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**Ministerial Council on Energy Standing Committee of Officials -
National Framework for Electricity and Gas Distribution and Retail Regulation
Foreword and Consultation Paper**

AGL is Australia's leading energy retailer and also has significant interests in distribution networks. AGL therefore welcomes the opportunity to contribute to the development of the national regulatory framework.

AGL looks forward to assisting in the development of a framework which delivers a more streamlined, efficient and lower cost basis for economic regulation. Our detailed comments on the matters raised in the *Consultation Paper* are attached.

As you may be aware, AGL is scheduled to demerge into separate energy and infrastructure companies from April this year. Therefore, the relevant contact personnel going forward will be: for retail matters, Sean Kelly on (08) 8299 5149 or email skelly@agl.com.au and for distribution matters, Rob Wiles on (02) 9921 2585 or email rwiles@agl.com.au.

Yours sincerely,

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The Australian Gas Light Company

Submission to the Ministerial Council on Energy

Standing Committee of Officials

**NATIONAL FRAMEWORK FOR ELECTRICITY AND GAS DISTRIBUTION AND
RETAIL REGULATION**

Response to Consultation Paper

31 January 2006

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EXECUTIVE SUMMARY

AGL is Australia's leading energy retailer and also has significant interests in distribution networks. AGL therefore is well placed to respond to the Ministerial Council of Energy (*MCE*) and Standing Committee of Officials (*SCO*) Consultation Paper on the National Framework for Electricity and Gas Distribution and Retail Regulation (*Consultation Paper*).

The current complexity and differences in regulatory requirements across the various jurisdictions impose significant compliance costs upon participants in the energy market. This, in turn, diminishes the benefits that would otherwise flow from energy market reform. The introduction of a national regulatory framework is an opportunity to implement a significant 'step change' in the energy industry. In the regulated environment of the energy industry, where the costs and efficiency of operations are significantly influenced by regulation, it is essential that the regulatory framework meets the principles of best practice regulation and delivers the identified policy objectives.

AGL supports a national framework where the National Electricity Law (*NEL*) and National Gas Law (*NGL*) set out overall principles of the framework, with specific requirements detailed in the National Electricity Rules (*NER*) and National Gas Rules (*NGR*). AGL supports the use of separate instruments for electricity and gas, but notes the importance of maintaining consistency as far as practical. AGL agrees that licences should not be used as a means to impose regulatory obligations, but believes that a simple form of licences needs to be retained as a means to ensure retailers and distributors meet minimum financial criteria and requirements for technical, operational and commercial competency.

Process for progressing regulatory framework

AGL notes that the Consultation Paper addresses significant areas of detail as well as the broad structure of the new national regulatory framework. AGL has previously emphasised the importance of establishing clear objectives and principles to guide the development of detailed provisions. While the Consultation Paper has made a useful contribution to the debate by offering criteria for best practice regulation, AGL believes that greater clarity is required about the process for resolving the future regulatory regime for energy retailing and distribution.

AGL is concerned by the current lack of clarity around the process to be adopted in developing the national regulatory framework, particularly in respect of retail matters. AGL submits that the MCE should outline its approach prior to progressing the framework any further. AGL believes that in order to achieve broad based support for, and confidence in, the national regulatory framework, it is imperative to ensure both industry participants and consumer groups are involved in each step of its development. The national regulatory framework must not become an amalgamation of existing regulation. Such an outcome would represent the waste of a unique opportunity to reform and improve the efficiency, innovation and competitiveness of the Australian energy industry.

Price regulation of distribution is the subject of other modules of the MCE reform process. AGL agrees that regulation of networks pricing is an important component of the national law and rules for both electricity and gas, but notes that the content has been the subject of extensive consultation and review by the Productivity Commission (PC) and is being currently addressed by an Expert Panel appointed by the MCE. AGL is concerned that specific proposals in the Consultation Paper are very different from the approach taken by the PC following its extensive consultations, and are supportive of an intrusive heavy handed approach that is at odds with the policy direction provided by governments through the Australian Energy Markets Agreement.

Regulatory Principles

AGL believes that in order to develop an effective, nationally consistent regulatory framework as envisaged by the MCE, all regulation needs to be made in accordance with the following principles:

- Regulators (both rule makers and rule enforcers) must be independent, and must look to achieve an appropriate balance between the rights and responsibilities of all participants in the energy market, including customers;
- Regulation should only be imposed where competition does not exercise sufficient constraint on the market participants and should apply only to the extent necessary to constrain the exercise of market power. Energy specific regulation should not be contemplated unless there is a demonstrable point of market failure that is not sufficiently addressed through generally applicable law and regulation;
- Regulation should be designed to achieve consistency across fuels and jurisdictions in so far as is practical, and in so far as the pursuit of consistency does not impede an overall reduction in the level of regulation. That is to say, where there is scope to reduce regulation in one jurisdiction or in respect of one fuel, nothing in the legislative framework should preclude this approach in favour of maintaining the principle of consistency; and
- The regulatory framework should be designed to ensure that it provides a network of complementary obligations on market participants. If one participant provides a service in accordance with regulatory obligations, or in accordance with reasonable end-user expectations, there must be sufficient regulatory incentive on other market participants to provide the supporting services necessary, and in the manner necessary, for that participant to fulfil its obligations.

Summary of comments on specific recommendations

Distributor/ Retailer Relationship

AGL submits that the relationships between customers, retailers and distributors need to be structured to support the current paradigm where retailers are equipped to manage the interface with customers in a competitive marketplace for energy supply – and distributors are not. Thus, the principal relationship with customers for the majority of transactions will be handled by the retailer, with the distributor providing

the necessary support services to the retailer under a Distribution Use of System (*UOS*) Agreement. AGL acknowledges, in addition, that there are some circumstances (in particular, new connections and network faults) where a direct relationship between a distributor and customer is needed, and believes that these can be dealt with separately.

AGL acknowledges that achieving an equitable balance in managing the distributor – retailer interface is a difficult issue. AGL has experience on both sides and has devoted extensive effort to formulate a fair and reasonable approach. Retailers now operate in a competitive marketplace and face increasingly sophisticated customers. They need to establish a firm basis for the provision of network services that supports customers' needs for secure and reliable supply. On the other hand distributors operate under economic regulation which imposes limitations on their ability to be flexible in providing services. Compounding the problem has been a disparate regulatory approach across jurisdictions and between electricity and gas.

AGL does not believe that it is appropriate for the Australian Energy Market Commission (*AEMC*) to develop a default UOS agreement. Notwithstanding the monopoly status of distributors the relationship between retailers and distributors is a commercial one and it is unlikely to be in any party's interests to have a regulatory body impose provisions in a commercial contract. Such an intrusive approach is also contrary to the policy direction agreed by Australian Governments. AGL believes that the more appropriate approach is for the law to require the service provider to propose, and seek regulator approval for, terms and conditions of a UOS agreement, with a requirement for the regulator to conduct public consultation in deciding whether the terms and conditions are satisfactory. This approach is similar to the current Gas Code requirements. AGL submits that with suitable enhancements to the law and rules a fair and equitable balance can be achieved between the interests of retailers and distributors. Such enhancements would provide guidance on the content of UOS agreements, addressing matters such as service standards and remedies and providing direction in relation to the achievement of national consistency where practical.

Consumer Protection

As noted above, AGL is concerned to ensure that an equitable and open process of consultation is adopted in developing the consumer protection regulatory framework. AGL views the development of an effective, nationally consistent framework of retail regulation as a critical element of the framework project. In order for this project to deliver true cost efficiencies and effective market reform, the regulation of a retailer's relationship with customers must be determined by reference to what is necessary in the current market, rather than by reference to existing regulation.

AGL agrees that a national consumer protection regime is needed to reflect the 'essential service' character of energy supply, but emphasises that the development of national energy-specific rules must be guided by the objectives and principles of best practice regulation. In order to achieve the necessary balance between the public interest in protecting consumers, and the public interest in facilitating the efficient operation of energy retailers, regulation must be imposed only where necessary. Regulation should be imposed where competition does not exert a sufficient

constraint on retailers, and where generally applicable laws or regulations do not provide adequate protection. Federal and jurisdictional laws establish a firm set of legal obligations on all businesses operating in Australia, and the need for energy specific regulation should be considered in this context. It is imperative that the retail regulatory framework achieves an appropriate balance of rights and obligations between industry participants and customers.

Step-In-Retailer

AGL agrees that the national framework should establish a Step-In Retailer (*SIR*) regime to replace the various state-based Retailer of Last Resort Schemes. To put the scheme in context, AGL sees the SIR regime being used only in the event that a retailer fails and after all attempts have been made to facilitate the orderly transition of customers prior to the retailer ceasing operations. Its primary role is therefore to maintain customer supply and cash flows from customers, through retailers to generators and network service providers.

AGL does not, however, agree with the detail of the SIR regime as proposed in the Consultation Paper. Firstly, AGL believes that it is an essential feature of a SIR regime that retailers are assured of full cost recovery, which does not appear to be a feature of the regime as proposed. A SIR regime that jeopardises the financial viability of the SIRs cannot be considered effective since it risks giving rise to a further SIR event. Secondly, AGL is very concerned that the measures proposed in the Consultation Paper to manage a retailer's risk arising from acquiring unhedged loads in the form of new retail customers will not be effective and, in fact, would serve only to increase the risks faced by retailers. AGL therefore submits that there needs to be further consultation with participants and customer representatives prior to progressing the SIR approach.

Dispute Resolution

AGL agrees there is a need for informal, fair and efficient dispute resolution, but is concerned that the proposal to retain jurisdictional schemes is inconsistent with the broader objective of the move to a national regulatory framework. At the minimum there needs to be an explicit objective of achieving national consistency even if the administration remains at the jurisdictional level. Arrangements should not preclude a national dispute resolution scheme should such a structure be viewed as more efficient and effective in the future.

Jurisdictional Directions

AGL notes that the proposal to permit 'jurisdictional directions' does not accord with the principle of national consistency, and AGL does not believe that this proposal accords with the broader objectives of the national regulatory framework. AGL is of the view that ultimately there should be no residual jurisdictional energy specific customer protection regulation.

Conclusion

The Consultation Paper addresses a wide range of important issues in the establishment of a national regulatory framework for energy retailing and distribution, and in the development of specific provisions within the framework. Finalisation of the framework and its content will be substantial tasks that will benefit from the active involvement of industry representatives. AGL looks forward to working further with the MCE and the SCO in developing the national regulatory framework for the Australian energy industry.

PART A PRELIMINARY COMMENTS AND LEGAL ARCHITECTURE

1. PRELIMINARY COMMENTS

1.1 Elements of an effective national regulatory framework

As noted in AGL's earlier submission to the MCE's National Framework for Electricity and Gas Distribution and Retail Regulation Issues Paper (dated 16 November 2004), AGL believes that an effective national regulatory framework must have the following characteristics:

- The regulatory framework must be based on a clear separation between rule making and rule enforcement and monitoring. AGL notes that the Consultation Paper has sought to give effect to this principle, and supports the Consultation Paper's suggestion that the AEMC is the body responsible for making the rules, and the Australian Energy Regulator (*AER*) is the body responsible for enforcing the rules;
- The regulatory framework must be premised on clear objectives that reflect principles of best practice regulation¹, and be directed at addressing circumstances only where:
 - there is clear and demonstrable market failure. Competition is to be preferred to regulation, and where competition is effective, there should be reliance on those competitive forces rather than regulation; and
 - existing consumer protection laws and regulation do not adequately address issues of market failure.
- AGL is concerned to ensure that all regulation comprising the national framework is formulated in accordance with these principles, and is not included on the grounds that such regulation forms part of the existing jurisdictional frameworks;
- Regulation must be nationally consistent, and consistent across gas and electricity in so far as possible (subject to the objective of reducing the level of regulation);
- The costs of regulation under a national framework must not outweigh the benefits. In making the rules, the AEMC must establish if the regulatory burden placed on participants is necessary to achieve the articulated objectives;
- The regulatory framework must be sufficiently flexible to encourage innovation and efficiency from market participants, and be adaptable to change through accountable, transparent and consultative change management processes;

¹ See Appendix 1 which outlines principles of best practice regulation as established by various regulatory bodies.

- The regulatory framework must ensure that decision-making bodies are accountable to all parties through fair and transparent procedures. Key regulatory decisions should be subject to a merits based review; and
- The regulatory framework must be focussed on fostering investment certainty in all sectors of the energy market.

2. RECOMMENDATIONS REGARDING LEGAL ARCHITECTURE

2.1 Appropriate Policy Criteria

AGL welcomes the approach adopted by the Consultation Paper in formulating the proposed legislative framework, which is articulated as follows²:

The approach developed in this Paper represents a significant rationalisation of the current arrangements. As such it is intended to improve the transparency of the regulatory arrangements, lessen duplication and reduce compliance costs.

AGL supports the stated aims of the Consultation Paper, and believes that the framework proposed largely accords with the principles outlined by AGL as being essential to an effective national framework, namely:

- the separation of the rule making function of the AEMC from the enforcement function of the AER;
- the removal of energy specific regulation where general consumer protection law is adequate.
- the inclusion of an industry based gas market governance body in the framework. AGL believes this is essential for efficient and effective Rule making, and will ensure that the costs of gas market regulation do not outweigh the benefits.

However, AGL believes that in order to ensure the objectives outlined by the Consultation Paper are achieved, there needs to be an explicit requirement that the rules made under the NEL and NGL accord with the principle that competition is to be preferred to regulation. That is to say, the rules must be formulated in order to address identified points of market failure, and where general consumer protection laws are not adequate.

2.2 Comments on Specific Recommendations

2.2.1 Regulatory Instruments

2.2.1(a) Legislative scheme

AGL supports the establishment of a separate national legislative scheme for each of gas and electricity. AGL agrees that:

² Consultation Paper, at page 9.

- the National Electricity Law (*NEL*) and National Gas Law (*NGL*) should outline the basic legal architecture;
- rules in respect of electricity and gas should be passed as subordinate legislative instruments in pursuance of the NEL and NGL;
- the NEL and NGL should place parameters around the scope of the rules; and
- the rules are to set out the national obligations applicable in respect of the gas and electricity sectors.

AGL also makes the point that while the goal of consistency across jurisdictions and across fuels is an important one, this aim should be subject to the primary objective of reducing the overall level of regulation. That is to say, where there is scope to reduce regulation in one jurisdiction (due to differing levels of competition in each jurisdiction), nothing in the legislative framework should preclude such an approach.

