



ActewAGL
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1 August 2008

Ms Kimberley Pattinson
Manager, MCE Secretariat,
Department of Resources, Energy and Tourism,
GPO Box 9839
Canberra ACT 2601

Dear Ms Pattinson

ActewAGL Response to National Customer Framework SCO Policy Response Paper

Thank you for the opportunity to comment on the proposed Ministerial Council on Energy Standing Committee of Officials National Customer Framework Policy Response Paper. The Policy Response Paper is a key step towards the establishment of new national distribution and retail customer arrangements across the electricity and gas sectors.

ActewAGL is Australia's first multi-utility to offer electricity, natural gas, water and wastewater services. ActewAGL's electricity network connects to approximately 156 000 customers in the ACT. The gas network connects to around 107 000 customers in both the ACT and the surrounding region. ActewAGL Retail also sells energy to customers in the ACT and southern New South Wales.

This breadth means that ActewAGL is in a unique position to comment on the proposed national framework from the perspective of efficiencies that may be available through the development of national arrangements.

Detailed comments from the electricity and gas retail and network perspective are included in the submission that accompanies this letter. Should you require further information on retail issues discussed in the submission, please contact Ms Sheryl Harrington, Manager Business Improvement, Retail Division on (02) 6248 3134. For further information on distribution issues, please contact Mr Janusz Worony, Manager Strategy and Regulatory, Networks Division, on (02) 6293 5871.

Yours sincerely

Michael Costello
Chief Executive Officer

ActewAGL response to proposed National Energy Customer Framework

Submission to Ministerial Council on Energy
Standing Committee of Officials

August 2008

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Overview of ActewAGL's Submission

While supporting the development of a consistent national customer framework, ActewAGL is concerned that the proposed alignment of regulatory instruments between the electricity and gas sectors may lead to a *net increase* in the scope, complexity and cost of the regulation of gas arrangements without a clear case for consistency having been made, and without clear efficiencies having been identified. ActewAGL therefore does not support the proposal to create a triangular contractual model between retailers, customers and distributors in the gas sector. The current linear contracting model is aligned with the allocation of responsibilities under the gas access regime, and appropriately manages the relationship between the three parties.

ACT electricity arrangements currently involve a triangular contractual approach. ActewAGL supports the proposed triangular contractual model for the electricity sector under the national customer framework, but notes that ActewAGL Distribution and Retail will incur costs in moving to the new framework requirements. Adequate transitional arrangements will need to be put in place to support changes to current customer contracts.

Establishing separate National Customer Rules outside the National Electricity Rules (NER) and the National Gas Rules (NGR) could create the potential for inconsistency between the National Customer Rules, and their application by the Australian Energy Regulator (AER) in individual access determinations. ActewAGL seeks clarification on the proposed interaction between the classification of services under the NER access provisions, and the definition of services subject to an obligation to connect under the proposed National Customer Rules. In addition, ActewAGL seeks clarification on how the proposed National Customer Rules will align with the NER and NGR with respect to the retailer-distributor relationship obligations.

ActewAGL supports *in principle*, the proposed SCO framework for establishing an obligation to connect and to offer to supply. The proposed arrangements largely reflect those in place in the ACT.

ActewAGL does not support the proposal to establish national standard distribution-customer and retailer-customer contracts in the National Customer Rules. This approach would limit scope for innovation and differentiation of energy delivery on the basis of service, and is inconsistent with other MCE reform areas such as the development of a national framework for smart meters, which seek to provide a basis for innovative product and service delivery using the functionality available through advanced meters.

A preferable approach would be to set out minimum terms and conditions for standard, deemed and market retail contracts in the Rules, and to require the retail business to submit proposed standard contracts to the AER for approval. Similarly, distributors would need to develop distributor-customer contracts in line with obligations set out in the Rules.

The proposal to publish small customer standard tariffs that cannot be changed more frequently than every six months is not supported. ActewAGL understands that this obligation

is intended to operate regardless of whether retail price regulation is in place. It therefore represents a re-regulation of gas retail prices in the ACT, as the ACT Government has not continued gas retail price regulation following the expiry of a gas price direction on 30 June 2004. This requirement would also undermine competition between retailers on the basis of non-tariff service parameters such as bundling offers.

ActewAGL recommends a future liability regime where retailers and distributors are protected from liability for losses that are outside of their control, and where liabilities are limited to direct losses, are capped, and are subject to a time limit.

