customers.

There are 'customer-related factors' (section 116; NERL) applicable to the AER in exercising its functions and powers. Further, 'core' customer protections exist as part of the AER's conditions.

The regulatory framework also enables emerging issues to be considered, including the current consideration of customer access to Ombudsman schemes. As we have previously provided to both the AER, Victorian Government and part of the Ombudsman network, there needs to be appropriate consideration of the most appropriate and cost-effective dispute resolution mechanisms. In our sector, retail tenants have access to dispute resolution mechanisms under retail tenancy legislation.

- *Do the regulatory arrangements promote efficient investment and the allocation of risks and costs?*

Yes, embedded network operation and investment has continued including in jurisdictions (and AER obligations and conditions) where customers have access to retail competition.

In relation to specific regulation, risk has increasingly been allocated to embedded network owners over recent years (e.g. explicit informed consent, appointment of accredited Embedded Network Manager (ENM)).

Issues remain, however, under current regulatory arrangements – including under the AEMC's embedded rule change - whereby an embedded network owner (or ENM) will be responsible for issues beyond their control, such as 'double-billing', or where a retailer fails to provide an 'energy' only offer to enable comparison. As we have provided previously to the AER, an embedded network owner should not be responsible – or penalised – for issues beyond their control and we believe that the AER should be provided with powers to address this issue.

- *Are the regulatory arrangements proportional to the risks they seek to mitigate?*

Yes, principally through the exemption framework, which has a legislative basis and various obligations and requirements – including customer protection requirements – for exempt embedded network operators. The AEMC's embedded network rule change is a major change in regulatory arrangements. Costs at this stage remain unknown. There is an ongoing need to ensure that the cost and impost of regulation does not place pressure on service, pricing issues, or innovation.

In addition, the AER has the powers to issue infringement notices and fines to an exempt person, who carries an ultimate regulatory risk of the relevant obligations and requirements, and hence has an incentive to manage and minimise risks.

The regulatory arrangements for embedded networks are 'fit for purpose'. This needs to be contextualised, however, given that regulatory arrangements remain *somewhat* harmonised (e.g. AER), but with some jurisdictions still 'going it alone'. It would be a positive outcome if embedded network regulation – and a focus of any AEMC recommendations - could be: (1) to have harmonised regulation, and (2) to stabilise regulation to prevent what seems to be a merry-go-round of regulatory reviews in this space (often duplicative, and devoid of evidence).

**RESPONSE TO QUESTIONS**

The following is structured around the AEMC's formal questions as follows – and builds upon our commentary in the previous sections:

**IS THE REGULATORY FRAMEWORK FIT FOR PURPOSE?**

***Q1. Does the two-tiered framework of requiring either registration / authorisation or exemption remain fit for purpose?***

Yes.

The two-tiered framework remains appropriate and fit for purpose, and the regulatory framework for the granting of exemptions from the need to obtain retailer authorisation and/or network registration should continue.

From a policy perspective, the two-tiered framework remains appropriate to maintain exemptions on the basis where selling energy remains incidental to a group's core business. Further, in the case of shopping centres (and, we'd expect, other segments), the size of the market is relatively small in terms of overall customers.

The framework has a strong legislative basis (e.g. under the NEL, NERL and NERR).

This enables, for instance, the AEMC to make rule changes (as it has, in specific relation to embedded networks and issues such as competition in metering), and also establishes the AER's regulatory powers and functions, including its ability to grant exemptions.

We don't believe there is a need, or case, for alternative regulatory arrangements.

The two-tiered framework ensure cost-effective and proportional approach, noting the circumstances of embedded networks as outlined above.

The two-tiered framework also meets all three of the national energy objectives – the National Energy Retail Objective (NERO), National Energy Objective (NEO), and the National Gas Objective (NGO), which all prescribe similar principles such as efficient investment in, and operation and use of energy services for the long-term interests of customers.

This also includes the national energy objective protection for small customers (including hardship), with respect to price, quality, safety, reliability and security of supply.

