



**Small Business
Development Corporation**

Our Ref: D16/1613

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Dear Mr Kroon

Submission – Proposed amendments to electricity and gas on-selling exemptions

Thank you for the opportunity to submit comments to the Public Utilities Office (PUO) consultation paper on proposals relating to licence exemptions for the residential and commercial on-selling of electricity and gas.

The role of the Small Business Development Corporation

The Small Business Development Corporation (SBDC) is an independent statutory authority established to foster the growth and development of small businesses in Western Australia (WA). The SBDC offers a wide range of services designed to meet the needs of prospective and current small business operators. These services include specialist business advice and workshops, advocacy to government on policy settings, dispute resolution and mediation services.

Of relevance to this consultation, the SBDC receives and monitors complaints from small business operators about the behaviour of landlords, particularly in relation to commercial leasing arrangements.

The SBDC's interest in on-selling arrangements

For a number of years, the SBDC has been concerned about the practice of shopping centre landlords on-selling electricity at an inflated price to their small business tenants (tenants). The SBDC first raised these concerns with the PUO in 2012 and provided input into the PUO's request for legal opinion from the State Solicitors Office about the *Electricity Industry Exemption Order 2005* and its interaction with the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (CT Act).

The SBDC continues to receive complaints from tenants about the on-selling of electricity and it remains an issue we wish to address. Complaints typically involve:

- tenants not being providing detailed billing information to make transparent a landlord's purchase price for electricity from a licensed retailer, the inflated "on-selling rate" applicable to tenants and the calculations relevant to determining this additional cost; and
- landlords inflating the cost of electricity for the purposes of on-selling to tenants (refer to Box One).

Box One

The owner of a number of small businesses in the Perth metropolitan area sought advice from the SBDC in relation to the electricity bills for one of these premises. The owner noticed a significant difference in electricity bills between two of his premises, with one being almost 50% more expensive. These two premises were comparable for the purposes of electricity consumption with both being restaurants of similar size. The price difference was attributed to on-selling of electricity by the landlord. When the owner requested details of the cost of the electricity, the landlord refused to provide this information.

The tenant has also become aware that two other restaurants in the same shopping centre complex have negotiated a cheaper electricity on-selling rate which has not been made available to the tenant. The landlord went further to advise the tenant that because it was operating within the legislative requirements for an exempt retailer it was legally entitled to on-sell electricity at an inflated price and have refused any reduction to the cost of the electricity on-sold to the tenant.

The SBDC recognises that the consultation paper focuses on five proposed amendments rather than being a far reaching review of the exemption orders themselves. This being said, the SBDC believes there are issues with the current on-selling regime and uses this consultation process to raise these issues for consideration by the PUO.

Identified issues with commercial on-selling of electricity

It is the SBDC's view that the current exemptions for commercial electricity on-selling facilitate an environment that allows shopping centre landlords to install "embedded electricity networks" within the shopping centre for the purposes of purchasing electricity at a reduced price from a licensed energy retailer (such as Synergy), without any requirements to be fair or transparent about on-selling costs (at inflated prices) to their tenants.

Embedded electricity networks in shopping centres allow the physical aggregation of the energy consumed within a complex to a single point, treating the shopping centre as one customer. The theory behind this is to enable the landlord to purchase electricity in bulk from licensed energy retailers and on-sell to tenants at a cheaper rate than would otherwise be possible.

In addition to cheaper electricity, embedded network suppliers advertise that other benefits of these systems include easier management of electricity, greater flexibility in electricity relationships and opportunities to further reduce costs by introducing energy savings measures.

The problem is that it appears a large number of shopping centre landlords are not passing on this cheaper electricity rate to tenants, and are instead using their ability to on-sell electricity as an additional income stream. It is openly advertised by embedded network suppliers that on-selling of electricity can be an income stream for site owners and managers. The SBDC has observed that in advertisements for the sale of shopping centres the revenue derived from on-selling electricity is advertised as a key benefit to prospective landlords.