ActewAGL supports the proposed national retail licensing regime, and the decision not to establish a national distributor licence at this stage. It is expected that the move to the national customer framework will lead to considerable changes to the current ACT Utility Services Licence, including removal of its application to retail businesses, and removal of consumer protection aspects of the Licence that currently apply to ActewAGL Distribution.

ActewAGL is concerned that the SCO is seeking to introduce a new regulatory enforcement mechanism that will be available for enforcement across the National Electricity Law (NEL) and National Gas Law (NGL). This change does not appear to be based on any evidence that the current enforcement provisions under the NEL and NGL are inadequate and therefore is not supported.

ActewAGL considers that any decision to introduce new enforcement powers should be based on evidence, rather than a slow creep towards greater regulatory intervention on the basis of the powers available to other regulators and regimes. In addition, the proposal to allow private enforcement of provisions, as well as the use of lower courts, would extend current enforcement provisions in the electricity and gas sectors and made enforcement more uncertain, without a case having been made that such an expansion is warranted.

Extending the information provisions of the NEL to allow the AER to issue regulatory information instruments to retail businesses appears to be an inappropriate extension of regulatory intervention powers beyond those anticipated when the instruments were developed and is not supported.

ActewAGL is concerned to ensure that appropriate transitional arrangements are in place to manage the move to national arrangements, and changes to jurisdictional legislation, codes and licences occur within a process that is aligned with the transitional arrangements. This will be important in ensuring that ActewAGL is not subject to duplicating, overlapping and potentially inconsistent regulatory obligations that will drive costs and increase regulatory complexity for customers.

1. Introduction

ActewAGL is Australia's first multi-utility to offer electricity, natural gas, water and wastewater services. ActewAGL's electricity network connects to approximately 156 000 customers in the ACT. The gas network connects to around 107 000 customers in both the ACT and the surrounding region. ActewAGL Retail also sells energy to customers in the ACT and southern New South Wales.

The key policy objectives for the national customer framework are set out in the *Australian Energy Market Agreement* (AEMA). The most relevant to this process are objectives to:

- (i) strengthen the quality, timeliness and national character of governance of the energy markets, to improve the climate of investment;
- (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;
- (iii) [...]
- (iv) enhance the participation of energy users in the markets including through demand side management and the further introduction of retail competition, to increase the value of energy services to households and businesses¹

ActewAGL is acutely aware of the challenges involved in creating a consistent national customer framework that covers the electricity and gas sectors, and which serves the needs of distribution and retail businesses and customers. In establishing the national customer framework, governments will need to strike a balance between the potential benefits that may be derived from establishing uniform arrangements, and those derived from supporting innovative and flexible service provision.

ActewAGL considers that, similar to the approach taken for the electricity and gas economic regulatory frameworks, appropriate consistency can be achieved without necessarily creating uniform arrangements in all areas across the sectors.

As a vertically-integrated multi-utility that operates in more than one jurisdiction, ActewAGL understands the potential benefits of having more national uniformity in customer arrangements. Similarly, ActewAGL is also in a position to advise governments on areas where a diversity of approaches may provide for innovation in business processes to increase the value of energy services to households and businesses, and potential economies of scale and scope. The framework must also consider the costs of moving from existing regulatory structures, and the possibility that these may outweigh potential benefits. These issues are raised throughout this submission.

¹ *Australian Energy Market Agreement*, clause 2.1(b)

2. Governance Model

2.1 Law/Rules framework

The Standing Committee of Officials' (SCO') proposed approach to establishing the customer framework involves creating a discrete set of customer rules that are common across the electricity and gas sectors.

There are a number of issues that arise from establishing common National Customer Rules relating to the appropriate scope of consistency between the electricity and gas regimes, and these are discussed below.

2.1.1 Appropriate scope of consistency between electricity and gas customer rules

A key policy driver behind the decision to establish National Customer Rules is the AEMA requirement to develop a national framework for distribution and retail regulation. This requirement has been translated by the SCO into the establishment of a common set of proposed Rules for the electricity and gas sectors. The main concern in establishing the rules primarily appears to be consistency across the electricity and gas sectors, and across jurisdictions, from the customers' perspective.