The AER's exemption framework specifically includes requirements relevant to the objectives – and allocates regulatory risk to embedded network owners/operators – in relation to (network):

- (1) safety,
- (2) dispute resolution,
- (3) network charging,
- (4) metering, and
- (5) access to retail market offers.

In relation to retail exemptions, there are requirements in relation to:

- (1) information provision,
- (2) dispute resolution,
- (3) retail pricing,
- (4) access to retail market offers, and
- (5) customer protections.

In relation to customer protections, there are currently 19 'core' protections in place.

In short, this highlights that the AER does not grant 'unconditional' exemptions. The framework is also flexible, and enables the AER to scrutinise exemption applications and tailor conditions to areas of higher-risk.

As we identified earlier in this submission, the overall embedded network 'market' across shopping centres is also relatively small particularly when compared with the broader energy market covered by authorised energy retailers and registered network service providers.

To illustrate for our sector, it is estimated that the shopping centre industry across Australia, across around 1,700 shopping centres, has around 65,000 specialty (i.e. small) retailers.

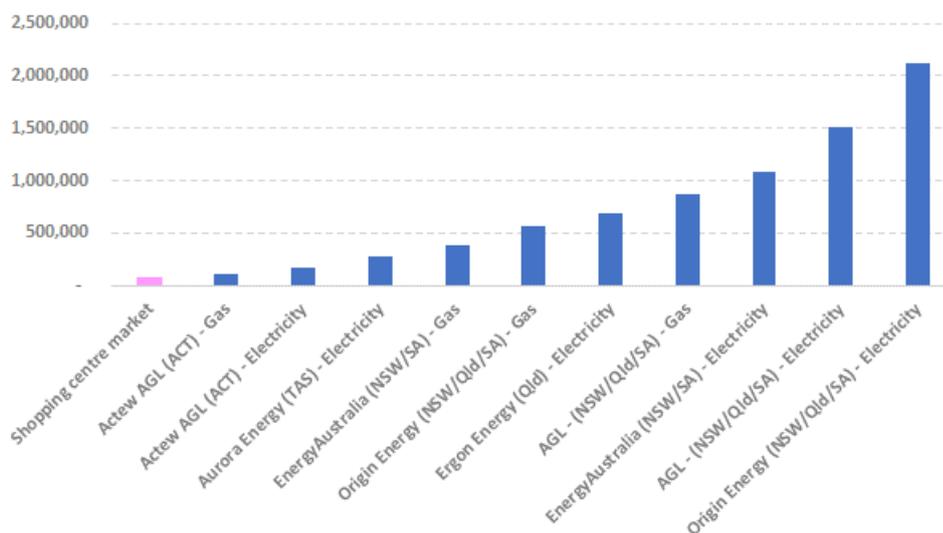
This is illustrated below, from an industry statistics report (prepared by Urbis) which is publicly available on our website:

Centre Type	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	Total Australia (no.)	(%)
Regional	5,956	3,340	3,388	803	1,173	0	0	809	15,469	24%
Sub Regional	5,174	4,707	4,744	1,397	2,397	218	204	103	18,943	29%
Neighbourhood	5,754	3,276	5,033	1,604	3,373	223	266	287	19,815	30%
CBD	1,604	920	605	508	414	114	16	18	4,199	6%
Outlet	258	758	453	120	102	0	0	93	1,784	3%
Other	860	1,903	1,357	194	573	9	50	26	4,972	8%
<b>Total Shopping Centres</b>	<b>19,606</b>	<b>14,904</b>	<b>15,580</b>	<b>4,626</b>	<b>8,032</b>	<b>563</b>	<b>536</b>	<b>1,336</b>	<b>65,183</b>	<b>100%</b>
<b>(%) of Australia</b>	<b>30%</b>	<b>23%</b>	<b>24%</b>	<b>7%</b>	<b>12%</b>	<b>1%</b>	<b>1%</b>	<b>2%</b>	<b>100%</b>	

Source: *Shopping Centre Industry Statistics – August 2015: Urbis – available at [scca.org.au](http://scca.org.au)*

This can be contrasted with the relatively larger number of customers that major energy retailers such as Origin Energy, Energy Australia and AGL have individually, and collectively, which highlights the relatively small nature (and the 'maximum' scale) of the shopping centre embedded network market. This is illustrated below, based on the AER's *Small Customer Time Series* (as at December 2016).