2.2.1(b) Gas market governance

AGL recommends an industry-based approach to the management of the gas market (referred to as a ‘co-regulatory’ model). The management of the gas market should be under an industry-based limited liability, non-profit company with a board and an executive team. AGL considers it essential that industry should have a greater role in the development of codes and rules to ensure that the outcomes are commercially viable and adhere to principles of good regulation. Clearly, this co-regulatory model would require compliance with the same principles of regulation as applied to the AEMC. AGL’s position in respect of gas market governance is outlined in detail in Section D4.

2.2.1(c) No duplication of consumer protection rules

AGL is firmly of the view that energy specific consumer protection rules must be introduced only where determined appropriate in accordance with the framework objectives and principles as set out in Part A, Section 1.1 above.

AGL strongly supports the removal of regulatory provisions that duplicate the various jurisdictional Fair Trading Acts (*FTAs*) and other general consumer protection law, codes and guidelines such as the Trade Practices Act (*TPA*). Under current jurisdictional regimes there is significant duplication and inconsistency, which creates inefficiencies and impedes national business operations. Energy specific regulation should only be implemented where general consumer protection mechanisms are not adequate to address issues of market failure.

Further, AGL believes that there needs to be a concerted attempt from jurisdictional governments to achieve consistency between the FTAs through legislative amendments. For example, the FTAs in the different jurisdictions are inconsistent in respect of permitted hours of contact for marketing purposes. AGL acknowledges and supports the joint initiative of the NSW Office of Fair Trading and the Consumer Affairs Victoria to harmonise elements of the FTAs. However, AGL believes it is necessary to instigate a national harmonisation project, which would include nationally consistent laws regarding explicit informed consent (if deemed necessary), cooling off periods and contact hours.

2.2.1(d) Other regulatory instruments

AGL agrees that the national regulatory framework should limit the use of other forms of regulatory instruments. The Consultation Paper has outlined an exception to this principle, whereby governments of each jurisdiction could issue Jurisdictional Directions to the AER and market participants. AGL has some concerns with this proposal, which are detailed in Part D, Section 8.

2.2.2 Roles and responsibilities

2.2.2(a) Role of AEMC and AER

AGL supports a separation of rule making powers from rule enforcement powers. AGL agrees that:

- the AEMC should be responsible for making and amending rules;
- the AER should be responsible for application and enforcement of the rules; and
- AGL would support providing the AER with the powers to make Statements of Requirements in respect of specific regulatory functions provided that:
 - these powers are limited to providing guidance as to interpretation of the rules only. Statement of Requirements should not impose any obligations on energy market participants but rather clarify and define existing obligations within the rules; and
 - the matters that are the subject of Statements of Requirements are limited to those matters specified in the rules.

2.2.2(b) Rule development and rule change

AGL emphasises that rule formation, as well as rule change, should be done in accordance with a comprehensive and transparent consultative process that allows stakeholder consideration and comment. Stakeholders must have the opportunity to propose rule changes through an established rule change process.

Industry should be given a greater role in developing codes and rules to ensure rules meet the principles of best practice regulation and are commercially viable. AGL submits that participants must have an opportunity to participate in the consideration of:

- whether energy specific regulation is required;
- what the objectives of that regulation should be; and
- the form the regulation is to take in order to meet those objectives.

PART B PRICE REGULATION OF DISTRIBUTION

1. General comment

AGL has consistently supported full and open consultation on the major MCE reform topics, including a national framework for retail and distribution. However, AGL also considers that each of these consultations should have a clear focus and not pre-empt or involve excessive overlap with other MCE processes.

AGL has previously submitted that distribution access and pricing are specialised matters that are not appropriate for consideration in a retail and distribution framework, and should be addressed in other relevant MCE processes.³ AGL has further submitted that national framework for distribution access should be primarily based on the access principles established in the Gas Access Regime and the principles in the National Access Regime (as accepted by the Government for inclusion in Part IIIA of the TPA).

In AGL's view, Part B of the Consultation Paper goes well beyond the scope of adopting the existing national frameworks, and develops a particular version what an alternative distribution access framework should look like. In doing so, the paper's proposals:

- pre-empt the Expert Panel's Review of Revenue and Network Pricing across the Energy Market;
- pre-empt the MCE's response to the Productivity Commission's review of the Gas Access Regime (*GAR*);
- revisit previous relevant reviews of pricing principles conducted by the Productivity Commission (*PC*), and diverge very significantly from the Commission's recommendations;
- are inconsistent with the access framework established under Part IIIA of the Trade Practices Act and the Competition Principles Agreement;
- generally exhibit a preference for heavy handed regulation, in contrast to the stated objective of energy market reform to reduce the complexity and cost of regulation⁴.

We discuss these matters further below.

³ AGL submission on MCE/SCO Issues Paper *National Framework for Electricity and Gas Distribution and Retail Regulation*, 16 November 2004 (esp section 4); and AGL submission on MCE/SCO *Proposed Framework Schedule for Transfer of Distribution and Retail Functions*, 15 November 2005.

⁴ COAG *EnergyMarket Agreement* 6 June 2004 – objective 2.1(b)(ii): “streamline and improve the quality of economic regulation across energy markets to lower the cost and complexity of regulation facing investors, enhance regulatory certainty, and lower barriers to competition”

2. Work of the Expert Panel

Part B of the Consultation Paper sets out (s 1.3) a view of a ‘national framework for the regulation of distribution prices in the gas and electricity sectors’.

After describing a particular legislative structure, Part B sets out the elements for distribution price regulation and presents ‘more detailed policy principles and proposals in relation to each element’.⁵ The ‘elements’ of distribution regulation are:

- the scope of regulation;
- the form of price cap regulation for distribution services;
- principles for tariff setting;
- service performance targets;
- process for regulation of price capped services;
- information disclosure requirements;
- connection and capital contribution requirements; and
- distribution network expansion rules.

A simple comparison of the Consultation Paper framework with the forthcoming task of the Expert Panel shows the very high degree of overlap and duplication in the Consultation Paper’s proposals. The Expert Panel’s task will be to:

Develop a common set of arrangements for economic regulation of access to gas and electricity transmission and distribution networks⁶ (emphasis added)

The Panel is specifically directed to address a number of matters identical to the suggested ‘elements’ in the Consultation Paper, including:

- the form of price control and guidance;
- CPI-X building block control and potential alternatives;
- the scope of the regulator’s discretion, including propose/respond models;
- the scope of regulation;
- regulatory procedures; and
- the appropriate scope of information gathering powers for economic regulation.

As a matter of process, the Expert Panel’s work program, associated public consultation and final output should take absolute precedence over anything in the Consultation Paper. The Expert Panel has already commenced consultation by inviting comment on matters raised in its terms of reference. It is clear that this process will be a major source of policy advice to the MCE on access and pricing.

The formation of the Expert Panel may not have been predictable at the time of completion of the Consultation Paper (May 2005). However, it had always been the intention of the MCE work program to address access issues in other processes, such

⁵ Consultation Paper, p 11

⁶ MCE Expert Panel Review of the Guidance for a National Approach to Economic Regulation for Energy Transmission and Distribution Network Access, *Terms of Reference*, November 2005

as its response to the PC review of the GAR (see below)⁷. AGL remains firmly of the view that the National Retail and Distribution Framework is an inappropriate forum in which to address access pricing matters.

3. MCE response to the PC

In November 2005, the MCE issued a proposed response to the Productivity Commission's review of the GAR. The response addressed issues such as the objectives of price regulation and associated amendments to simplify the GAR, and the coverage test for regulation of pipeline services. These are also matters addressed in the Consultation Paper in the context of an access framework for distribution services.⁸ Further, the MCE indicated that it was referring specific PC's recommendations on price regulation and regulatory processes to the Expert Panel for advice on a response. Similar matters are also addressed in the Consultation Paper (see 4 below).

The Consultation Paper's recommendations therefore override or pre-empt major elements of the MCE's final response to the PC. Consistent with the view expressed above, AGL maintains that it is inappropriate to address access issues in the context of a national retail and distribution framework when other more relevant processes exist.

4. Previous reviews and consultation

Much of Part B in the Consultation Paper traverses ground already reported on by the PC in its reviews of the National Access Regime and Gas Access Regime and which has been (or will be) responded to by the Government or the MCE. Further, the paper develops alternative pricing rules which diverge in major respects from those recommended by these previous reviews.

A framework for national access pricing is already incorporated in:

- the principles accepted by the Government for incorporation into the National Access Regime;⁹
- the principles recommended by the Productivity Commission for incorporation into the GAR (which mirror the principles for the National Access Regime).¹⁰

The above principles provide specific pricing and operational guidance for setting reference tariffs under the respective regimes. In addition, the PC reviewed the processes and timelines for setting reference tariffs under the GAR.

In contrast, the Consultation Paper's proposals envisage that, apart from some high level objectives in the NEL/NGL, *'the NEL/NGL should not contain any further prescription in relation to the form of distribution price regulation, or the form of*

⁷ Other foreshadowed processes for addressing access issues were the MCE's intention to develop a *national approach to energy access*, and amendments to the *Trade Practices Act* following the PC review of the NAR.

⁸ Part B section 3 proposes three objectives for price regulation. Section 2 sets out criteria which test whether particular services should be covered by the scope of regulation.

⁹ Included in the Trade Practices Amendment (National Access Regime) Bill 2005

¹⁰ Productivity Commission *Review of the Gas Access Regime*, recommendations 7.1 – 7.3

price control adopted within any given form of regulation'.¹¹ Instead, the rules should specify (a) the applicable forms of regulation; (b) when these forms of regulation apply; and (c) provide the relevant guidance in their application. The Consultation Paper then sets out its proposed rules for:

- guidance on the various elements of costs¹²;
- proposed principles of tariff setting¹³; and
- a process for the AER in determining price caps¹⁴.

The Consultation Paper is thus proposing an alternative framework for and content of access pricing which would revisit lengthy and thorough investigations conducted by the PC, (which in turn involved extensive market consultation). Further, the paper attaches no weight to the fact that the PC's pricing principles, as accepted by the Government, are now to be included in the National Access Regime. The Expert Panel has been specifically directed to take these principles into account.

AGL considers that the Consultation Paper revisits previous reviews and establishes an alternative and quite different framework for access pricing. Given that the MCE and the Expert Panel will be addressing the PC's pricing recommendations, the presentation of a further access pricing framework at this time will serve only to confuse the market and not assist development of a national approach to energy regulation.

5. Inconsistent with the access framework established under Part IIIA

The MCE has agreed that the national electricity and gas regimes will be certified under section 44N of Part IIIA the Trade Practices Act, which cites the criteria in clause 6 of the Competition Principles Agreement (CPA) to establish whether a particular regime is 'effective'. The terms of reference of the Expert Panel state that the Government proposes including the (newly introduced)¹⁵ pricing principles in the National Access Regime in the criteria for certification in the CPA. Hence, the Expert Panel is directed to consider how its own recommended pricing principles will best meet certification requirements.

It is AGL's view that the access pricing framework in the Consultation Paper would not be capable of meeting certification criteria. The paper's framework is often inconsistent with the National Access Regime under Part IIIA of the TPA because:

- **It does not adopt an access approach and is inconsistent with the CPA;** for example:
 - the proposed rules will prescribe the forms of regulation (eg building blocks or other) and the circumstances when the AER is to adopt each form¹⁶, whereas the service provider should be able to propose a particular form; and

¹¹ Consultation Paper Pt B, s 3.1

¹² Consultation Paper Pt B, s 3.1(b)

¹³ Consultation Paper Pt B, s 4.1(a)

¹⁴ Consultation Paper Pt B, s 6

¹⁵ AGL notes that the TPA Amendment Bill is in the final stages of progress in federal Parliament

¹⁶ Consultation Paper Pt B, s 3.1

- the proposed form of regulation mandates a CPI-X price cap¹⁷ and again the service provider should be able to propose a particular form of price limitation;
- **It does not provide a basis for negotiation of access, but uses the old paradigm of regulatory control;** for example:
 - the “process for regulation of price capped services” (Part B section 6) sets out a regulator-determined approach to setting prices. The distributor is allowed to submit price arrangements “consistent with the framework and required information set out by the AER”.¹⁸ The envisaged powers of the AER in this framework appear very akin to the rule-making powers of the Victorian regulator, rather than the administrative role provided for the regulator in both the National and Gas Access Regimes (see section 6 below);
 - it is proposed that tariffs should take into account any explicit jurisdictional policy requirements as set out in the Jurisdictional Direction;¹⁹ and
 - it is proposed that there should be a constraint on the extent to which tariffs can be changed year-on-year.²⁰
- **It substitutes the regulator for the customer in the regulatory process;** for example:

It is AGL’s view that regulation of network performance targets under an access framework (ie targets relating to the reliability of distributed gas or electricity or activities such as network call centre performance) should be developed as part of a integrated price-service offering by distributors. This offering should, where possible, take account of quantified end-user preferences, should be appropriately costed for pricing purposes and should be subject to public consultation and regulatory approval. In contrast, the Consultation Paper proposes that distributor service performance targets should be mandated as part of the national regulatory regime.²¹ The paper also proposes that these user-related targets, which would be additional to the ‘minimum’ technical and safety requirements of the jurisdictions, should be set (as a default) by the AER.

As a matter of principle, AGL considers that it is inconsistent with the regulator’s administrative role of balancing user preferences and price/service outcomes that the regulator or any other external party should be the entity proposing access-related performance targets. It is further inconsistent with the regulators’ role that these standards should be specified without users agreeing to such standards and the extra costs involved, either directly (via public consultation) or indirectly (via relevant user preference surveys); and

¹⁷ Consultation Paper Pt B, s 3.1

¹⁸ Consultation Paper Pt B, s 6.1

¹⁹ Consultation Paper Pt B, s 4.1(a)

²⁰ as above

²¹ Consultation Paper Pt B, s 5.1(a)

- **the paper proposes a very detailed (and in AGL’s assessment, unworkable) series of rules as the basis for charging capital contributions²²** rather than relegating this matter to pricing principles as the Gas Code does, and allowing the distributor to develop a policy acceptable to customers within this framework.

In summary, the potential for negotiation of the terms and conditions of access (in accordance with Part IIIA) appears minimal in the Consultation Paper’s framework. The plethora of new rule making provided for in the framework also suggests a rigid and uniform approach to access rather than the diversity of terms and conditions envisaged under the CPA²³.