As stated throughout the SCO Policy Response Paper, establishing a common set of rules is expected to reduce complexity of arrangements for customers, and reduce the costs for businesses, particularly retailers, operating across jurisdictions and fuels. This approach should only be pursued, however, where it can be established that the benefits of consistent arrangements outweigh:

- the transitional costs of change;
- the ongoing additional costs arising from the new regulatory structure; and
- the costs of limiting innovation and flexibility in service provision, and scope for allocative and dynamic efficiency, that may arise from mandating consistent arrangements across businesses and across the electricity and gas sectors.

ActewAGL supports the development of a national framework for distribution and retail regulation, and considers that there are some areas of regulation where consistent arrangements may be appropriate and may deliver the kinds of benefits outlined above. In the ACT for example, the electricity and gas sectors are subject to a common Consumer Protection Code. As a regulated multi-utility, ActewAGL observes that these consistent arrangements reduce regulatory complexity in retail service provision.

ActewAGL does not consider, however, that the case for *complete* consistency between electricity and gas customer rules, particularly in the distribution sector, has yet been made.

ActewAGL has not been able to identify significant benefits arising from the proposed alignment of customer obligations and regulatory instruments between the electricity and gas sectors. Other differences between the sectors that arise because of differences in basic service parameters mean that complete consistency is unlikely in the short and longer term. These differences include the degree of competition and the status of gas as a fuel of choice. Given the limits to the scope for complete consistency in arrangements, ActewAGL considers that the costs of potentially stifling competition in retail service provision will offset the benefits of the alignment anticipated in the SCO Policy Response Paper.

The benefits of consistency between the electricity and gas sectors must therefore be considered on a case by case basis, rather than relying on a principle that consistency will always deliver better outcomes for customers. This is particularly the case since alignment between the sectors is likely to lead to a net increase in regulation in the gas sector, which will drive additional costs.

These issues are explored in greater detail below in respect of the proposed contractual arrangements.

2.1.2 Role of the Australian Energy Market Commission

ActewAGL notes that SCO proposes that the Australian Energy Market Commission (AEMC) Rule change process under the *National Electricity Rules* (NER) and the *National Gas Rules* (NGR) would apply to the National Customer Rules. SCO expects this to limit scope for significant inconsistency in approach between the three sets of rules. In the event that the proposed National Customer Rules are established outside the NER and the NGR, ActewAGL supports this consistent governance approach to the rule change process.

3. Contractual Model

3.1 Alignment of contractual models between electricity and gas

ActewAGL supports moves to clarify the rights, roles and responsibilities of distributors, retailers and customers in the supply of energy, to the extent that these obligations are currently not clear and lead to uncertainty for market participants.

As noted above, the case for alignment between the electricity and gas regimes with respect to the contractual model between distributors, retailers and customers must be made on its merits, rather than on the basis of the assumption that alignment will necessarily deliver net benefits to customers or is an end in itself. This assumption, however, is inherent in the SCO Policy Response Paper statement that the driver to alignment is a desire for national consistency:

...in the interests of a nationally consistent approach between jurisdictions and between sectors, a contractual interface for the distributor-customer relationship has been adopted for both electricity and gas.²

As a vertically-integrated multi-utility, ActewAGL is well placed to identify and capitalise on potential benefits and efficiencies available from establishing consistent contractual approaches across electricity and gas. It could also be expected that any reduction in complexity of approach for the business would lower overall costs of supply, and also be reflected in a reduction in complexity of regulation from the customers' perspective.

However, as outlined below, ActewAGL has not been able to identify potential benefits arising from alignment in contractual arrangements between electricity and gas.

3.2 Gas contractual model

ActewAGL is concerned that the proposed alignment of regulatory instruments and contract provisions between electricity and gas may lead to a *net increase* in the scope and complexity of regulation of gas without a clear case for reform having been made, and without clear benefits having been identified. By the nature of the two sectors, there is a considerable degree of additional regulatory complexity involved in the regulation of electricity customer rules.

ActewAGL is not aware of any problems arising from the legislative and contractual arrangements between customers, retailers and distributors in the gas sector that would warrant increasing the scope of regulatory intervention in the sector. One of the major risks in establishing nationally consistent rules is therefore in imposing a greater regulatory burden on gas than has been considered efficient and appropriate in the past. Such an increase in

² Ministerial Council on Energy Standing Committee of Officials, *A National Framework Regulating Electricity and Gas (Energy) Distribution and Retail Services to Customers: Policy Response Paper*, June 2008, pg 58.

regulation in the gas sector is likely to lead to an increase in costs for both businesses and the regulator, without leading to benefits for consumers.