**Number of small customers - December 2016**



The above highlights, for instance, that even at a minimum, traditional retailers have (ActewAGL; ACT; Gas), 109,509 small customers (including residential and business), which is larger than the total number of 'specialty' tenants (akin to 'small customers') in the Australian shopping centre market.

Further, Origin Energy has over 2 million small electricity customers (NSW, Queensland, South Australia), and AGL has over 1.5 million customers (NSW, Queensland, South Australia) – this compares with 39,800 shopping centre tenants across NSW, Qld and SA (1.14% of Origin and AGL electricity customers in those jurisdictions).

As noted above, a key element of the current regulatory framework being fit-for-purpose is its strong legislative basis.

There is certainly no 'vacuum' of regulation, or structural failure.

At a broad level, under the NEL and NERL, this appropriately sets out the AER's powers and function, including the discretion to grant and revoke network and retail exemptions. There is also an existing penalty regime that applies to breaches of the NERL (section 88), for example.

Further, under the NERL (using 'retail' as an example) – at Divisions 6 and 7 – the AER has the power to “exempt persons or classes of persons in accordance with the Rules from the requirement to hold a retailer authorisation” (section 110).

This includes the imposition of conditions in accordance with the Rules (section 112). (The AER also has the powers to revoke an exemption if the “AER is satisfied that there has been a material failure by the seller to meet the conditions imposed on the exempt seller”).

These 'exempt seller' factors are outlined at section 115 of the NERL.

This addresses an issue that has been raised, that, despite the fact that the NEL or NERL do not “guide” the AER in relation to conditions that apply to exemptions, the AER’s regulatory framework includes the imposition of conditions.

In a practical sense, customer protections, including 'core protections', have been a feature of the exemption framework since it was developed. Current retail customer protections, consistent across different 'registrable' exemption categories, are summarised as follows:

<b>Exemption category</b>	<b>R1 – 10 or more small commercial/retail customers</b>	<b>R4 – caravan parks, residential manufactured homes, parks, home estates</b>	<b>R5 – large customers</b>
<b>Conditions</b>	<u>Condition 1 - Obligation to supply</u> <u>Condition 2 - Information provision</u> <u>Condition 3 - Billing and payment arrangements</u> <u>Condition 4 - Estimation as basis for bills</u> <u>Condition 5 - Pay-by date</u> <u>Condition 6 - Receipts</u> <u>Condition 7 - Pricing</u> <u>Condition 8 - Undercharging and overcharging</u> <u>Condition 9 - Payment difficulties and disconnection or de-energisation</u> <u>Condition 10 - When disconnection or de-energisation is prohibited</u> <u>Condition 11 - Reconnection or re-energisation</u> <u>Condition 12 - Concessions and rebates</u> <u>Condition 13 - Choice of retailer</u> <u>Condition 14 - Contact details</u> <u>Condition 15 - Dispute resolution</u> <u>Condition 16 - Life support customers</u> <u>Condition 17 - Continuity of supply</u> <u>Condition 18 - Termination of energy supply agreement</u> <u>Condition 19 - Maintaining records</u>	<u>Condition 1 - Obligation to supply</u> <u>Condition 2 - Information provision</u> <u>Condition 3 - Billing and payment arrangements</u> <u>Condition 4 - Estimation as basis for bills</u> <u>Condition 5 - Pay-by date</u> <u>Condition 6 - Receipts</u> <u>Condition 7 - Pricing</u> <u>Condition 8 - Undercharging and overcharging</u> <u>Condition 9 - Payment difficulties and disconnection or de-energisation</u> <u>Condition 10 - When disconnection or de-energisation is prohibited</u> <u>Condition 11 - Reconnection or re-energisation</u> <u>Condition 12 - Concessions and rebates</u> <u>Condition 13 - Choice of retailer</u> <u>Condition 14 - Contact details</u> <u>Condition 15 - Dispute resolution</u> <u>Condition 16 - Life support customers</u> <u>Condition 17 - Continuity of supply</u> <u>Condition 18 - Termination of energy supply agreement</u> <u>Condition 19 - Maintaining records</u>	<u>Condition 1 - Obligation to supply</u> <u>Condition 2 - Information provision</u> <u>Condition 3 - Billing and payment arrangements</u> <u>Condition 4 - Estimation as basis for bills</u> <u>Condition 5 - Pay-by date</u> <u>Condition 6 - Receipts</u> <u>Condition 7 - Pricing</u> <u>Condition 8 - Undercharging and overcharging</u> <u>Condition 9 - Payment difficulties and disconnection or de-energisation</u> <u>Condition 10 - When disconnection or de-energisation is prohibited</u> <u>Condition 11 - Reconnection or re-energisation</u> <u>Condition 12 - Concessions and rebates</u> <u>Condition 13 - Choice of retailer</u> <u>Condition 14 - Contact details</u> <u>Condition 15 - Dispute resolution</u> <u>Condition 16 - Life support customers</u> <u>Condition 17 - Continuity of supply</u> <u>Condition 18 - Termination of energy supply agreement</u> <u>Condition 19 - Maintaining records</u>