6. Exhibits a preference for heavy handed regulation

As indicated above, the Consultation Paper adopts a heavy handed approach to access regulation, contrary to the Productivity Commission’s recommendations for the GAR. The paper’s proposals would increase the regulator’s discretion and levels of intrusion above that in the existing National and Gas frameworks, would be more prescriptive on the service provider and possibly eliminate the limited discretion the service provider presently has. The Consultation Paper does not recognise the legitimate role of the service provider in having discretion over certain matters (as is required in a true ‘propose-respond’ model).

In fact, the Consultation Paper itself admits that its framework *‘is not as extensive a propose-respond model as that which currently applies to gas distribution businesses under the Gas Code’*.²⁴ The reason given for this more restrictive model is that ‘some jurisdictions’ (Victoria is cited) pre-empt the distributors’ proposals by issuing their framework requirements as a first step and that this therefore *‘enhances the efficiency (and lowers the cost) of the overall process.’*²⁵

These and other comments exhibit a narrow perspective of access regulation, and reflect an outlook influenced by jurisdictional regulation of electricity distribution. AGL makes the following observations:

- Jurisdictional regulation of electricity distribution is carried under local legislation (including Tariff Orders²⁶) which derogate from the national electricity framework. The Expert Panel will be developing key aspects of economic regulation applicable to both gas and electricity which will (in due course) obviate the need for jurisdictional derogations;
- Excessive discretion allowed to a regulator (including the power to make pre-emptive rules) results from the lack of an adequate guiding framework. It is not, as the Consultation Paper appears to suggest, an indicator of ‘efficiency’ in a process;
- The paper does not demonstrate why an approach based on current jurisdictional electricity regulation is appropriate for gas distribution, and simply assumes that it is; and

²² Consultation Paper Pt B, s 8

²³ CPA clause 6(4)(f)

²⁴ Consultation Paper p 34

²⁵ as above

²⁶ Some of which also apply to gas, eg Victoria

- The proposed framework assumes that the role of the regulator is to *control* the service provider rather than to administer a regime to *restrain market power*. The latter is the fundamental premise of access regulation in the National and Gas Access Regimes.

7. Conclusion

AGL is strongly of the view that distribution access pricing for gas and electricity should not be part of the current consultation on a national retail and distribution framework. Consideration of these matters now would pre-empt the results of forthcoming consultations by the Expert Panel and the MCE, and revisit matters considered after lengthy investigation by the PC.

Moreover, the distribution access pricing framework developed in the Consultation Paper diverges very considerably from the principles accepted by the Government for the National Access Regime and recommended by the PC for the Gas Access Regime. The introduction of an alternative framework into public discussion at this time will not assist further development of a national approach to energy regulation, and may only confuse forthcoming consultations.

Finally, in AGL's view, the distribution access pricing proposals in the Consultation Paper are heavy handed, adopt a narrow perspective of access regulation, and in AGL's assessment are unlikely to meet the tests for certification under the National Access Regime.

AGL will be responding to the forthcoming consultations by the Expert Panel and the MCE on access issues in due course.

PART C CONSUMER PROTECTION

1. OVERVIEW

AGL accepts that as energy is an essential service, general consumer protection provisions will not provide adequate protection in all circumstances. AGL agrees that where energy specific consumer protection rules are required, they should be applied through a nationally uniform regime and enforced by a national regulator. However, AGL believes that in formulating this regulation, the AEMC must adopt a rigorous and transparent process, whereby the need for energy specific regulation and the objectives of any regulation are widely consulted on and established with reference to consistent principles, such as those outlined below. Rule changes should be subject to the same process.

AGL is concerned to ensure that the rules under the national regulatory framework are not premised on an assumption that all matters currently subject to jurisdictional regulation should remain subject to regulation. AGL notes that the COAG's stated objective for the energy market reform process is to:

Streamline and improve the quality of economic regulation across energy markets, to lower the cost and complexity of regulation facing investors, enhance regulatory certainty and lower barriers to competition.

AGL believes that in order to achieve this objective it is necessary to approach the rule making process as completely distinct from existing jurisdictional regimes. The national regulatory framework must be based on a consideration of what is necessary and rational, rather than what existing regulation stakeholders might expect to see replicated.

Recommended principles for determining energy specific consumer protection framework

AGL believes that the following principles should determine the scope and content of the national energy specific consumer protection framework:

- **Competition preferred over regulation**

A competitive market represents the most effective and efficient form of customer protection. Jurisdictional regulators have periodically reviewed competition within the energy market with a view to reviewing the degree of regulatory controls deemed appropriate. AGL submits that in determining the appropriate level of regulation, it is necessary to look for areas where competition does not exercise sufficient constraint. It should not be assumed that there is a need for regulatory intervention to achieve a properly functioning market.

- **Adequacy of generally applicable consumer protection law**

AGL agrees with the position in the Consultation Paper that duplication of general consumer protection regulation should be avoided. The TPA, Privacy Act, Electronic Transactions Acts, and state FTAs provide for a comprehensive national consumer protection regime across all jurisdictions, and these provisions should not be duplicated in energy-specific regulation. Energy specific regulation should only be introduced where general consumer protection mechanisms are not adequate.

- **Improved quality of regulation through national consistency**

AGL is of the view that there wherever possible (and subject to the objective of reducing the overall level of regulation) there should be no jurisdictional differences in the applicable customer protection regime. The introduction of a more cost effective and efficient regulatory framework is one of the principal rationales of the national regulatory framework process, and jurisdictional inconsistency will impede efficiency and increase regulatory costs.

2. DISTRIBUTOR OBLIGATIONS TO PROVIDE CONNECTION SERVICES

2.1 Appropriate Policy Criteria

The Consultation Paper has advocated a ‘triangular’ model, whereby the distributor provides all distributor services under a direct contract with the customer. AGL does not propose to respond to the Consultation Paper on the basis of a ‘triangular’ or a ‘linear’ model, as AGL believes that in order to establish an efficient, viable regulatory framework, the relationship between customers, retailers and distributors needs to incorporate elements of each.

2.2 Specific Comments

2.2.1 Suggested Model

AGL submits that the relationship between customers, distributors and retailers should have the following characteristics:

- distributors should have a direct relationship with customers in respect of the connection of new users;
- retailers should be the primary interface with customers in respect their energy supply. That is to say, from the time a customer enters into a supply contract with a retailer, a retailer supplies a customer with ‘delivered energy’, and contracts with distributors to supply the ‘delivery’ services necessary to provide that ‘delivered energy’ service. As the majority of contact with customers is in relation

to energy supply issues, AGL understands that in practice, responsibility for the majority of customer interface issues will reside with retailers; and

- notwithstanding that retailers will be the primary interface with customers, there will remain clear areas in which customers have a direct relationship with the distributor. For example, distributors should maintain a direct relationship with customers in respect of:
 - faults and emergencies which are part of the distributor's functional responsibilities (this would not include faults etc on user's appliances, wiring or pipework); and
 - network technical matters such as reconfiguration of supply points, network augmentation.

This is not to say that retailers are to be precluded from being involved in these 'distributor' matters. A retailer may wish to provide a 'complete energy service' to customers. However, it is AGL's position that this would be a matter for commercial negotiation between retailers and distributors.

2.2.3 Regulation of Distributor relationship with customer

AGL accepts that, where a distributor deals directly with a customer, there will need to be some form of governance of that relationship. There are several forms this governance could take, each involving varying degrees of regulatory involvement. AGL submits that there needs to be further consultation as to this form of regulation once the framework of the customer, distributor and retailer relationship has been addressed. Whatever form of regulation is adopted, there needs to be consistency in respect of the standards that will apply to distributors in their relationships with customers and the standards that are present in UOS agreements.

3. DISTRIBUTOR DISCONNECTIONS AND RECONNECTIONS OF SMALL END-CUSTOMERS

Under the AGL model detailed in Section C2 above, disconnections and reconnections would be initiated by, and therefore the responsibility of, the retailer (except in the case of faults and emergencies).

4. DISTRIBUTOR: SMALL END-CUSTOMER DISPUTE RESOLUTION

Consistent with the model outlined in section C2 above, AGL accepts that distributors will need to develop their own internal procedures to address customer disputes, and will need to be subject to some form of dispute resolution procedures.

AGL considers that there should be a nationally consistent dispute resolution framework (as discussed in section C8 of this submission) which should cover both distributors and retailers.

5. RETAILER OBLIGATION TO SUPPLY TO SMALL END-CUSTOMER

5.1 Appropriate Policy Criteria

AGL understands the position the Consultation Paper proposes is as follows:

- the standing and deemed contract regimes will be enshrined in the NEL and NGL;
- jurisdictions will determine, on the basis of an effectiveness of competition review, whether the ‘local retailer’ regime will apply in that jurisdiction. AGL believes that it is appropriate that jurisdictions be required to determine this matter, and should do so in accordance with any process established to govern reviews of effectiveness of competition;
- where the local retailer regime applies, the **standing contract** regime will oblige a specified ‘local’ retailer to offer to supply specified customers within the specified area. The Consultation Paper has suggested that the jurisdictional minister should be responsible for determining the local retailers, the areas they are responsible for and the category of customers the local retailer is obliged to supply. The Consultation Paper is proposing that the AEMC will develop a National Retail Code (*NRC*) which will regulate the terms and conditions of the contract that must be offered by the local retailer to those customers (*standing contract*); and
- the **deemed contract** regime will cover situations where a customer moves into a premises and starts consuming energy without first contacting a retailer and establishing an account. Under the regime proposed, a contract will be deemed to exist between the customer and the financially responsible retailer (the retailer of the previous resident of the premises). The Consultation Paper suggests that the contract that is deemed to exist between the new customer and the retailer will be regulated under the same terms regulating the standing contract. While AGL accepts that at this stage it is appropriate for the deemed contract to be subject to the same regulation as standing contracts, AGL believes that as competition increases, the regulation of deemed contracts should be reviewed and reduced in line with any surviving regulation of market contracts.

The Consultation Paper has not provided any detailed suggestions as to what the content of the NRC should be. Instead, the Consultation Paper has listed the broad matters it believes should be subject to regulation under the NRC, namely:

- the calculation of charges;
- termination rights;
- the circumstances in which security may be sought, and the payment and treatment of that security;
- billing, meter reading and bill estimation, apportionment of payment and billing disputes;
- payments for undercharging and refunds for overcharging;
- payment methods and dealing with payment difficulties;
- bill smoothing;

- disconnection and reconnection; and
- liability and warranties.

As noted above, AGL is concerned to ensure that the single consumer protection code is not drafted as an amalgamation of the existing jurisdictional regulations. In determining each provision of the NRC, the AEMC must consider the responsibilities of retailers in delivering energy and customers in receiving that energy and determine whether provisions:

- are necessary when considered in the context of competition and general consumer protection provisions;
- promote rather than stifle innovation and competition;
- do not add unnecessary complexity or compliance costs; and
- are necessary to achieve the agreed specific regulatory objectives established for the national regulatory framework.

Further, AGL believes that in an effectively competitive energy market the concept of a local retailer and the distinction between standing, market and deemed contracts will no longer be relevant.

AGL expects that in an effectively competitive market, the focus will be on regulating only those aspects of energy market operations where there is an identified market failure, and such regulation will form the minimum standards for the relationship between consumers and retailers, irrespective of the type of contract (making the definitions of standing, market and deemed redundant). All other terms and conditions will be subject to negotiation. AGL agrees that there will remain need for a provision to deem a default contract between a retailer and a customer where there are no agreed arrangements in place.

AGL's comments below on the proposals in the Consultation Paper are premised on the proposals being transitional arrangements until market reviews to determine the effectiveness of competition and the "wind back" of regulation, including review of arrangements with respect to local retailers, and the various types of contracts.

5.2 Comments on Specific Recommendations

5.2.1 Obligation to connect – 'Local Retailer' Regime

The Consultation Paper has proposed a regime whereby:

- jurisdictional ministers determine whether the Local Retailer regime is to apply in each jurisdiction;
- jurisdictional ministers designate the Local Retailer and the region that Local Retailer is 'responsible' for;
- Jurisdictional ministers are to designate Specified Classes of Customers (Specified Customers); and
- Local Retailers are then obliged to supply any customer that is a Specified Customer within the Local Retailer's geographic area of responsibility.

AGL largely agrees with the proposed process, subject to the 'specified classes of customers' being determined in accordance with nationally consistent principles.

While the level of competition in one jurisdiction may mean that a narrower scope of customers require the protection of a Local Retailer regime than in another jurisdiction, AGL believes that the scope of the category in each jurisdiction should be determined by reference to a nationally consistent set of set of criteria.

AGL suggests that it would facilitate consistent application of these principles if the AEMC were responsible for determining the 'specified class of customers. AGL further submits that, in general the Specified Class of Customers should be confined to residential customers only. Non residential customers are able to negotiate a market contract with retailers as they would with any other commercial supplier interacting with their business.

5.2.2 Standing Contracts

AGL understands that for so long as there exists a local retailer regime, there should be *standing contracts* – a standard contract that governs the supply relationship between the retailer and the customer. However, AGL does not agree with the Consultation Paper on the extent to which the terms and conditions of that contract should be subject to regulation by the AEMC.

AGL is firmly of the opinion that in so far as the terms and conditions are regulated, these regulations must be consistent across jurisdictions and justified against the objectives of the regulatory framework.

5.2.3 Deemed contract regime

As noted above, AGL agrees that there is a need for a deemed contract regime, whereby a customer that moves into a site and starts consuming energy is responsible under a deemed contract for that consumption.

AGL agrees that the deemed contract should exist between a customer and the retailer that is financially responsible for the site – ie was the retailer of the previous resident at that same site. AGL notes however, that this regime needs to be supported by specific obligations on customers to inform retailers when they move into a premise and when they move out. In the absence of the new resident informing a retailer of their move in, it can be very difficult for a retailer to determine when a contract starts and finishes. Difficulties can also arise when the customer informs a retailer they are transferring, but the transfer is not completed, so that the customer effectively falls back onto a deemed contract. Any notice obligations on the retailer must provide exemptions to deal with such circumstances.

The Consultation Paper states that the deemed contract should be subject to the same regulation as the standing contract. While AGL considers deemed contracts to be distinct and separate from standing contract, AGL agrees that at this stage deemed contracts should be subject to the same regulation as standing contracts. However, as noted above, AGL expects that as the level of competition in each jurisdiction increases, the level of regulation in respect of deemed contracts will be reduced in line with the regulation of market contracts.

AGL notes that the Consultation Paper states that ‘the prices and charges associated with the deemed contract for a move-in customer should be subject to the jurisdiction’s retail price setting requirements’. It is inappropriate to include any provision in the regime that is premised on an assumption that retail prices will continue to be subject to regulation in the future.