ActewAGL notes that the Council of Australian Governments (COAG) Principles for Best Practice Regulation require governments to “establish a case for action before addressing a problem”, as well as government actions being “effective and proportional to the issue being addressed”. In addition, the COAG principles state that “legislation should not restrict competition unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the regulation can only be achieved by restricting competition”.³

ActewAGL does not believe that the case has been made for alignment in contractual arrangements between electricity and gas such as to satisfy these principles.

ActewAGL believes that the current gas linear contractual model, which is closely aligned with the access arrangement process, leads to more efficient outcomes than the introduction of new contractual arrangements in the sector. The potential decoupling of the gas contracting process from the access arrangement process would create unwarranted additional complexity and costs.

3.3 Electricity contractual model

ActewAGL supports the proposed electricity contractual model, which is characterised by a triangular structure with direct contractual arrangements between retailers and customers, distributors and customers, and retailers and distributors.

ActewAGL currently operates under a triangular contractual model in the electricity sector, with retail and distribution customer contracts, as well as a use of system contract between the retailer and the distributor. ActewAGL expects that there will be transitional costs involved in moving to the proposed new national arrangements, as they involve changes to the contracts currently in place with customers.

ActewAGL emphasises, however, that these same arrangements do not apply in the gas sector in the ACT, and therefore the proposed gas model would lead to an increase in regulatory burden and therefore costs, with no clearly identified benefits. In addition, ActewAGL’s support for the contractual model does not extend to support for proposed deemed contractual arrangements, which are discussed in more detail below.

3.4 Distributor-customer contracts

3.4.1 Definition of distribution service and obligation to connect

ActewAGL is concerned that establishing separate National Customer Rules outside of the NER and the NGR appears to create the potential for inconsistency between the customer

³ Council of Australian Governments *Principles of Best Practice Regulation*, <http://www.finance.gov.au/obpr/proposal/coag-requirements.html>, accessed on 21 July 2008

rules, and their application by the Australian Energy Regulator (AER) in individual access determinations. From both the distribution and retail perspective, the terms and conditions of network access, definition of the service, and retail service provision, make up the service product to the customer. Therefore, the distinction created between pricing and “interface issues”, from other terms and conditions associated with network access, is an artificial one.

The SCO Policy Response Paper establishes a definition of distribution services for the purposes of the national customer framework. The definition of services is related to the obligation to connect and supply, and is therefore linked to the access regime and access price determinations. This definition of the distribution services under the national customer framework is not aligned, however, with the definition of a distribution service under the NER and the NGR.⁴

The separation of terms of access from customer rules therefore creates the potential for the access determination decision-making process of the AER to create inconsistencies with the rules associated with retail service provision. As an example, ActewAGL seeks clarification on the proposed interaction between the classification of services as *direct* or *negotiated* control services under the NER for the purposes of access regulation, and the definition of services subject to an obligation to connect under the proposed National Customer Rules.

3.4.2 Deemed contract terms and conditions

SCO proposes that contracts between distributors and customers be based on deemed terms and conditions. The scope to enter into alternative contract provisions would be very limited, where distributors will only have scope to make “look and feel” type changes and to refer to the specific parties to the contract.

SCO proposes that the prescribed industry-wide model contract terms would be set out in the rules and subject to the AEMC Rule change process. The intent of using contracts is to create a direct relationship between distributors and customers for which the distributor and customer can be held directly accountable. The scope for contract terms to be altered by a process initiated by a party other than those subject to the contract appears to undermine the intended accountabilities. For example, a successful Rule change process initiated by a party in another jurisdiction, addressing issues not relevant in the ACT, would alter the contract between ActewAGL and a customer, potentially introducing new rights and obligations on and between the parties to the contract. This makes these contract provisions more akin to rules. Overlaying a contract onto these rules appears to do no more than add an additional layer of regulatory complexity.

ActewAGL is also concerned that this approach will limit scope for innovation and differentiation of energy delivery on the basis of service. It implicitly assumes that the only arena for competition between retailers now and in the future is on the basis of price. It also assumes that distributors offer a generic service throughout Australia and no product differentiation is possible.

⁴ MCE SCO *Policy Response Paper*, June 2008, p.61

This approach appears to contradict efforts in other forums, including the development of a national framework for smart meters, which seeks to provide a basis for innovative retail product service delivery using the functionality available through meters, such as in home displays. In addition, the proposed approach could undermine the potential for distribution contracts to support distributor-led demand management to manage network peak demand in jurisdictions where this may be beneficial.