The above protections also address the national energy objectives, including for hardship customers.

In terms of the AEMC’s statements about 'substantially different obligations', 'differences in customer protections', and 'differences in compliance obligations', this obviously has to be balanced with the different customer characteristics and the AEMC’s assessment criteria in relation to proportionality, clarity, cost and risk.

## **Q2. Does the exemption framework remain fit for purpose?**

Yes – insofar it remains suited for the circumstances it is dealing with. It is also the appropriate regulatory instrument to outline key obligations, requirements and customer protections.

In the case of shopping centre embedded networks (which includes exemption categories such as R1 and R5, the exemption framework is appropriate given that electricity provision is incidental to the main relationship between an exempted person and their customer (i.e. the relationship of lessor and lessee under a lease of retail premises), and their core business of real estate investment and management.

They are also selling energy to a defined set of customers (e.g. within one building or asset), and a relatively smaller customer market.

From a legislative and regulatory perspective, the framework is also fit for purpose for the following reasons:

1. It has a strong legislative basis (e.g. AER powers, section 115 exempt seller related factors, section 116 customer related factors),
2. It includes discretion for the AER to grant and revoke exemptions – and issue penalties.
3. The AER's exemption decisions can be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1997*.
4. It comprises different types of exemption, enabling different levels of scrutiny and oversight (e.g. low-risk, deemed; or higher-risk, individual),
5. It covers different circumstances and is flexible (as an example, the AER's retail exemption framework includes 'Registrable' exemption categories and 9 'Deemed' categories. Some categories are also based on thresholds – such as the R1 criteria of having more than 10 small retail or commercial customers),
6. It includes energy-specific core customer protections – largely clearly outlined in a single document (the relevant exemption guidelines) - including access to choice of retailer and dispute resolution.
7. It includes a public registry of exemptions, enabling awareness and transparent information on exempt networks,
8. It has been adapted over time, since its initial commencement in 2011.

While the exemption framework and core conditions are applicable across all categories – and are thus asset-neutral – the different categories enable a flexible approach between different thresholds such as:

- Enables 'agents' of embedded network owners to operate embedded networks,
- Enables the consideration of residential /non-residential circumstances,
- Enables the consideration of small/large customers,
- Enables the size of the embedded network (above or less than 10 customers),
- Enables the consideration of adjoining sites – that are not owned, occupied or operated by the embedded network.