5.2.4 Rule making role of AEMC

As noted elsewhere in this submission, AGL supports the AEMC having the power to make energy specific consumer protection rules, but submits that it should do so in accordance with the principles outlined in Section A1.1 above and the principles of best practice regulation outlined in Appendix 1.

5.2.5 Regulation of terms of standing and deemed contracts

AGL notes that the Consultation Paper has only outlined those matters in standing and deemed contracts which should be subject to regulation – the Consultation Paper does not set out in any detail what the substance of the regulation should be. However, AGL proposes to respond to the Consultation Paper to include specific comment on:

- the necessity of regulation in respect of most matters currently the subject of jurisdictional regulation (ie not only those listed in the Consultation Paper). AGL has extended its response to include comment on the necessity or otherwise of other current regulation as it expects that the MCE will receive submissions advocating the adoption of regulation in respect of a broader set of matters; and
- the appropriate objectives of regulation where energy specific regulation is considered justified. Where there is a necessity for energy specific regulation, the objectives of the final regulation should be articulated and agreed, and then used to define the parameters of the new regulation. AGL is concerned to ensure that the new NRC is not comprised from an amalgamation of existing regulation.

5.2.5(a) Billing

Retailers currently operating nationally in the energy market must comply with a variety of different regulations in respect of the billing of customers. Inconsistency in jurisdictional based regulations has added considerably to compliance costs, particularly with the maintenance of multiple systems to deal with different billing requirements. In AGL’s view, there is no apparent need to regulate the majority of the billing matters currently subject to regulation. Where there is a need for regulation, it must be nationally consistent.

Billing Cycles

AGL submits that there is no need for regulation in respect of the timing or length of a bill cycle. While there are potential benefits associated with shortening the billing period, retailers will be effectively constrained by the significant costs associated with issuing additional bills. Further, retailers require flexibility around billing periods to negotiate meter reading cycles with meter providers, and to cater for changing customer needs.

Contents of a bill

AGL submits that there is no need for regulation in respect of the content of a bill, except in so far as necessary to compel the provision of the customer's MIRN/ NMI/ DPI ID on bills.

Retailers are constrained from removing any information important to a consumer by the administrative costs that would be incurred from responding to customer complaints or queries in respect of their bills. Customers expect to see a basic level of information about the services they are being charged for, and it is in a retailer's interests to minimise customer queries and dissatisfaction by ensuring the information is as comprehensive and comprehensible as possible.

However, retailers should be required to provide information in respect of the customer's MIRN/ NMI/ DPI ID, as this is necessary to facilitate the efficient and effective transfer of customers, which in turn facilitates competition and the further development of a competitive energy market.

Where the information is being required to drive policy outcomes (eg the provision of consumption graphs in order to drive energy efficiency) there needs to be a review of the effectiveness of that regulation in changing behaviour before mandated as a regulatory requirement. Any increased costs to retailers should also be considered and particularly minimising these costs through ensuring that provisions deemed necessary are nationally consistent.

Adjustments – overcharging and undercharging

Retailers should be subject to the same statutory limitations as other suppliers of goods and services in Australia. AGL therefore does not believe that there is any need for energy specific regulation in respect of undercharging and overcharging.

However, in the event that regulation is deemed to be necessary AGL believes the regulation should be premised on the following objectives:

- establishing a fair and certain time period in which retailers should endeavour to bill customers for goods and services provided during that period;
- establishing a customer's right to be reimbursed for any amount of an overcharge (excluding interest). AGL submits that there does not need to be any regulation in respect of the means by which a retailer reimburses the customer – it is enough that the retailer is under an obligation to make the reimbursement, and retailers and customers are then able to agree on the means of reimbursement.

Additional retail charges

AGL firmly believes that it is inappropriate to include regulation of additional retail charges in the NRF. It is accepted that markets with effective competition should not be subject to price regulation. AGL submits that it is therefore not appropriate to impose a form of price regulation through regulation on additional retail charges.

In the event there is regulation imposed, AGL believes that this must be premised on acceptance of retailers being able to reasonably recover their costs. AGL suggests

that this would be best achieved by requiring retailers to base additional retail charges on a fair and reasonable assessment of the cost for which they are trying to recover. AGL does not believe that the charge should be subject to regulator approval, but compliance with the requirement would need to be established by the retailer in the event a regulator receives a complaint and is required to investigate the matter.

Apportionment of bill payment

AGL is of the view that this should not be regulated as arrangements should be as agreed between the customer and the retailer.

5.2.3(b) Meter reading

Bills based on meter reading and estimations

It is essential for retailers with market settlement procedures and UOS charge reconciliation procedures to ensure that they have accurate and timely billing data information on their customers' consumption. Retailers will want to minimise cashflow risk by ensuring bills are based on actual data for billing and to reduce the costly incidence of adjustments. Accordingly, retailers have a clear incentive to obtain regular accurate meter readings and bill on that basis. AGL therefore does not believe there is a need for regulation in respect of retailers' procuring meter reads or basing bills on meter reads.

AGL notes that a retailer's inability to access a customer's meter is the predominant reason for bills being issued on estimated consumption, rather than on the basis of actual data. AGL submits that in order to facilitate the billing on actual reads, it is essential that customers are obliged to provide safe and unhindered access to metering equipment. Under current jurisdictional regulation, the ability to disconnect is the only remedy available to a retailer where customers will not comply with the obligation to provide access. While the threat of disconnection may provide sufficient incentive in respect of electricity customers, it is not effective in respect of gas customers. This is because disconnection of gas supply in circumstances where there is no access is extremely difficult, and may involve a complex excavation to disconnect gas supply at street level. In circumstances where disconnection does not provide an adequate incentive for customers to provide access, financial penalties or fees should be applied, particularly in circumstances of chronic access issues.

Accordingly, AGL believes that any regulation should be based on the following objectives:

- retailer, distributor or meter data provider must take all reasonable steps to obtain a reading of the meter;
- establish a clear and definite obligation on a customer to provide safe and unhindered access to metering equipment on their premises;
- establish a notification process that a retailer must follow informing the customer of its inability to procure a meter read due to the customer's failure to provide safe and unhindered access;
- establish an ability on the part of a retailer to impose a fee on the customer in the event the customer does not provide safe and unhindered access after the required notification; and

- a retailer must be able to bill on the basis of an estimated read if the customer has not provided access to the meter.

5.2.5(c) The calculation of charges

AGL does not believe that there is any need to regulate the manner in which a retailer communicates information about the calculation of charges. It is in the commercial interests of a company to provide customers with the information they commonly require, and energy retailers are subject to the same prohibitions on misleading and deceptive conduct as any other corporation (see above in respect of information to be contained on the bill).

5.2.5 (d) Payment methods (including bill smoothing)

AGL submits that regulation in respect of payment methods or bill smoothing is not warranted for the following reasons:

- it is in all retailers' commercial interests to provide as diverse a selection of payment methods as possible in order to maximise the opportunity for customers to pay their bills;
- in a competitive market retailers will be required to offer the most convenient methods of payment to customers on beneficial terms in order to remain competitive; and
- bill smoothing is a facility to which a retailer may offer as a marketing incentive and does not warrant customer protection regulations.

In the event that regulation is introduced, retailers must be able to recover any transaction costs associated with the different means of payment.

5.2.5(e) Dealing with payment difficulties

AGL recognises that sections of our community can face temporary and permanent financial hardship as a consequence of personal and social difficulties, and this can result in customers being unable to afford to pay for the energy they have consumed. AGL believes that regulation of retailers alone will not achieve the desired outcome of relieving payment difficulties for this group of customers and that a holistic approach to financial hardship is required. AGL views the protection of customers experiencing financial difficulty to be a mutual social obligation, shared between customers, the energy industry, Governments and the broader community. Hence AGL supports a model of 'shared responsibility' to assist customers experiencing temporary or ongoing difficulties in paying their energy bills.

In our view, those customers experiencing permanent payment difficulties are best managed through comprehensive, direct and transparent social support programs that are effectively and efficiently administered and funded by governments. However AGL recognises that under a 'shared responsibility' model, there is a need for specific targeted regulation to govern the relationship between retailers and customers experiencing financial difficulties. AGL believes that these regulations must achieve the following objectives:

- confirm the retailers' right to be paid for energy supplied and the customers' obligation to pay for energy consumed;

- establish a clear and unequivocal obligation on a customer to contact a retailer if they are experiencing financial difficulty and are unable to pay their energy bill by the due date; and
- establish an obligation on a retailer to offer reasonable payment plans (that cover ongoing consumption and arrears) to customers who have identified themselves as experiencing financial difficulty.

5.2.5(f) Security deposits

Retailers should have the flexibility to require security deposits in line with their commercial imperatives. Competitive forces will operate to constrain retailers in respect of requiring security deposits – a retailer requiring a security deposit is always at risk of losing a customer to another retailer who is not requiring a security deposit. On this basis, AGL does not accept that regulation in respect of security deposits is necessary.

5.2.5(g) Disconnection and reconnection

AGL agrees that there should be energy specific regulation in respect of disconnection and reconnection procedures as general consumer protection law may not adequately cover retailer and customer responsibilities.

Grounds for disconnection

The regulations need to establish a reasonable and certain basis on which a retailer can disconnect a customer for breach of material contractual obligations. AGL submits that these should include (but not be limited to):

- non-payment of a bill;
- failure to provide information and identification details when requested;
- repeated denial of access to meter;
- illegal use or theft of energy; and
- failure to comply with a request for a security deposit.

Notice of disconnection

The regulations need to establish a process whereby a customer is provided with sufficient opportunity to avoid disconnection by ensuring the number of warnings and disconnection notices achieve a reasonable balance between:

- providing the customer with sufficient notice and opportunity to remedy the breach;
- control of accumulation of debt;
- obligation on customers to ensure the retailer has up to date contact details; and
- ensuring the costs incurred by the retailer are reasonable and recoverable.

AGL submits that there should be different disconnection procedures governing disconnection depending on the reason underlying the disconnection. For example, a retailer should be able to disconnect a customer who is refusing to provide

identification details within a relatively short time frame, rather than going through the same process followed when disconnecting a customer for non-payment. In respect of disconnection for non-payment, AGL submits that the following notice obligations should be considered:

- for general customers – one bill, one late notice prior to late fee being incurred, one disconnection warning and then disconnection; and
- for customers in financial difficulty – one bill, one late notice (no late fee), one disconnection warning, one attempted contact through a phone call and then disconnection if no customer contact/payment plan.

Prohibition of disconnection

The regulations need to establish the circumstances in which disconnection is prohibited, for example:

- where customers in financial difficulty have entered into a payment plan with a retailer and are complying with the payment plan;
- where the customer's premises are registered as a life support machine supply address;
- where the customer has registered the premises as a medical exemption supply address;
- where the customer has applied for a government funded relief grant; or
- where there is an unresolved dispute between the customer and the retailer that has been referred to an external dispute resolution body.

5.2.5(h) Liabilities and Warranties

AGL would support regulation in respect of liability and warranty provisions in a standing and deemed supply contract, provided any regulation is limited in line with the following principles:

- any restrictions in respect of liability and warranty provisions in energy specific contracts should only have the effect of imposing the same limitations on energy retailers as are imposed on retailers of all other products in Australia – i.e. energy retailers should not be subject to provisions any more onerous than the liability and warranties provisions in the TPA and FTAs; and
- retailers (and distributors) need to be able to mitigate the possibility that they will bear liability in relation to third party actions or incidents. AGL supports the inclusion of Force Majeure provisions within the regulation to define limitation of liability to those incidents beyond the retailer's control.

5.2.5(i) Price variation under contract

AGL does not believe that there should be any regulation in respect of the means by which price variations are notified to customers and the time frames in which these communications are made. Retailers require flexibility in order to take advantage of the innovations and developments in communication methods. General consumer protection provisions are sufficient to guard against misleading and deceptive conduct in respect of price variations.

5.2.5(j) Termination of contract – customer and retailer

Retailer termination of contract

AGL does not believe that there is any need for energy specific regulation in respect of the grounds on which a retailer and customer can terminate their contract for the following reasons:

- as noted above, AGL agrees that there needs to be regulation with respect to disconnection, including the grounds on which a retailer can disconnect a customer. While the termination of a contract does not equate to disconnection, it is not possible to effectively terminate a standing contract or a deemed contract without disconnecting a customer. Similarly, a disconnection does not equate to a termination of contract (note AGL's position in relation to the termination of market contract without disconnection in section 6.2.2(f) below). In AGL's view, regulation of disconnection completely negates the need for any regulation around termination of a contract, and to include such redundant regulation can only lead to confusion and complexity; and
- there is a clear and well developed body of law that governs the termination of contracts, and there can be no justification for adding to this through regulation particularly in light of the regulation that will exist around disconnection.

Customer termination of a contract

As noted above, there is a clear and well developed body of law that governs the termination of contracts. There can be no justification for imposing regulation around the circumstances in which customers can terminate contracts or the process which customers must go through in order to terminate a contract.

5.2.5(k) Transfer

AGL believes that the NRC should include rules that establish an effective, efficient and nationally consistent transfer scheme for both gas and electricity (see below in Part D, Section 4 regarding transfer rules for gas). AGL believes necessary features of this scheme would include:

- the ability to initiate a transfer on receiving explicit informed consent from a customer. If the customer subsequently 'cools off' the retailer is then responsible for reversing the transfer;
- flexibility and consistency in respect of retrospective transfers; and
- flexibility and consistency in respect of objections to transfers on the grounds of the customer having an outstanding debt.

5.2.6 Enforcement of compliance with the rules

AGL agrees that the AER should be responsible for enforcing compliance with the rules. As noted above, AGL strongly supports a 'separation of powers, so that the body that is responsible for setting the rules is independent of the body that enforces the Rules.

5.3 Transition

AGL agrees with the Consultation Paper's recommendations that:

- all jurisdictional legislation implementing the current 'standing contract' regimes be repealed;
- all jurisdictional legislation, retail codes and marketing codes which currently establish energy specific consumer protection regulations be abolished; and
- the new NEL and NGL regime be established with sufficient notice and flexibility to enable retailers to implement the new requirements in a manner that creates the least transition costs.

AGL is of the view that ultimately there should be no residual jurisdictional customer protection regulation.

6. RETAILER: SMALL END-CUSTOMER MARKET CONTRACTS

6.1 Appropriate Policy Criteria

The Consultation Paper suggests a regime of regulation for market contracts, whereby market contracts entered into by retailers would need to comply with a specific set of regulations referred to as 'model terms'.