ActewAGL therefore considers that a more appropriate approach in the electricity sector would be to set out minimum terms and conditions for distributor-customer contracts in the Rules.

3.5 Retailer-customer contracts

3.5.1 Retailer obligation to offer to supply and standard terms and conditions of supply

The proposed obligations to offer to supply reflect those currently in place in the ACT in respect of small electricity and gas customers. Small customers are determined on the basis of demand under 100MWh or 1TJ, for the electricity and gas sectors respectively. The ACT Government, however, has not continued gas retail price regulation following the expiry of a gas price direction on 30 June 2004.⁵ Small customers are supplied under a standard customer contract, minimum terms for which are set out in the Consumer Protection Code.

ActewAGL supports *in-principle*, the proposed SCO framework for establishing an obligation to offer to supply, which largely reflects the obligations already in place in the ACT.

ActewAGL does not support, however, the intent to standardise retail customer contracts across Australia. Similar to issues outlined above for the deemed distributor-customer contract, ActewAGL considers that such an approach would have a considerable impact on competition in the retail sector, by reducing scope for product differentiation to competition over price. This is significantly at odds with other reforms in the energy sector such as smart metering, and the stated AEMA policy objectives to “increase the value of energy services to households and businesses”.⁶

ActewAGL would support an approach which sets out minimum terms and conditions for standard, deemed and market contracts (which may be different) in the Rules, and required the retail business to submit proposed standard contracts to the AER for approval. The AER approval process would be guided by the Rules, as well as potential AER guidelines.

ActewAGL does not support the publication of market tariffs, as this approach would undermine competition between retailers on the basis of non-tariff service parameters such as bundling offers, which may not be directly comparable between retailers. In addition, the proposed requirement not to change a published tariff more often than every 6 months is an effective re-regulation of gas prices in the ACT. The approach would also undermine the ability

⁵ ActewAGL notes that the status of gas retail price regulation in the ACT was incorrectly recorded in Table 3.1 of the SCO Policy Response Paper.

⁶ AEMA Clause 2.1(b)(iv)

of retailers to respond to changes in the market, and may lead to more conservative pricing methodologies to reduce this risk.

3.5.2 Definition of designated retailer

The SCO Policy Response Paper proposes moving to a new approach to allocating the designated retailer role, which has not previously been raised in consultations on this framework. The approach involves appointing the financially responsible market participant as the responsible retailer for an existing connection.

ActewAGL is concerned that the proposed approach is not compatible with a stable and predictable Retailer of Last Resort scheme, and may leave some customers without supply in the event of a second tier retailer failure. ActewAGL therefore seeks further clarification on the potential compatibility of this approach with the Retailer of Last Resort arrangements which are currently being considered by Officials.

ActewAGL also considers that the introduction of the Financially Responsible Retailer model would impose unnecessary additional regulatory and cost burdens on second tier retailers that would flow through to end charges to customers and reduce scope for competition.

3.6 Retailer-distributor contracts

The SCO Policy Response Paper proposes the establishment of a “Retail Support Contract” between retailers and distributors to manage a range of operational and coordination issues arising from the national customer framework. Model terms for the contract would be included in the National Customer Rules.

ActewAGL seeks clarification on how the proposed National Customer Rules would align with the NER and NGR with respect to the retailer-distributor relationship. The SCO Policy Response Paper states that the new Retail Support Contract will be designed to work consistently within the relevant access regimes under the *National Electricity Law* (NEL) and the NER (for electricity) and the NGL and the NGR (in gas), but does not provide further clarification of how this consistency will be achieved.⁷ This alignment may be particularly challenging given the scope for different classifications of services between distribution businesses under the access framework.

ActewAGL also seeks clarification on how existing default contractual arrangements would be accommodated under the new scheme. ActewAGL notes that a range of different approaches are currently adopted across jurisdictions. In the ACT, the arrangements between retailers and distributors are set out in the ACT *Electricity Network Use of System Code*, which includes a default use of system agreement, to apply only where the parties do not negotiate alternative arrangements.

As noted above, ActewAGL considers that the access arrangement process in the gas sector is sufficient to address “interface” issues associated with the supply of energy to customers.

⁷ MCE SCO *Policy Response Paper: Table of recommendations*, p.33

3.7 Liability between parties

The SCO Policy Response Paper seeks specific comment on the appropriate liability regime to apply between parties.