The framework also incentivises efficient investment in infrastructure and appropriately allocates risk, including regulatory risk, to the embedded network owner/operator.

If anything, the AER's changes over time have increased and transferred the risk to embedded network owners, such as needing individual exemptions (rather than registrable exemptions), explicit informed consent, and in accordance with the new rule change, the appointment of an accredited Embedded Network Manager (ENM).

Of concern, embedded network operators are facing an increased regulatory risk at this stage (e.g. being in breach of their AER conditions), given we understand that AEMO has not yet received any applications for accredited ENMs under the embedded network rule change, despite being only 6-months away from the 1 December 2016 commencement.

A key failure in embedded network regulation is the lack of consistency across jurisdictions, and the constant reviews making it confusing for stakeholders to have a period of regulatory stability and certainty.

This failure possibly stems from issues at the COAG Energy Council level, whereby jurisdictions are not adopting national frameworks, or only part of national frameworks (e.g. Victoria).

The objectives of retail and network exemptions should be to enable the efficient investment in, and operation of, embedded networks, while providing customer protections appropriate and proportional to the scale and characteristics of the network and its customers.

#### **TRANSITION SHOPPING CENTRE EXEMPTIONS BACK TO REGISTRABLE EXEMPTIONS**

We believe there's a strong case to no longer require individual exemptions for shopping centre embedded networks, given the maturity of our market, our members' compliance culture, and that the appointment of ENMs will further transfer increased regulatory risk to embedded network owners, and reduce the risk for customers.

In essence, we believe there is a case whereby the increased nature of obligations and risk transfer to embedded network owners – and the relatively low risk of for shopping centre embedded network customers – should result in a reduced regulatory oversight.

This is not seeking 'unconditional' exemptions for shopping centre embedded networks – merely a lower-risk approach given the characteristics of our sector and customers.

This issue could also be considered in light of alternate compliance approaches, for instance, via semi-regular sector-specific reviews and audits – similar in-principle for the audit regime for ENMs.

#### ADDRESSING THE DOUBLE-BILLING ISSUE

A critical issue, that we have raised previously, relates to the issue of 'double-billing'.

This issue manifests itself whereby electricity retailers incorrectly issue a bill to an on-market customer in an embedded network, yet neither the owner or AER does not have the power to stop them from doing so, or apply a remedy.

Powers should be provided to the AER to ensure that embedded network owners are not responsible for issues beyond their control – including the need to address double-billing issues.

#### CUSTOMER PROTECTION GAP – ACCESS TO OMBUDSMAN SCHEMES

An identified 'gap' in relation to customer protections is the issue of customer access to Ombudsman schemes (as a proxy for free/low-cost dispute resolution). This has already been identified as a work stream by the AER, and ANZEWON.

From an 'embedded network' regulatory framework perspective, the AER already has conditions in relation to access to Ombudsman schemes as part of its latest network exemption guidelines (December 2016).

We have been engaged in the consideration of this emerging policy issue, and have developed a policy position on critical issues that we believe to be properly considered and further analysed. We would be happy to discuss this with the AEMC.

#### **Q3. How do jurisdictional legal instruments affect the regulatory framework for embedded networks?**

The lack of harmonisation across jurisdictions is frustrating, inefficient, and we believe possibly goes some way to creating perceived problems with embedded networks.

Any critique about efficient investment and operation should at least note the inefficiency of the national regulatory framework.

A key impact is that companies operating embedded networks across jurisdictions have to have different compliance regimes. This also means companies also have to stay abreast of potential policy and regulatory changes and their implications on (for instance) new customers.

A key illustrative problem is Victoria.

The AEMC itself notes the current separate review of the Victorian General Exemption Order (GEO) – which relates to their exemption framework from the requirement to hold a license under section 16 of the *Electricity Industry Act 2000*.

We have encouraged the Victorian Government to adopt the AER framework in its entirety, rather than develop a new framework. Much of the issues that they raised in their consultation paper have also been considered in other forums.