While AGL agrees that there should be regulation in respect of the process that must be followed in order to obtain effective consent from a customer entering into a contract, AGL does not agree that the substance of the market contract should be subject to regulation, except in those provisions that are not adequately covered in general customer protection law – disconnection, reconnection and payment difficulties and dispute resolution.

6.2 Comments on Specific Recommendations

6.2.1 Entry into Market Contracts - Explicit Informed Consent

AGL agrees that there should be regulation in respect of explicit informed consent. This is discussed further below.

6.2.2 Regulation of terms and conditions of Market Contracts

The Consultation Paper suggests that the following matters should be subject to regulation in market contracts:

- calculation of charges;
- termination;
- billing;
- payment difficulties;
- meter reading;
- warranties;
- dispute resolution; and

- disconnection and reconnection of customers on life support systems.

6.2.2(a) Calculation of charges

AGL's position in respect of the regulation of the calculation of charges under a market contract is the same as stated above in respect of standing and deemed contracts.

6.2.2(b) Billing

AGL's position in respect of the regulation of billing under a market contract is the same as stated above in respect of standing and deemed contracts.

6.2.2(c) Meter reading

AGL's position in respect of the regulation of meter reading under a market contract is the same as stated above in respect of standing and deemed contracts.

6.2.2(d) Payment difficulties

AGL accepts that there needs to be regulation in respect of managing payment difficulties in market contracts. AGL submits that regulation in respect of market contracts should be established in line with the same objectives set out above in relation to standing and deemed contracts (see Section 5.2.5(d)).

6.2.2(e) Disconnection

AGL agrees that there needs to be some regulation in respect of disconnection procedures, but submits that there should be more flexibility in respect of disconnection procedures than those established in respect of standing and deemed contracts. For example, customers should be able to enter into arrangements with retailers whereby they obtain certain benefits in exchange for tighter notification and disconnection procedures. However, AGL accepts that this flexibility may not be considered appropriate in circumstances where the customer is experiencing financial difficulty, and expects that the regulation governing those circumstances will be the same for market contracts as standing and deemed contracts.

6.2.2(f) Termination

Termination of contract

AGL submits that there should not be any regulation in respect of the termination of a market contract. Both retailers and customers should have the same flexibility to terminate a contract as afforded by the general law governing the termination of contracts.

As noted above, termination of a market contract does not necessitate disconnection. A retailer can terminate a market contract, thereby terminating the benefits the customer is obtaining under the market contract, and the customer will fall back onto a standing contract. For example, the customer may have entered into a market

contract that gives certain benefits in return for the customer agreeing to pay the retailer in a certain way. If the customer stops paying the retailer in the agreed manner, the retailer will wish to terminate the market contract, cease providing the customer the benefits that were contingent on the method of payment and continue to supply the customer on the standing terms of a standing contract. There should not be any regulation of market energy contracts that constrains either party beyond the law of contract as it generally applies.

Expiry of a fixed term market contract

AGL believes that there does not need to be any detailed regulation governing the expiry of a fixed term contract. The standing contract regime provides a significant safety net, which means that in the event a retailer does not wish to enter into a further market contract with a customer, the customer always has the option of returning onto a standing contract. The regulations only need to provide that, on expiry of a market contract, the customer is returned to a standing contract (or a generally available market contract) unless otherwise agreed between the parties. This ensures that retailers are not able to roll a customer over onto any other market contract without first informing the customer of their options.

For efficiency in retailer operations and to sustain market competition, retailers require flexibility in terms of:

- their right to enter into market contracts with customers;
- determining the means of notifying customers of the expiry of the contract and the time in which that notification is to occur. This not only permits retailers to adopt uniform practices across jurisdictions, but also enables them to establish the most efficient and effective means of communicating with customers in respect of recontracting; and
- the terms on which the retailer and the customer re-contract.

6.2.2(g) Liability and Warranties

As noted above, AGL only accepts that retailers be liable as a result of actions or incidents that are within the control of the retailer.

6.3 Transitional Arrangements

AGL agrees that any new regulation introduced to cover market contracts should be done in a manner that would give retailers sufficient notice to enable implementation of requirements and which creates least cost.

7. RETAILER: SMALL END-CUSTOMER MARKETING

7.1 Appropriate Policy Criteria

AGL agrees with the conclusions reached by the Consultation Paper in respect of the existing jurisdictional regimes – that they are overly complex, overly prescriptive and that the costs of those regimes outweigh the benefits.

7.2 Comments on Specific Recommendations

AGL supports the Consultation Paper's recommendations in respect of those matters that should be subject to regulation, and has set out below its views as the appropriate objectives for regulation in respect of those matters. However, as with the discussion in respect of the regulation of standing and deemed contracts, AGL expects that there will be submissions advocating regulation of a broader set of matters, and has therefore expanded its response to include a discussion of other matters currently the subject of jurisdictional regulation.

7.2.1 Training of marketing representatives

AGL does not believe that there is any need for energy specific regulation requiring the training of energy marketing representatives. The common law and generally applicable statutory consumer protection laws (ie the TPA and the various FTAs) all impose vicarious liability on a company for the actions of its employees and agents. This means that an energy company would be liable for the conduct of its marketing representatives in breach of any consumer protection law. It is therefore incumbent on any company to ensure it has a comprehensive training program, reporting system and supporting disciplinary regime in order to manage the risk associated with this vicarious liability. There is clearly no need for additional energy specific regulation in respect of training requirements.

7.2.2 Regulation of contact – contact hours and disclosure requirements

AGL does not believe that there is any need for energy specific regulation in respect of contact hours, as energy retailers are subject to the provisions in the state FTAs. However, there is a clear need for legislative amendments to the existing FTAs to achieve uniformity across jurisdictions in respect of permitted hours of contact for marketing purposes.

7.2.3 Pre-contractual disclosure of information

AGL notes that the jurisdictional FTAs contain various provisions regarding 'non contact sales', including in some jurisdictions provisions regarding the pre-contractual disclosure of information. In the absence of consistent jurisdictional legislation regarding pre-contractual disclosure, AGL would support energy specific regulation to the effect that the key terms and conditions of the supply contract need to be provided to the customer as part of an explicit informed consent process. However, these regulations should establish a nationally consistent regime – i.e. establish an exemption from any inconsistent FTA provisions. The regulations must not be overly prescriptive, and must be confined to the provision of information essential to the customer's decision to enter into a contract eg price, duration and any key conditions of the contract.

In AGL's view, the explicit informed consent process needs to accommodate flexibility in obtaining and recording the customer's consent to ensure that as technology advances, retailers are not constrained from using that technology to make the explicit informed consent process more efficient and effective.

7.2.1(d) Provision of collateral and cooling off periods

AGL notes that currently under the jurisdictional FTAs there are provisions in respect of retailers providing full terms and conditions of the supply contract and the cooling off periods. In AGL's view, the most effective way for a regime of full disclosure and cooling off to operate would be for the jurisdictions to make the FTA provisions uniform and consistent. In the event that this is not possible, then AGL would accept energy specific regulation regarding the provision of collateral, provided these provisions should be formulated so as to provide:

- a nationally consistent regime – i.e. an exemption from any inconsistent FTA provisions;
- the retailer with flexibility in respect of the time periods in which the collateral must be sent to the customer. There are considerable costs associated with imposing short time frames on retailers, and AGL submits that these costs clearly outweigh the benefit to the customer in receiving the collateral in that timeframe; and
- the customer with sufficient time to consider the collateral prior to the cooling off period expiring. This could be achieved through extending the cooling off periods in line with the time frames around the provision of collateral.

7.2.1(e) Record keeping

AGL notes that some jurisdictional regulation currently imposes certain record keeping requirements. AGL does not believe there is any need for such regulation to be retained. The risk management policies and internal compliance regimes of companies provide sufficient incentive to ensure adequate records are maintained in the absence of specific regulation. It should be noted that AGL regards existing consumer protection law as sufficient to govern the adjustments to customer accounts. If the basis of adjustments were to follow this existing customer protection law, it therefore would be reasonable to assume that retailers would adhere to the statutory limitation period in keeping records.

8. RETAILER: SMALL END-CUSTOMER DISPUTE RESOLUTION

8.1 Appropriate Policy Criteria

AGL supports the principle as stated by the Consultation Paper that small-end customers should have access to informal, fair and efficient dispute resolution arrangements. AGL agrees that retailers should be obliged to be part of an approved Ombudsman scheme that is available in the jurisdiction in which they participate.

However, the Consultation Paper is proposing that energy Ombudsman schemes remain jurisdictionally based, even under a national framework, and makes no suggestions as to ways in which jurisdictionally based schemes might be made

nationally uniform. The rationale put forward in the Consultation Paper to maintain jurisdictionally based Ombudsman schemes is that:

- Ombudsman schemes are most valuable for “vulnerable” customers; and
- vulnerable customers are most likely to benefit from other jurisdictionally based policies.

AGL does not see that these factors preclude effective nationally consistent energy Ombudsman schemes, or indeed to preclude an effective national Ombudsman. Customer vulnerability is not a function of jurisdiction but of social, health or financial disadvantage, irrespective of jurisdiction. Further, AGL recognises that government CSOs to assist vulnerable customers may be jurisdictionally specific but this does not preclude a national scheme of managing customer disputes.

Provisions to participate in an Ombudsman scheme should not preclude the transition to a national Ombudsman scheme in future if one is seen as more efficient and effective. AGL believes that there needs to be a nationally consistent Ombudsman scheme, even if jurisdictionally based schemes are maintained. There are a number of inefficiencies associated with schemes that are inconsistent across jurisdictions adding cost to participants. Further, disparity in jurisdictional schemes prevents continuous improvement in the handling of disputes it is difficult to establish meaningful comparison and therefore benchmarking.

8.2 Comment on Specific Recommendations

8.2.1 Internal Dispute Resolution

AGL agrees that it is appropriate for retailers to be required to have internal dispute resolution regimes, and suggests that these should be consistent the *Australian Standard on Complaints Handling (AS 4269 – 1995)*.

8.2.2 Ombudsman Schemes

As noted above, AGL believes there needs to be a nationally consistent Ombudsman regime, irrespective of whether one is administered nationally or jurisdictionally. A nationally consistent Ombudsman scheme(s) should have the following fundamental characteristics:

- be based on principles of national consistency, efficiency and effectiveness;
- be industry based and funded on a cost reflective basis;
- be available to residential customers who have already approached their retailer in order to seek resolution of the dispute;
- have a clear charter defining its role as an independent arbiter of disputes being neither an industry or consumer advocate;
- apply the best practice benchmarks in its dispute resolution processes – for example, the Department of Industry, Science and Tourism Benchmarks for Industry Based Customer Dispute Resolution Scheme (***DIST Benchmarks***) could provide a useful reference; and
- be promoted by retailers as an alternative dispute resolution scheme when disputes cannot be reasonably resolved with the retailer.

Scope of the Ombudsman scheme(s)

In order to increase the effectiveness and efficiencies of the Ombudsman scheme, it is considered that the scope of Ombudsman schemes across the jurisdictions should be consistent, and should only apply to customers covered by consumer protection provisions in the Retail Code or equivalent. As the current consumer protection provisions in the South Australian, New South Wales, and Victorian markets are transferred to a national regulatory framework, the customer segment to which these apply will be aligned.

Principles governing administration of Ombudsman Scheme(s)

The Ombudsman scheme(s) should be administered in accordance with, and measured against best practice principles, for example, those set out in the DIST Benchmarks. AGL believes that appropriate principles would be as follows:

- **Accessibility** – the Ombudsman(s) scheme must be fee-free and easily accessible by customers.
- **Independence** – the Ombudsman(s) must be free to act independently without interference from energy industry or consumer advocacy organisations. The processes and decisions of the Ombudsman must be objective and unbiased, and be seen to be objective and unbiased. The Ombudsman(s) must not act as either an industry advocate or customer advocate.
- **Fairness, impartiality, and consistency** – the Ombudsman(s) must remain impartial, objective and consistent when conducting investigations and negotiating resolutions.
- **Accountability and transparency** – the Ombudsman(s) must be accountable to the public, its Board and its members.
- **Efficiency** – the scheme must operate efficiently so as to provide customers and scheme members confidence in the scheme and ensure that the scheme provides value for its funding. The Ombudsman(s) should operate under, and be benchmarked against, a nationally consistent set of key performance indicators, including timeframes for the resolution of complaints.
- **Effectiveness** – the scheme must be effective by having appropriate and comprehensive terms of reference and periodic reviews of its performance.

Consistency in Procedure and Reporting

Currently there are differences in procedure of the existing schemes that add to cost and impede retailer efficiency. Where the jurisdictionally based schemes are retained the following reforms are necessary to ensure the schemes are operating in a consistent, effective and efficient way:

- consistency in the governance and administration of the Ombudsman schemes across the jurisdictions;
- aligning the criteria on which complaints are upgraded within the scheme; and

- consistency in reporting the number of enquiries and complaints handled by the Ombudsman schemes to allow meaningful comparison and therefore benchmarking. Ombudsman scheme(s) should report on numbers of complaints, enquiries and cases in such a way as to accurately represent trends and developments in dispute resolution in the energy industry.

8.3 Transition

Existing dispute resolution schemes will need to transition to a consistent national approach to dispute resolution, whether that be the establishment of nationally consistent operating principles, or the establishment of a national ombudsman scheme.

PART D OTHER DISTRIBUTION AND NON-PRICE RETAIL REGULATION

1. BUSINESS AUTHORISATION

1.1 Appropriate Policy Criteria

The Consultation Paper recommends the removal of licences, with all obligations being included in legislation and compliance governed by a civil penalty regime. AGL agrees that licensing regimes should not create unnecessary barriers to entry, nor should they be used as a means of imposing legal obligations. However, AGL believes there is a need for a licensing regime that ensures participants are financially viable and commercially competent to operate in the market. Further, AGL is of the view that the AER should have power to impose the ultimate sanction of revocation of retail licence for numerous and/or serious breaches of the consumer protection rules.

1.2 Comments on Specific Recommendations

1.2.1 National retail licence regime

AGL supports the removal of jurisdictionally based licence regimes. AGL also agrees that retailers should be subject to direct legal obligations for consumer protection, gas retail market rules and metering where demonstrated to be necessary. However, AGL maintains that there should be a national mechanism which regulates entry to, continued participation in, and exit from the market.