While it has been argued that tenants have a choice in where they obtain their electricity, it can be very difficult for tenants to exercise this choice. This is due to either the costs of having a meter replaced and connected to an external electricity network often prohibitive, or unavailability i.e if an energy retailer elects not to sell to a customer inside an embedded network. The lack of transparency about the rate a landlord may be inflating the cost of electricity for on-selling, and that a tenant has a right to negotiate this, is also an issue that makes it difficult for a tenant to exercise any options they may have.

The SBDC is a strong advocate for fairness in business dealings, particularly when there is an imbalance of power between parties. It is not uncommon for small business operators to lack experience in negotiations, have limited negotiating power, have English as a second language, be time poor and not have engaged the services of a lawyer or accountant. For this reason, they are often faced with unfair contracts and business practices. State and Federal Governments have recognised the vulnerability of small businesses and for this reason, various protections including those contained in the CT Act have been introduced and shortly, “unfair contract terms in standard form contracts” will be extended to assist small businesses.

The SBDC appreciates that shopping centre landlords have a right to make money from their investment, and that there may be costs associated with the ongoing maintenance of embedded electricity networks. This being said, the SBDC does not believe that inflating the cost of an essential utility is fair or reasonable treatment of tenants, particularly as tenants cannot operate lighting or other equipment without it.

While it is arguable that recovering the cost of maintaining an embedded electricity network would be considered a management fee under the CT Act and prohibited from being passed onto tenants, this has not yet been tested in the State Administrative Tribunal. In any case, the SBDC believes it is appropriate to fix the issue via the on-selling exemptions rather than relying on the protections under the CT Act, especially given the CT Act does not capture all the types of small businesses affected by these exemptions.

The SBDC argues that just as residential customers have protections from on-sellers of electricity, so too should small businesses.

Proposed amendments

The PUO has presented a number of amendments to the Electricity Exemption Order and Gas Exemption Order, which the SBDC has considered in light of the above information. The SBDC has elected to only comment on those amendments that directly impact on small business tenants.

Amendment One: Exempt a third party providing electricity or gas supply services on behalf of a commercial on-seller from the requirement to hold a transmission/distribution/retail licence (electricity), or distribution licence (gas).

The SBDC has no objections to this proposal, providing restrictions on what costs are passed on to tenants are introduced – this is elaborated on in the next section.

Amendment Four: Grant a new gas trading licence exemption to allow a person to on-sell gas on commercial premises that it has control or management of, and allow a third party to operate under this licence exemption on behalf of the on-seller.

The SBDC has no objections to this proposal, providing restrictions on what costs are passed on to tenants are introduced.

Amendment Five: Include a condition in all electricity and gas on-selling licence exemptions that the on-seller must provide its customer with billing information, which must include information that clearly sets out the quantity and price of electricity/gas supplied to the customer and the fees and charges payable by the customer for the provision of electricity/gas services.

The SBDC supports this proposal.

Recommended additional amendments

While Amendment Five seeks to address the current lack of transparent information being provided to tenants, the SBDC asserts that further changes are needed.

In this case, the SBDC argues that the conditions placed on residential electricity on-selling arrangements be extended to commercial on-selling arrangements. Specifically:

- If the electricity supplied to the premises is supplied by Horizon Power or Synergy, the on-seller is not allowed to charge its tenants more than the per unit consumption charge in Horizon Power or Synergy's regulated business electricity retail tariff.
- Any fees or charges imposed by the on-seller for 'electricity services' must not, in a licence area in which Horizon Power or Synergy sells electricity to customers, exceed the daily fixed supply charge component of Horizon Power or Synergy's regulated business tariff.
- If electricity supplied to the premises is generated using generating works owned or operated by the on-seller, any charge for the electricity must not exceed the amount necessary for the on-seller to recover the costs of generation.
- As is currently being proposed by the PUO, the on-seller must provide its customer with billing information, which must include information that clearly sets out the quantity and price of electricity/gas supplied to the customer and the fees and charges payable by the customer for the provision of electricity/gas services.

We note that these amendments were in fact suggested by the PUO in 2012 as a way of addressing the SBDC's concerns, and have yet to be implemented.

For any queries about the content of this submission, please contact Ms Lauren Westcott, Senior Policy and Advocacy Officer on 6552 3307 or at lauren.westcott@smallbusiness.wa.gov.au.

Yours sincerely



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SMALL BUSINESS COMMISSIONER

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