As a potential compliance issue, we understand that neither the proposed Victorian registrable network exemption conditions, nor the AER network exemption conditions will have precedence, so this gives rise for potential conflict and uncertainty for participants in an embedded network.

The Victorian Government also wants to have a public register, similar to the AER, which will merely be duplicative.

Similarly, while we support the development of *Exempt Selling Guidelines* in Victoria, this once again raises the issue that the AER already has a set of Guidelines which could readily be adopted (or adapted) by the Victorian Government.

The AEMC has noted the jurisdictional requirements within Queensland, which are currently under review.

On a separate matter, the AEMO undertook consultation on its *Service Level Procedures* for ENMs late in 2016 and early in 2017, in relation to the Embedded Network Rule Change, which were issued as final on 1 March 2017 ahead of the 1 December 2017 commencement date. This rule change should be given time to operate, and monitored to see to the extent to which it addresses identified concerns, ahead of making

further substantial changes. (The same applies for the 'competition in metering' rule change, also scheduled to commence on 1 December 2017).

As noted earlier in this submission, the AER's network exemption guidelines already prescribes the requirements and obligations in relation to the appointment of ENMs.

This rule change comes with substantial compliance issues for embedded network owners.

We are keen to ensure that there is an appropriate pool, or market, or AEMO accredited ENMs ahead of the 1 December 2017 commencement. At this stage, we understand there are ENMs that have been accredited by AEMO.

In the case that there is no ENMs in the market by at least August 2017, the rule change should be deferred, or alternatively, embedded network operators should not be penalised, such as being in breach of their AER exemption conditions.

#### **CAN ACCESS TO RETAIL MARKET OFFERS BE IMPROVED?**

##### ***Q4. Can access to retail competition be improved?***

Embedded network customers in some jurisdictions can and do already access competition.

It is disappointing that the AEMC has characterised that an "exempt seller" effectively becomes "the monopoly electricity provider".

This suggests that there is no related regulation or customer protections (such as price protection), or that certain circumstances aren't a function of historical Government policy.

Some of our members' centres already have 10-20% of their tenants as 'on-market' customers. This defies any definition of there being a "monopoly".

It is also our understanding that a large portion of traditional customers, where full access to competition is available, do not seek our new retailers or churn. The AER's available '*customer switching*' data, for electricity, suggest an average of 4.9% switching as at December 2016.

There are also general provisions to deal with market-power, such as section 46 of the *Competition and Consumer Act 2010*.

Also, the unfair contract terms regime commenced on 12 November 2016 which also addresses the 'imbalance' in negotiating power between embedded network customer and embedded network operators in negotiating terms and conditions, including price, due to barrier to accessing retail market offers.

Further, particularly given that both price and customer protections are in place, embedded network owners, similar to actual regulated monopolies, are not able to charge customers whatever they want or in an 'unregulated' manner.

The AEMC notes that the embedded network rule change commencement from 1 December 2017 will address some existing competition barriers, by providing a market interface function.

The AEMC identifies two main barriers to competition, being: (1) jurisdictional regulations, and (2) clear obligations and requirements on relevant parties.

With the exception of Queensland and South Australia, due to jurisdictional policy positions, there are no major technological (e.g. meter type) or other (e.g. exit costs) obstacles to enable customers to access retail competition.

The AEMC has noted that Queensland is currently reviewing their arrangements.

As the AEMC notes, however, the nature of embedded network operators may deter retailer from making offers to small customers in embedded networks.

However, this is not an issue created by embedded network operators.

Whether authorised retailers want to make offers to customers is a matter for them.

The AER's exemption guidelines also provide circumstances where embedded network operators must 'price match' offers from external retailers. As the AEMC notes, this issue can be complex and may not enable direct comparison, given that pricing from retailers can often come with conditions (e.g. contract length and pay-on-time discounts).

This issue is not purely a problem created by the embedded network operator. We expressed this point to the AER on this issue when they consulted on this matter.