AGL believes that the granting and maintenance of a licence should be subject to compliance with essential eligibility conditions, including:

- **Financial and commercial competence of the retailer**

AGL agrees with the Consultation Paper's recommendation that there be a regime for prudential regulation of retailers. However, AGL believes that the prudential requirements of NEMMCO and gas market administrators should be complemented by a national licence regime whereby prospective retailers should be required to satisfy the AER that they have the financial capacity, risk management and governance policies and procedures necessary to operate a retail business.

In AGL's view, there should be some triggers and means by which a regulator can re-examine a retailer's financial and commercial competence, and revoke the retailer's licence in the event it is no longer satisfied that the retailer complies with this condition.

- Compliance with the SIR rules**
 AGL believes that retailers should be required to establish compliance with the Step-in retailer (**SIR**) regime in order to conduct a retail business. Retailer preparedness for a SIR event is essential to the success of any SIR regime necessary to ensure market stability in the event of retailer failure.
- AER has power to revoke a licence in the event retailers engage in flagrant, repeated or continuing breaches of consumer protection law.**
 AGL does believe that the civil penalty regime proposed by the Consultation Paper will be effective in enforcing compliance with consumer protection rules. However, it believes that the AER should have the ultimate ability to revoke a retailer's licence in the event that retailer has demonstrated a sustained or flagrant disregard for consumer protection laws such that the regulator believes the retailer is no longer fit to conduct a retail business.

The Consultation Paper has proposed that retailers should be defined as 'persons who supply energy to end-customers, excluding generators and producers that directly supply end-customers outside the distribution or transmission network'. This definition would not appear to capture large end customers that participate directly in wholesale markets and procure distribution services. While AGL understands that retail obligations concerning consumer protection may not be relevant to such participants, AGL is concerned to ensure that these participants would be subject to other obligations in the NEL and NGL. Any participant that is using common infrastructure or operating systems must comply with all relevant rules.

The Consultation Paper has also proposed that the legislative regime would provide a separate category of 'private network/resellers' which may be subject to a limited tailored set of regulatory arrangements. AGL is of the view that private network/resellers should be subject to the same obligations that apply to other licensed operators and retailers, particularly in respect of supply, disconnection and dispute resolution. Applying a limited set of rules to private resellers implies that those customers could receive lesser benefits than others. As the final interface with their customers, private resellers should be required to deliver specified market outcomes to them and there appears no reason why resellers should be exempt from market rules and customer protection arrangements. However, any division of responsibilities between private reseller and other market participants is best achieved through contractual arrangements rather than through legislative means.

1.2.2 Authorisation Regime for Distribution

AGL agrees with the Consultation Paper's recommendation that the function of administering technical, safety and environmental aspects of operating gas or electricity distribution networks should be left with the jurisdictions, as these matters are best dealt with at a State or Territory level. These matters could possibly be addressed through a limited jurisdictional authorisation scheme for distribution businesses, as proposed in the Consultation Paper. Consistent with the Consultation Paper's view that licences should not impose regulatory obligations, AGL considers that any technical requirements on distributors should be established through State legislation and Australian Standards, rather than as conditions of a

licence/authorisation. The AER should then be required to recognise such legal technical requirements when making economic determinations.

However, in contrast to the Consultation Paper's recommendation that general business licences be abolished, and consistent with AGL's position in respect of retail licences, AGL believes that participation as a distributor in the market should be subject to a national licence regime which assesses a company's prudential, technical and operational competencies to act as a market participant. National authorisation of the competencies of distributors is necessary to ensure stable and predictable market operation and transportation of energy for the ultimate benefit of consumers, and should ensure:

- ongoing financial capability to manage and operate networks; and
- operational capability to fulfil market obligations (including indirect obligations to consumers).

Authorisations serve the valuable purpose of clearly identifying the particular licensed entity, and so avoid potential ambiguities in interpretation of national and jurisdictional law. Given the level of investment associated with distribution networks, such certainty is an essential component of establishing business confidence in the new national framework. Other more complex arrangements to achieve the same end might be possible, but the Consultation Paper has not made a persuasive case for them.

1.3 Transitional Arrangements

In order to transition to a national licence regime, AGL suggests that the following steps should be taken:

- all compliance obligations to be enacted in national rules;
- all jurisdictional legislation establishing jurisdictional licence regimes to be repealed; and
- the NEL and NGL amended to establish a national licence regime which:
 - establishes the conditions on which national licences for retailers and distributors will be contingent; and
 - provides the AER with administrative authority for the issue and revocation of licences.

2. DISTRIBUTOR INTERFACE WITH RETAILERS

2.1 Appropriate Policy Criteria

The Consultation Paper identifies the need for regulation of commercial arrangements between distributors and retailers in order to ensure that consumer protection objectives are met, because distributors can exercise monopoly power that may deliver suboptimal outcomes in negotiations with retailers. AGL agrees that the regulatory approach must ensure that services provided by distributors to retailers will be sufficient to enable retailers in turn to meet their regulatory obligations and reasonable customer expectations, and the arrangements must be balanced, fair and reasonable.

AGL notes that distributor obligations (both to retailers and customers) are currently located in a variety of arrangements nationally such as UOS Agreements, Coordination Agreements, Codes, Transportation Agreements, Access Arrangements, Market Operation Rules, licences, energy specific legislation and general law. The development of the NEL and NGL provides an opportunity to revisit and consolidate these arrangements into a consistent national framework.

2.2 Comments on specific Recommendations

The Consultation Paper proposes the following approach to achieve this outcome:

- the NEL and NGL include a requirement for distributors to enter into UOS agreements, and that if a distributor has not entered into a negotiated UOS agreement a default UOS agreement would be deemed to apply; and
- the AEMC make a generic default UOS Agreement(s) having regard to certain matters and that it would contain certain provisions.

AGL agrees that regulation must ensure that distributors and retailers enter into UOS Agreements. However, AGL does not believe that a default UOS Agreement developed by the AEMC should be the means for achieving this. Such an intrusive approach is contrary to the policy direction established by Australian Governments in the Australian Energy Market Agreement. In addition, it is unlikely to be in any party's interests to have the terms of a commercial agreement imposed, particularly when there is no reference to specific circumstances of a distribution network, the market and the other terms of access, including services and tariffs offered.

A better approach to ensure that distributors and retailers enter into UOS agreements and that the terms and conditions of the agreement meet the policy objectives is one where the distributor proposes and seeks regulator approval for terms and conditions of a UOS agreement, with the requirement for the regulator to conduct public consultation in deciding whether the terms and conditions are satisfactory. In addition, there should be a dispute resolution process in the event that a retailer and distributor are unable to reach agreement on non-standard services or terms and conditions, or where the retailer wishes to vary the UOS agreement between regulatory reviews in response to changes in the regulatory or market environment.

AGL submits that with suitable enhancements to the law and rules a fair and equitable balance can be achieved between the interests of retailers and distributors in the following alternative approach:

- The terms and conditions of standard (or reference) UOS agreements would be established as part of access and pricing reviews for distributors;
- The NEL and NGL provide a standard national framework for UOS agreements which contains standard elements and requirements for each element. The standard national frameworks would be designed to be as consistent between gas and electricity as is reasonable while at the same time avoiding unnecessary cost and complexity;

- The national standard framework for UOS agreements would include the following major elements:
 - access services and prices;
 - ancillary services and charges;
 - general terms and conditions (includes quality obligations, invoicing , liability and indemnity, force majeure etc);
 - service standards for the distributor would cover such matters as:
 - provision and accuracy of meter data;
 - energisations (fuse insertions);
 - new connections;
 - reliability of supply;
 - disconnections;
 - billing of retailers for distribution services;
 - customer theft (an agreed national calculation methodology for the allocation of theft);
 - provision of information within a determined timeframe for retailers to respond to queries, including Ombudsman queries; and
 - any other service to a customer whereby the provision maybe impacted by the performance of a distributor in fulfilling that service;
 - Sufficient incentive for parties to comply with the performance standards or remedies in the event that the service standards are not met; and
 - Provision for timely renegotiation or variation of the UOS Agreement in the event of:
 - a change in regulatory obligations on a retailer; and
 - market/customer expectation changes during the regulatory period.
- That the NEL and NGL include dispute resolution/arbitration provisions in relation to negotiation of UOS agreements. The provisions should ensure an accessible, efficient and cost effective dispute resolution mechanism to deal with any disputes as to the agreement to and compliance with performance standards, poor performance or interpretation of an agreement between retailers and distributors. AGL suggests consideration should be given to a ‘staggered’ dispute resolution scheme, whereby:
 - the dispute is first escalated to a higher level within each company; and
 - in the event a resolution is not reached, escalated to an independent arbitrator.

These dispute resolution procedures should also apply to negotiations between retailers and distributors on variations to UOS agreements between regulatory reviews.

AGL believes this approach better achieves the policy objectives for the following reasons:

- a default UOS agreement established by the AEMC would not reflect the particular circumstances of any network. And any changes to the default UOS agreement would require the AEMC to go through the Rule change process in the NGL and NEL which is likely to be protracted. As a result this approach will lack adaptability and flexibility to conditions in the market as they vary, is unlikely to meet the needs of retailers, distributors or customers;

- all the terms and conditions of a reference/standard UOS agreement, including prices/tariffs and standards of service and various customer specific obligations, should be approved by the AER as part of a complete regulatory/commercial package. Terms and conditions impact on costs, which in turn impact on prices – they cannot and should not be separated;
- the obligation of distributors to enter into a UOS agreement with each retailer will be a natural consequence of the regulatory review process;
- service standards approved by the AER as part of regulatory reviews will deliver better results for retailers, distributors and consumers;
- retailers will have flexibility to renegotiate/vary UOS agreements for changes of circumstances such as regulatory and market changes;
- it provides an efficient and effective dispute resolution process to facilitate agreement on matters in an expeditious manner.

Overall this alternative approach ensures that UOS agreements will:

- ensure that the consumers are protected in a framework that is efficient and effective and also protects the legitimate interests of both the distributor and retailers;
- have an appropriate level of consistency nationally and across gas and electricity;
- provide for flexibility, allowing variation of UOS agreements as regulatory and market conditions change; and
- enhance the environment for more effective retail competition.

3. DISTRIBUTOR INTERFACE WITH EMBEDDED GENERATORS

AGL supports the eventual development of nationally consistent rules regarding the connection and operational interface between embedded generators and distribution networks. However, AGL considers that it would be premature to adopt the Consultation Paper's proposals for standardised terms and conditions of interconnection to be set out in national rules at this time. A number of complex policy issues require resolution before such rules could be contemplated²⁷. Until these issues are appropriately resolved, and given the relatively small (albeit growing) role of embedded generation at this time, AGL agrees with the Consultation Paper that parties should be free to negotiate terms and conditions of interconnection on a commercial basis.

²⁷ Major issues include the following: What ultimate role do governments envisage for embedded generation (eg wind power) and what are the ensuing policies for network augmentation, costing, risk-sharing and power quality vis-à-vis embedded generators? These matters should be addressed at a policy level at not left to regulators (technical and/or economic) to make piecemeal and uncoordinated decisions.

AGL notes that valuable work on the interface issue has been undertaken at a jurisdictional level, and also that there is a national process to progress the matter via the MCE Renewable and Distributed Energy Working Group. The Consultation Paper itself refers to this MCE workstream, and recognises that “the principles put forward in this paper---may therefore need to be revisited once that work is complete”.²⁸ AGL considers that it is clearly preferable to work towards nationally consistent rules through one process rather than two.

AGL also considers that there could be a role for Australian Standards in formulating certain technical and operational aspects of the distributor-generator interface, which could then be referenced in eventual national rules.

As an interim measure, AGL supports the inclusion of clear principles and objectives in the NEL, but sees no benefit in the development of new rules governing the interface between distributors and embedded generators when the present National Electricity Rules provide adequate direction on some interface matters (eg avoided TUOS). In the event of market failure, AGL agrees that a dispute should be resolved by the AER in accordance with stated objectives of the NEL.

4. BALANCING REGIME AND SETTLEMENTS, EFFECTING CUSTOMER TRANSFER IN BALANCING AND SETTLEMENTS SYSTEM

4.1 Appropriate Policy Criteria

The Consultation Paper recommends that the establishment of a national regime for the regulation of energy distribution and retail must take into account the regime(s) for balancing systems, supply/consumption reconciliation and settlements and customer transfer.

AGL notes that the Consultation Paper has recommended that Independent Market Administrators (*IMAs*), such as GMC, REMCo and VenCorp, continue to administer Gas Retail Market Rules in relation to balancing and settlement, customer transfer in the balancing and settlements system and metering²⁹. AGL strongly supports the retention/extension (under a national authorisation process) of the current co-regulatory (industry/government) approaches as the most appropriate structure for an IMA. AGL also notes that a co-regulatory approach to the development and administration of market rules is consistent with recommendation 10.2 of the Productivity Commission in its report on the Review of National Competition Policy Reforms³⁰. AGL also submits that there needs to be greater consistency and harmonisation of rules and market operations, and greater opportunity for market participants to actively participate in the management of these schemes.

²⁸ Consultation Paper, p 71

²⁹ Ibid, p. 4

³⁰ Review of National Competition Policy Reforms, Productivity Commission Inquiry Report, February 2005, page 283.

AGL largely agrees with the Consultation Paper's recommended policy criteria in respect of developing rules for balancing systems, supply/consumption reconciliation and settlements and customer transfers. However, AGL believes that the MCE should also seek to achieve the following objectives:

- providing industry with a greater role in the development of codes and rules. AGL believes this will ensure that rules are viable, prudent and adhere to principles of good regulation. AGL believes that this objective is best achieved through adopting authorised industry based scheme(s);
- establishing a robust and transparent rule change process as an essential element of the energy framework. AGL strongly recommends that rules are administered and developed through an extensive consultation process led by an authorised industry based scheme;
- ensuring that in general there is only one consultation process on rule development and rule changes. AGL submits that consultation should be undertaken by the IMA in a manner deemed appropriate through the principles governing the operation of an authorised industry scheme;
- making the AEMC responsible for the approval of rule development and change. As noted above, in so far as possible, the AEMC should not conduct further consultation.
- forming an independent compliance panel which would be charged with the responsibility of facilitating compliance with market rules by market participants. This independent compliance panel should be formed within the structure of the authorised industry scheme;
- establishing the industry based scheme under an authorisation from the AER. This ensures that the regime is consistent with the division of functions under a national framework. Authorisation should be based upon principles and objectives for a 'best practice' energy market as determined by the AEMC;
- provide for national consistency across jurisdictions and fuel types in so far as possible;
- promote effective and efficient use and operation of the market systems by addressing the following objectives in the rules:
 - provide incentives to balance injections while conforming with the required safety and reliability standards;
 - make or allow infrastructure operators to make full and efficient use of the infrastructure available in each system;
 - facilitate generator/producer and retailer competition including by effecting efficient customer transfers;
 - accurately measure and allocate the costs of theft and leakages; and
 - ensure compatibility with the metering, consumer protection requirements and retailer failure arrangements; and

- in addition to considering those objectives outlined above, the AER should also take into account the terms of access determinations.