**WHAT CUSTOMER PROTECTIONS SHOULD APPLY TO EMBEDDED NETWORK CUSTOMERS*****Q5. Issues for embedded network customers that are on-market or wishing to go on-market?***

A key starting point for customer protections is obviously the *National Energy Customer Framework (NECF)*, and the legislative basis for protections for embedded network customers.

We also believe that a critical issue that the AEMC needs to consider, as noted previously, is the difference between customers across embedded networks and their characteristics. At a basic level, this includes the difference between residential and non-residential customers, and the fact that some 'small' customers particularly can be very large companies. The AEMC (at page 31) has noted the divergence between different types of embedded network customers.

As we noted earlier, some 'small' customers in shopping centres, are in fact very large companies and have more than one energy contract across multiple jurisdictions, while still being part of embedded networks.

In relation to issues for on-market embedded network customers, we support the continuation of an embedded network operator being able to recover network costs on a 'shadow-pricing' basis. We do not believe this issue should change.

As we have noted above, however, there is an issue that needs to be resolved in relation to double-billing for on-market customers. whereby an electricity retailers issue a customer with a bill that includes a network charge.

In such circumstances, the electricity retailer is in the wrong, and there is nothing that an embedded network operator (nor the AER, we understand) can do about it.

At this stage, there are no powers for the embedded network operator – or the AER – to enforce action on the electricity retailer. We have raised this previously with the AER.

***Q6. What consumer protections, in relation to the sale of energy, are appropriate off-market embedded network customers?***

The current prescription and application of customer protections remains largely adequate, and we believe the AER's exemption guidelines are the appropriate regulatory instrument.

As stated earlier, an initial issue is the need to fully understand the characteristics of different embedded network customers, as not all customers – even small customers – are the same. The AEMC notes itself that consumer group concerns relates "particularly" in relation to vulnerable customers, which are obviously a high priority.

Embedded network customers enjoy both energy-specific customer protections – such as under the NECF, NERL, NERR and AER's retail and network exemption guidelines – alongside general protections under the *Competition and Consumer Act 2010*.

It is worth noting that the Australian Consumer Law (or 'ACL') (*Schedule 2, Competition and Consumer Act 2010*) provides protections for people, and small businesses, for goods and services which are purchased (priced) up to a monetary threshold of \$40,000.

This includes protections in relation to false, misleading and deceptive conduct, and for services to be delivered with appropriate care, which includes remedies such as competition for loss or damages.

In our market, there is also detailed, sector-specific retail tenancy legislation (e.g. *NSW Retail Leases Act 1994*, *Victorian Retail Leases Act 2003*, *Queensland Retail Shop Leases Act 1994*).

As an example, this legislation requires that landlords provide upfront disclosure of relevant information in relation to centre issues to a prospective tenant. This includes a package in relation to the embedded network – which enables an informed choice to be made. The notion of 'explicit informed consent' (EIC) is a feature of the AER framework.

In terms of broader requirements, the AER's retail and exemption framework includes requirements in relation to (network): (1) safety, (2) dispute resolution, (3) network charging, (4) metering, and (5) access to retail market offers. In relation to retail exemptions, there are requirements in relation to: (1) information provision, (2) dispute resolution, (3) retail pricing, (4) access to retail market offers, and (5) customer protections.

In relation to customer protections, the AER retail exemption framework also features 19 'core' protections.

We support the need for 'core' consumer protections for customers of embedded networks and that these should be clear and cohesive (by contrast, the Victorian customer protections under the Victorian Energy Retail Code (ERC) are, in our view, difficult to navigate and understand).

In addition, the AER's compliance regime is an important aspect of the customer protection framework and mechanisms.

An emerging issue is the consideration of customer access to Ombudsman schemes.

While we support this 'in-principle', there should not be a 'rush' to Ombudsman schemes as a default ahead of issues being properly considered. There are a range of critical and practical issues to resolve, including cost and membership issues. We have developed a policy position on this issue which we'd be happy to discuss with the AEMC.