4.2 Comments on Specific Recommendations

4.2.1 NEL Arrangements

The Consultation Paper notes that the NEL arrangements are consistent with the recommended policy criteria and as such no change to them is recommended.

AGL is of the view that there should be a greater level of industry participation in the management of the electricity market, and that strong consideration should be given by the MCE to encouraging a management structure similar to that being proposed by AGL for the gas market.

4.2.2 NGL Arrangements

4.2.2(a) Approval of Regional Independent Market Administrators

AGL strongly supports an authorised industry scheme for the operation and management of the gas market, and that the industry scheme is granted authorisation by the AER based upon its demonstrated ability to manage and operate the gas market to the principles and objectives determined by the AEMC.

4.2.2(b) Development and Administration of rules - distribution network balancing, settlement and customer transfer

As noted above, AGL supports that an authorised industry scheme is charged with the responsibility of operational oversight and management of the gas market, as such, considers it appropriate that the authorised industry scheme develop and administer the rules pertaining to balancing, settlement and customer transfer. This extends to the continued development of the underlying operations of gas market and that such development is consistent with overarching principles determined by the MCE.

Industry authorised schemes have proven successful and as such, AGL considers it appropriate that additional activities which are consulted on from time to time such as the development of the gas wholesale market and emergency response protocols should be reviewed and developed within this scheme.

4.2.2(c) Compliance with Gas Retail Market Rules

The Consultation Paper has recommended that retailers and distributors in jurisdictions with full retail contestability should be obliged to comply with the Gas Retail Market Rules that apply in the jurisdictions in which they operation. AGL fully supports this proposal.

AGL also supports that an independent compliance panel that is formed within the structure of the authorised industry scheme and charged with the responsibility of facilitating compliance with the relevant rules from market participants.

4.2.2(d) Consider and consultation on changes to Gas Retail Market Rules

AGL agrees with the Consultation Paper that an IMA should be obliged to consider applications by participants for changes to the Gas Retail Market Rules on the proviso that the IMA is an authorised industry scheme as outlined above.

It is important that all stakeholders are fully aware of consultations being undertaken and are provided with adequate opportunity to provide feedback into the consultation process, and that regulatory objectives and principles that underpin the national regulatory framework must be clearly articulated before any decisions are made. In that regard, AGL believes that the maintenance of a clear process for consultations that is transparent and which ensures active involvement of all stakeholders is critical to the successful development of Gas Retail Market Rules and the gas market as a whole.

4.2.2(e) AEMC to approve amendments to the Gas Retail Market Rules

AGL supports the proposal that AEMC approve amendments to, and implementation of new, Gas Retail Market Rules to the extent that the approval process does not lead to the creation of unwarranted additional consultations.

4.2.2(f) AEMC – consideration of matters put before IMA

As outlined above, AGL does not consider it appropriate that the AEMC should undertake subsequent consultations where initial consultations by an authorised industry scheme / IMA have been undertaken. Any process adopted which allows for second and third round consultations will be a key impediment to the effective and efficient development of the energy market. The AEMC should satisfy itself that the appropriate consultation processes have been followed, and this may necessitate a review of consultation documents.

4.3 Transitional Arrangements

AGL largely agrees that Gas Retail Market Rules should be grandfathered to facilitate transition to the new framework AGL does however, note that there are a number of operational and procedural requirements, such as the Gas Metrology Procedures embedded within the Gas Retail Market Rules. It is AGL's view that consideration be given to identifying these items and harmonising them to achieve national consistency where possible. AGL supports the repeal of jurisdictional legislation providing for and requiring compliance with Gas Retail Market Rules and the obligation transferred to the NGL to the extent that the obligations under the NGL reflect the proper operational requirements of the markets in each jurisdiction.

5. METERING

5.1 Electricity Metering

AGL submits that the national regulatory framework needs to include a nationally consistent regime regarding meter reading and metrology procedures in respect of electricity. AGL believes that the current jurisdictionally based code obligations and guidelines are not effective for the following reasons:

- the inconsistency between jurisdictions add cost and complexity to participants that operate nationally in electricity market; and
- some of the regulations are overly prescriptive, and appear to have been developed without due regard to operational complexity or customer needs.

AGL therefore supports the removal of jurisdictionally based metering provisions and the implementation of nationally consistent regulations. AGL notes that NEMMCO, industry participants and regulatory representatives have been working on the Metrology Harmonisation Program that seeks to implement nationally consistent metrology procedures. AGL is of the view that this project should proceed, and the AEMC make nationally consistent regulations in respect of:

- the provision of timely and accurate electricity meter data;
- installation and maintenance of metering equipment; and
- the manner in which meter data is provided to retailer (ie, in a manner that suits billing requirements for retailer).

Further any proposed national metering regulation must be subject to a test against the principles of a regulatory framework to determine whether the regulations are warranted.

5.2 Gas Metering

As detailed in Part D, Section 4 above, AGL supports a co-regulatory model for gas market governance, which would include the drafting and enforcement of market rules under an industry based authorised scheme. AGL recognises that there are different market structures in each jurisdiction, however an overarching objective of achieving national consistency where possible needs to be pursued.

Accordingly, AGL submits that:

- the metrology procedures for the gas industry should be as nationally consistent as possible;
- while some meter data procedures (such as energy data calculation, NSL methodology, settlement regimes) will need to reflect existing jurisdictional operating environments and their peculiarities, technical requirements surrounding metering standards could be developed nationally by a body such as Standards Australia, using their established committee frameworks; and
- application of the relevant Australian Standard(s) and continuing development of the metrology procedures should be through the national gas market administrator as part of their normal market development processes.

6. LOAD SHEDDING AND CURTAILMENT

6.1 Appropriate Policy Criteria

AGL agrees that there needs to be a national framework that provides for a nationally co-ordinated response (when appropriate) to supply interruption and system integrity issues. However, load shedding and curtailment raises different issues and potential responses as between gas and electricity and also between single and multiple distribution entities.

6.2 Specific Recommendations

6.2.1 Electricity

AGL agrees with the Consultation Paper that the National Electricity Rules establish an adequate set of rules in respect of electricity supply curtailment and hence there is no need to amend them.

6.2.2 Gas

AGL believes that different criteria are appropriate for gas and electricity load shedding and curtailment. While certain broad principles may be equally applicable to both energy forms, there are significant differences in the details. There are also significant differences in the approach to gas load shedding among jurisdictions. For example, under Victoria's market carriage system, VENCORP has a particular focus on the management of transmission constraints. VENCORP's powers of "direction" allow it to physically intervene in the operation of the gas transmission system and are designed to ensure the continued physical security and integrity of that system³¹. In the event of a system threat, VENCORP issues curtailment directions to all market participants. Gas retailers contact their gas customers to arrange the necessary load curtailments, while market customers are contacted directly³².

In other jurisdictions, load shedding procedures are usually implemented by the gas distributors. The procedures are specified in the terms and conditions of approved access arrangements, and may take into account broad jurisdictional requirements in relation to load shedding. In addition, all jurisdictions have prescribed contingency powers for gas emergencies.

Importantly, all gas load shedding schemes share the principal objective of maintaining the integrity, safety and security of the gas transportation network/system. In addressing load shedding in a distribution context, this issue should remain at the forefront of framework principles.

AGL considers that there are sensible reasons for the operational management of load shedding and curtailment to remain with distributors in those jurisdictions where that

³¹ In the event that curtailment does not reduce demand sufficiently to secure the transmission system, distribution networks may be selectively isolated to ensure the integrity of the system.

³² The more limited instances of network supply interruption are dealt with in the Victorian Gas Distribution System Code.

is currently the case. Unless the scope of control of IMAs was to encompass all gas transmission and distribution for each jurisdictional gas system (including pipelines not currently “covered” by economic regulation) there would be no market benefit from transferring operational responsibility from infrastructure operators to IMAs.

In the context of distribution integrity and security, the Consultation Paper recommendation to develop nationally consistent gas curtailment rules and load shedding tables is not necessary. However, AGL would support the development of high level principles through AEMC processes and suggests that these principles should recognise and allow for practical operational differences among networks and jurisdictions.

The curtailment principles suggested in section 7.3(a) of the Consultation Paper may be a useful starting point for consideration. However, given the diversity of jurisdictional interests and practices, AGL observes that there would need to be consultation with all market participants in further defining objectives and arriving at principles in line with those objectives.

AGL agrees that any national high level curtailment rules would need to operate subject to the emergency powers available to the Energy Minister in each jurisdiction, and that there needs to be co-ordination and consensus between the jurisdictions in respect of the scope of such powers and their implementation. If jurisdictions acted completely independently in line with emergency powers, there would be a significant risk that the actions of one jurisdiction would have unintended consequences in another jurisdiction.

With regard to the Gas Emergency Protocol Working Group (*GEPWG*), AGL notes that the Memorandum of Understanding between jurisdictional ministers concerning natural gas shortages deals with supply issues at an interjurisdictional market level, and not supply interruptions at the local operational level. The work of the GEPWG addresses a wide market context, and is not designed to develop a load shedding regime to replace the arrangements currently used by gas distributors to reduce network demand. However, AGL recognises that the NGL may need to accommodate the broader market outcomes of the MCE/GEPWG process.

6.2.3 Summary

In summary:

- electricity load shedding is adequately covered by existing arrangements and can be incorporated in the NEL;
- AGL sees some value in developing jurisdictional consistency through high level principles in relation to gas curtailment and load shedding, provided these principles were developed in a consultative manner. However AGL questions the benefit of developing prescriptive load shedding tables under national rules. Load shedding practices which are currently addressed as a network operational responsibility should remain so;

- AGL does not support the elevation of the decision to implement load shedding from a distribution operational procedure to a market operation function in jurisdictions where IMAs are not currently involved; and
- AGL supports the broader work being done by the MCE with regard to emergency allocation of gas at a national market level.

7. RETAILER FAILURE ARRANGEMENTS

7.1 Appropriate Policy Criteria

The Consultation Paper is proposing a Step-in Retailer (*SIR*) regime, sometimes referred to as a Retailer of Last Resort (*ROLR*) regime, whereby one or more SIR for a jurisdiction is designated by the AEMC.

AGL understands that a SIR regime will only be implemented in the most extreme circumstances, and that, where possible, all efforts would be made to facilitate the orderly transition of customers prior to the failing retailer ceasing operations.

AGL is generally supportive of a SIR regime as proposed by the Consultation Paper on the basis that the designated SIR was appointed following a competitive tender process. However, AGL believes that there are a number of issues associated with having only one or two designated SIRs, namely:

- In accepting SIR responsibilities, a retailer is accepting a great deal of risk – the SIR will become responsible for a large number of ‘unhedged’ customers in a very short period of time. As detailed in section 7.2.5 below, it is very difficult for a SIR to effectively manage this risk. The larger the number of customers a SIR acquires, the higher the risk;
- A SIR would need to invest a significant amount of money in building the systems capacity necessary to prepare operationally for a SIR event. The larger the number of customers a SIR might potentially acquire in a SIR event, the greater the operational cost a retailer will need to incur to prepare for the eventuality. The SIR regime would need to provide a means to reimburse the SIR for the cost of establishing SIR capabilities, and this reimbursement would need to occur at the time of expenditure; and
- A SIR event would lead to the one (or two) retailer(s) acquiring all the customers of the failed retailer. The SIR may experience a great deal of administrative difficulty in dealing with such a large number of ‘newly acquired’ customers at the one time. The greater the number of customers, the more likely there will be difficulties with the SIR’s billing and transfer systems. This may lead to significant customer inconvenience with delays in processing transfers or issuing bills.

AGL believes that consideration should be given to an alternative regime whereby customers of the failed retailer would be distributed amongst other retailers on basis

of existing market share and an appropriate allocation of the NMI and/or MIRN number. In effect, there would not be one (or more) designated SIR, rather all retailers remaining in the market would be responsible for ‘stepping in’. AGL notes that this proposal is not inconsistent with that proposed by the Consultation Paper and believes a ‘whole of industry’ regime would ameliorate a number of the difficulties that may be presented by a SIR event as outlined above. The customers of the failed retailer are spread across all other retailers on the basis of existing market share. This spreads the risks associated with hedging and system capabilities and also dilutes the potential skewing of market share, thereby maintaining the level of competition in the market.

AGL believes the provision under the SIR scheme should apply to a specific category of customers ie those whose consumption is less than a certain specified amount. AGL notes that the Consultation Paper does not make any specific reference to the scope of the proposed SIR regime, although does seem to suggest that all customers would be subject to the scheme.

While there would need to be further consultation on how to manage larger customers, AGL believes the position should be premised on the need to protect the integrity of the market, and the fact that larger customers are better positioned to act quickly to ensure supply is maintained and protect their own interests.

AGL largely agrees with the other principles put forward in the Consultation Paper³³, namely that the regime should:

- be able to preserve the integrity of the wholesale settlements system in the relevant market and ensure continuity of supply to customers of the failed retailer;
- ensure that customers of the failed retailer continue to be supplied with energy; and
- establish the legislative framework for the efficient transfer of the failed retailer’s obligations to the SIR.

However, AGL believes that it is equally important to recognise that the SIR regime must provide assurance that SIRs will obtain full cost recovery while operating as the SIR. It is essential that the SIR regime be structured so as to guard against a SIR event contributing to a domino effect of another retailer’s financial failure. The Consultation Paper states that it is not appropriate for customers to carry pool price risk in a SIR event. However, AGL considers that it is not reasonable, nor sensible, to implement a scheme whereby retailers are expected to incur significant costs without reimbursement.

7.2 Comments on Specific Recommendations

7.2.1 Designation as SIR

As noted above, AGL believes consideration should be given to a ‘whole of industry’ approach as outlined above.

However, if the Consultation Paper suggestion is adopted such that one or more SIR is to be designated, this designation should be conducted on the basis of a competitive

³³ Consultation Paper, at page 88

tender whereby retailers submit a tender document that would set out the costs the retailer will require reimbursement for in order to be the designated SIR. If this idea were adopted there would need to be further consultation around the tender and designation process. It should be noted, however, that any SIR will have difficulties in providing a costing for the provision of such services, as the retailer's load requirements and hedging requirements are unknown.

7.2.2 SIR 'trigger' event

AGL firmly believes that the responsibility for invoking the SIR regime should rest solely with the AER. While the NEL and NGL should outline a number of circumstances which might be considered to give rise to a 'trigger' event, AGL believes that it is essential that the AER is the body solely responsible for calling a SIR event. AGL suggests that this power be tied to the AER's role in administering the national retailer licence (as outlined above). The AER could then seek to facilitate the failing retailer's orderly exit from the market, and would only need to resort to calling a SIR event in the most extreme circumstances.

7.2.3 Retailers to submit SIR plans to AER

AGL agrees with the principle that retailers should be required to formulate procedures and communication templates in anticipation of a SIR event. While AGL agrees that retailers should submit SIR plans to the AER, NEMMCO and the gas market governance bodies as applicable, it emphasises that the requirement should be limited to a high level management plan only and should not seek to mandate the provision of a detailed documented plan.

7.2.4 SIR period to be for defined period

AGL agrees in principle that the SIR regime should only apply for a limited period of time, that is customers are precluded from transferring away from the SIR for a specified period of time (*SIR period*). This specified period should allow for the SIR to set the customer up within systems, calculate the costs incurred during the SIR event and the pass through costs to be billed to each customer (administrative fee) and bill the customer for energy consumed and the administrative fee (see below for further detail on proposed cost recovery measures). The customer should be precluded from transferring during this period to ensure the SIR is able to recover costs incurred and to ensure the SIR's administrative processes are not further complicated by an escalation in customer transfers of SIR customers at this time. This will also ensure stability in the market and minimise disruption to other customers.

AGL notes that a 'whole of industry' SIR regime removes the need to force customers to move from the SIR to another retailer at the expiry of the SIR period. Under AGL's proposed scheme, the customer base of the failed retailer is spread across all remaining retailers, and the market shares of the remaining participants following the SIR event correspond with their previous market shares. Accordingly, AGL submits that the SIR regime allow small customers who have not elected to enter into a market contract on expiration of the SIR period, to become a customer on an appropriate market contract.

Duration of the SIR period

The longer the specified period of time the more likely it is that the SIR will be assured cost recovery and the lower the likelihood of administrative errors in relation to billing and transfers. AGL notes that while SIR customers are not free to choose their retailer for the duration of this period, they are ensured continuity of supply, which AGL believes outweighs the short-term inconvenience they experience.

AGL believes a period of 9 months would be necessary to facilitate cost recovery (to ensure customers pay the SIR prior to transferring to another retailer) and effective administration of the SIR customers (billing and transfers). AGL believes that any substantial shortening of this period has the potential to lead to increased administrative difficulty for the retailer (which may result in customer inconvenience) and increases the likelihood that the SIR retailers will not fully recover their costs. Market settlement costs may alter up to 30 weeks in electricity and 118 days for gas in Victoria. AGL submits on this basis that, in order to allow for a billing period to accommodate these costs, 9 months would be a reasonable period in which transfers away from the SIR should not be permitted.

7.2.5 Ability of SIR retailer to recover costs

The SIR retailers will be exposed to a significant market risk in acquiring SIR customers. The SIR retailers are unlikely to have hedge cover for the SIR customer load and SIR retailer may be paying a premium for cover procured at short term. Further, those SIR retailers who are unable to obtain hedge cover immediately, may be unfairly exposed to high pool prices in respect of that load.

The Consultation Paper has noted that:

- the SIR regime should not expose customers to pool price risk; and
- the SIR customers should be charged in relation to the energy they consume plus an administration fee that is commensurate with the additional administration costs incurred by the SIR retailer.

AGL firmly believes that in order to be effective the SIR regime must provide for full cost recovery for SIR retailers. Imposing the risks attached to a SIR event (eg pool price risk or risk associated with administered prices) on the SIR retailer is unreasonable and could result in a weakening of the ongoing financial viability of that retailer and produce a subsequent SIR event.

The Consultation Paper puts forward two suggestions as to how the SIR retailers might manage the pool price risk. AGL does not believe either of these recommendations would be workable or practical:

- the Consultation Paper suggests that the hedging contracts of the failed retailer could novate over to the SIR retailer. AGL does not believe this is a viable solution. Firstly, it is unlikely that the terms of the hedge contract would permit such a novation. Further, the hedge contracts of the failed retailer may have contributed to its financial demise, and it would be unlikely that SIRs would accept the obligations and risks associated with such contracts.

- the Consultation Paper suggests that the SIR event act as trigger for NEMMCO administered pricing. AGL believes that such a measure increases the financial risk faced by a SIR retailer rather than reducing it. During an administered pricing event, generators that are dispatched at offer prices above the price cap are compensated by the market, and the costs passed through to retailers. This means that retailers face an unhedgeable cost during this period, as all contracts would settle against the pool price.

On this basis, and in the absence of any effective way to manage the SIR's exposure to unhedged pool prices, AGL believes that the most effective means of ensuring retailers are not exposed to financial loss during a SIR event is to allow retailers to recover the bulk of the costs from SIR customers, with any shortfall being recovered from all small customers in the market. AGL suggests the following model for cost recovery:

- **SIR customers' contribution – SIR Fee:**

SIR customers would be required to pay a 'SIR Fee'. The amount of this fee would be established through consultation between retailers and regulators, and would be calculated by reference to the administration costs the SIR is likely to incur in acquiring, supplying and servicing the SIR customer. The SIR retailers would charge SIR customers for their energy at the retailer's generally available tariff plus the SIR Fee, which could be comprised of:

- an upfront fee, which encompasses administration costs and costs of supply on the customer's first bill designed to provide the SIR retailer with an immediate financial ability to implement the necessary administrative arrangements; and
- an ongoing variable fee charged on each subsequent bill calculated as a rate per KWh or Mj as the case may be, during the course of the SIR period to cover the retailers costs.

AGL believes that the SIR Fee should be set at the time the SIR event commences, and should be recovered and paid to the SIR on an ongoing basis for the duration of the SIR period.

- **True-up**

Toward the end of the SIR period (for example, after 6 months of the commencement of the SIR event) there should be a 'true-up'. This would be a reconciliation whereby each SIR retailer calculates the actual costs incurred and the fees received from SIR customers during the SIR period.

In the event that a retailer has expended more money than it has recouped in relation to its SIR obligations, the shortfall would be recovered from a fee imposed on all small customers in the national market (ie all electricity and/or gas customers as appropriate). The money accrued through these means would then be distributed to SIR retailers accordingly. In the event that the retailers have recouped more money than they have expended, the SIR Fees will be refunded to SIR customers.

7.2.6 Prioritisation of payments to market participants

AGL believes it is a fundamental premise of any SIR regime that SIR retailers are in no way liable for any of the costs incurred in relation to SIR customers prior to the calling of the SIR event. The Consultation Paper has suggested that:

- the SIR to hold ‘on trust’ payments received from SIR customers for payments due to market operators, generators/wholesale suppliers and distributors;
- in the event that the receipts from the SIR customers are not sufficient to cover all SIR retailers obligations to market participants, the payments to the market operator are to take priority; and
- the liability of the SIR is to be limited to the amount held ‘on trust’ by the SIR.

It is not clear whether the Consultation Paper is suggesting that the SIR hold payments from SIR customers ‘on trust’ in order to defray costs incurred by the failed retailer. For the avoidance of any doubt, AGL wishes to make the following comments:

- the SIR regime needs to clearly articulate that a SIR is not liable for any costs incurred by the failed retailer prior to the SIR event. A SIR is only liable for costs incurred by or on behalf of SIR customers once those customers have become the customers of the SIR. Any wholesale or distributor UOS costs incurred prior to the event will be the responsibility of the administrator. AGL notes that prudential arrangements in the market for pool operators are intended to cover costs incurred. For distributors, costs would be addressed as part of the UOS agreement – see Part D, Section 2 above.
- accordingly, the SIR retailer is only entitled to take payment from SIR customers in relation to energy supplied to the SIR customers after the transfer of those customers to the SIR retailer has occurred. The SIR retailer cannot accept payment from SIR customers that relate to goods and services provided by the failed retailer prior to the SIR event. AGL believes this is in accordance with the Consultation Paper’s recommendation but needs to be clarified; and
- any outstanding debt of the failed retailer will be the responsibility of the administrator to recoup from customers even after the event has been called.

As a SIR will be reimbursed for any costs not recouped from customers, AGL agrees that it is essential that SIRs are required to strictly account for receipts from SIR customers. AGL assumes that the recommendation regarding holding these receipts ‘on trust’ was not intended to have its technical, legal meaning. AGL does not believe it would be necessary to establish a trust, but rather to have in place accounting mechanisms to ensure these amounts will be identifiable.

It is not clear from the Consultation Paper whether it is suggested that cost recovery of other market participants should take precedence over the cost recovery by SIRs. AGL is proposing a regime whereby full cost recovery for retailers (and therefore market operators, distributors and generators) is guaranteed. AGL would only support a regime where all market participants are treated equitably. The normal prudential obligations of the SIR to the market operators will ensure that payments to

the market operator are appropriately prioritised. AGL does not believe there is any cogent rationale for placing the claims of any one participant over the claims of other participants.

7.2.7 Obligation on failed retailer or representatives and market operators to co-operate

AGL agrees that there should be an obligation on both the failed retailer (and/or its representatives) and the market operator to give effect to the SIR regime. AGL suggests that the regime incorporate an ongoing obligation on all retailers to provide up to date information in respect of its existing customers in a standardised format to an independent custodian. Retailers should be able to recover any costs associated with this obligation.

8. JURISDICTIONAL DIRECTIONS

The Consultation Paper's proposal to allow Jurisdictional Directions is of concern to AGL. For example, there is no requirement for such directions to be in any way consistent with the market objectives or established rules, nor is there provision for any review process in respect of the regulatory application of the directions. The existence of a jurisdictional power of the kind proposed in the paper would be inconsistent with transparent and accountable decision making, and the concept of an independent national regulator.

AGL believes that the matters listed as being potentially the subject of jurisdictional directions all appear to be either matters suited to specific legislation, or matters pertaining to consistency with previous decisions of access regulators (ie essentially transitional matters). As an alternative to the Consultation Paper's proposals, AGL suggests that the NEL and NGL would contain obligations on the AER to recognise and take account of:

- jurisdictional legislation on environmental matters; and
- previous regulatory decisions to the extent that they are required to maintain certainty for retail and distribution businesses.

AGL understands that jurisdictional governments have interests in giving effect to community service policies, and that some of these policies will be specific to energy. However, AGL does not believe that it is necessary to permit Jurisdictional Directions in order to give effect to these policies. Similarly to the issue of distribution tariff equalisation, AGL believes that jurisdictional governments would be able to implement social policy through direct, transparent payments to customers, and that there is no necessity for the AER or retailers to apply the rules established by the AEMC to effect this policy. Further, this approach would accord with the recommendations made by the Productivity Commission³⁴. In the event that

³⁴ The Productivity Commission, *Review of National Competition Policy*, April 2005, at page 302:

In retail infrastructure markets, once effective competition has been established, regulatory constraints on prices should be removed. Ensuring that disadvantaged groups continue to have adequate access to services at affordable prices should be pursued through adequate, well targeted and transparent community service obligations (or other appropriate mechanisms), that are monitored regularly for effectiveness.

jurisdictional governments require the assistance of retailers in administering these direct payments, then the governments and retailers could enter into a separate commercial agreement to facilitate such an arrangement.

There would need to be some means of transitioning previous jurisdictional regulatory decisions to national regulation, and this could be done through transitional provisions in the NEL and NGL. Subsequently, market and regulatory policy issues should be decided nationally by the MCE and implemented through the appropriate rules.

APPENDIX 1

PRINCIPLES OF BEST PRACTICE REGULATION

Nine main principles of best practice regulation have been identified:³⁵ These are:

1. Communication – all stakeholders to understand regulatory initiatives and needs;
2. Consultation – effective and early consultation assists regulators understand the implication of their regulation and offers stakeholders the opportunity to suggest alternatives;
3. Consistency – consistency across sectors, over time and across jurisdictions provides confidence in the regime;
4. Predictability – helps utilities plan for the future;
5. Flexibility – ability to evolve and amend regulatory approach as the external environment changes;
6. Independence – free from undue influence that could compromise regulation helps build trust in the regulator;
7. Effectiveness and efficiency – assessment of cost effectiveness and efficiency includes time; taken to make decisions and having staff with appropriate technical knowledge;
8. Accountability – regulator taking responsibility for their regulatory actions; and
9. Transparency – open about objectives, processes, data and decision.

The principle of proportionality has also been recognised as being of prime importance in devising, implementing, enforcing and reviewing regulations. This principle requires that remedies be appropriate to the risk posed, with costs identified and minimised.³⁶

The Better Regulation Task Force³⁷ also identified a number of tests of good regulation that build on the aforementioned principles and recommended they be applied to the full range of policy tools, not just prescriptive regulation. They require regulations to:

1. Be balanced and avoid knee-jerk reactions – it can lead to ineffective or disproportionate regulation being introduced;
2. Seek to reconcile contradictory policy objectives – clear assessments of likely impacts of regulations are essential for identifying and reconciling contradictory objectives;
3. Balance risks, costs and benefits – trade-offs between the costs and benefits of regulation need to be assessed;
4. Avoid unintended consequences – by regulating in one area regulators may unintentionally create problems elsewhere;

³⁵ The Office of Water Regulation (1999), *Best practice utility regulation*, Utility Regulators Forum discussion paper, July 1999.

³⁶ Better Regulation Task Force (2003), *Principles of Good Regulation*, www.brtf.gov.uk, 2003, page 4

³⁷ *ibid*, page 7; The Better Regulation Task Force was established in September 1997. It is an independent body that advises United Kingdom Government on action to ensure that regulation and its enforcement accord with the Principles of Good Regulation/

5. Be easy to understand – the complexity of some regulations can undermine their effectiveness;
6. Have broad public support – it is a good indicator that the public sees it as necessary
7. Be enforceable – it must be practical to enforce;
8. Identify accountability – there must be clear accountability without resorting to unfair retribution;
9. Be relevant to current conditions - regulations should be reviewed on a regular basis to ensure they remain necessary and relevant;
10. Proportionality - remedies should be appropriate to risk posed and costs identified and minimised; and
11. Targeting - regulation should be focused on the problem and minimise side effects.

The development of the national regulatory framework should take into account these principles and related tests in order to ensure a net benefit to the national energy market.