#### **ARE CURRENT REGULATORY ARRANGEMENTS FOR GAS EMBEDDED NETWORKS APPROPRIATE?**

##### ***Q7. Are current regulatory arrangements for gas embedded networks appropriate?***

Yes, we believe it is appropriate to allow for gas embedded networks.

Some gas distributors are now requiring gas meters to be installed at the boundary of properties, which is a particular impost for shopping centres that often have various customers located across a large land area/centre.

If followed to a logical conclusion, this would create wasteful long-runs of gas piping (greater than 3km at some developments). This would be an inefficient deployment of infrastructure, where an alternate embedded gas network would provide for more efficient infrastructure.

#### **RECOMMENDATIONS**

We are pleased to provide the following recommendations for the AEMC's consideration:

1. The two-tiered regulatory framework for embedded networks should continue, including enabling exemptions to be granted from the need to obtain a retailer authorisation and network registration,
2. There should be no substantial change affecting the exemption regulatory framework under the NERL (e.g. section 110 – *Power to exempt*, section 114 – *manner in which AER performs AER exempt selling regulatory functions or powers*, section 115 – *Exempt seller related factors*), or NEL (e.g. sections 11, 13).
3. The current types of retail and network exemptions (deemed, registrable, individual) should continue, enabling responsiveness, flexibility and different levels of scrutiny and oversight.
4. The current approach for different retail and network exemption classes, based on different embedded network scenarios (e.g. residential vs non-residential) should continue to enable ongoing responsiveness and flexibility.
5. The AEMC should investigate and clearly note the different characteristics of embedded network customers, including between residential and non-residential customers, and between 'small' customers.
6. A risk-based approach to future regulation should be adopted, based on the highest-risk customers and operators where customer and compliance risk is perceived to be high, which should then translate into applicable obligations and conditions, and regulatory oversight, including the AER's compliance and enforcement activity.
7. The cost and risk of further regulation for embedded network owners/operators needs to be properly considered, and balanced with potential relief in other areas (e.g. process).
8. Consideration should be given to transition individual AER exemptions for shopping centre back to registrable exemptions.
9. Customer protections should continue to be applied, in the AER's exemption guidelines, however this should be reviewed to ensure efficiency between energy-specific (e.g. NECF) and general (e.g. ACL) consumer protections – and sector-specific regulation (e.g. retail tenancy) – particularly to avoid duplication.
10. The AEMC and AER should lead efforts to ensure a nationally harmonised and consistent approach to embedded network regulation, preventing jurisdictions from developing their own frameworks and reducing clarity and consistency.
11. There should ultimately be a consolidated and one-stop-shop policy and regulatory framework for embedded networks, under the AER, to enable better understanding and compliance,
12. The AEMC should engage with AEMO to ensure there is an appropriate pool of accredited ENMs that embedded network owners/operators can engage ahead of 1 December 2017.

13. The investigation of customer access to Ombudsman schemes should be comprehensive and consider a broad range of policy issues, including cost-benefit implications for embedded network owners and operators, and existing dispute resolution mechanisms (e.g. under retail tenancy legislation).
14. The AEMC and AER should consider alternate mechanisms appropriate for the shopping centre sector to address customer protection (and other issues – e.g. information provision) such as an industry code of conduct.
15. Powers should be given to the AER to ensure that embedded network owners are not responsible for issues beyond their control – including to address the double-billing issue when authorised retailers incorrectly issue a bill.
16. Shadow pricing for network charges for embedded network customers should remain in place.
17. The AEMC’s rule changes associated with embedded networks (i.e. the appointment of an accredited ENM) and metering competition should be given time to operate, and be monitored, ahead of any further substantial regulatory change.
18. The AEMC and AER should ensure relevant consumer groups have simplified information to ensure awareness that the exemption framework requires exempt persons/parties to comply with the law, rules and relevant obligations and conditions – and their own rights and obligations.

**ABOUT US**

The SCCA represents Australia’s major shopping centre owners, managers and developers. Our members are as follows:



Owner and Operator of Westfield in Australia and New Zealand



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