Civil monetary liability for network service providers is limited under the NEL to acts or omissions done or made in bad faith or through negligence.⁸ ActewAGL seeks clarification, in the first instance, as to whether the SCO anticipates changing these long-standing high level liability restrictions.

Other than provided through common law and the *Trade Practices Act 1974*, the ACT standard electricity customer contract limits distributor and retailer liability to the direct costs incurred by a customer associated with ActewAGL's negligence or a breach of contract. There is no guarantee of supply, and no liability where an electricity supply interruption was caused by events or circumstances beyond ActewAGL's control (such as public interference, extreme weather or car accidents), or where the interruption arose despite ActewAGL having complied with all relevant performance standards under the ACT *Consumer Protection Code*.

This approach is in line with the ACT *Electricity (Supply Standards) Code* which sets out minimum system average interruption duration and frequency standards that ActewAGL must publically report against. Where ActewAGL fails to meet the minimum service levels set out in the ACT *Consumer Protection Code*, it must also pay a specified rebate to customers. This approach means that ActewAGL's liability for breaching service levels is known, and rebate levels are set in accordance with the principles of efficient service delivery. Support for this approach is implied in the development by the AER of the National Service Target Performance Incentive Scheme, which will apply to ActewAGL from 2014, and which will include incentives for improving customer reliability and service quality, in addition to rebates for specific areas of non-performance.

Establishing an additional liability regime on distributors for service provision which is based on an adversarial and potentially litigious process could undermine efforts towards an orderly compliance approach discussed in section 8 of the SCO Policy Response Paper and the efficient delivery of services under the access regime. It is unlikely to be in the public interest for a distribution business to be forced to pay claims to a large number of customers for specific events, and be involved in numerous lengthy claims. This approach would lead to higher insurance premiums (and the liability may indeed be uninsurable) and would ultimately lead to higher costs for customers. It is unclear how such an approach could be preferable to an orderly rebate scheme where liabilities are known and established in the context of efficient service delivery, as contemplated under Chapter 6 of the *National Electricity Rules*.

ActewAGL supports a future liability regime where retailers and distributors are at the very least protected from liability in the following circumstances:

- Outages and losses that are outside of their reasonable or direct control;

⁸ *National Electricity Law* section 119(2)

- Outages and losses that occur despite compliance with relevant regulatory provisions; and
- Outages and losses caused or contributed by faults in the customer's own equipment.

ActewAGL also considers that liability should be limited to direct losses, be capped, and subject to a time limit.

4. Business Authorisation

4.1 Distributor authorisation

ActewAGL supports SCO's proposal to not at this stage establish a national distribution licence. As noted in the Policy Response Paper, there is an ongoing need for a jurisdictional distribution licence to support technical and safety regulation, and therefore a national licence would likely lead to an additional layer of regulation.

ActewAGL notes recent developments in the COAG and MCE reform processes towards harmonisation of technical and safety regulation in the energy sector. This process could lead to national regulation of these functions in the future. In this event, the case for a national distribution licence may need to be revisited.

As noted in the SCO Policy Response Paper, it is important for economic regulatory obligations to be removed from current jurisdictional licences to ensure there is no overlap in regulatory obligations between national and state regulators and governments. These issues are discussed further in respect of transitional arrangements below.

4.2 Retailer authorisation

The SCO proposes establishing a national retailer authorisation, administered by the AER, which sets out some minimum entry requirements for retailers.

ActewAGL supports the proposal to establish a national retailer licence, replacing current jurisdictional licences. ActewAGL also supports the proposed form of that licence, containing no substantive rights or obligations.

5. Enforcement

5.1 Enforceable undertakings

The SCO Policy Response Paper includes a proposal to expand the current enforcement and compliance tools under the NEL and NGL to include a power for the AER to use enforceable undertakings. This new enforcement mechanism is intended to apply to the broad regulatory regime, and not just the national customer framework.

ActewAGL is concerned that the SCO is seeking to introduce, through a consultation process directed at establishing customer arrangements, a new regulatory enforcement mechanism that will apply to the entire energy sector. ActewAGL considers that wider notification and consultation is necessary on this proposed change.

The issue of appropriate enforcement mechanisms under the NEL and NGL involves consideration of the balance between regulatory responsibilities and powers that arise under the *Trade Practices Act 1974*, and those under the NEL and NGL. It does not necessarily follow, as supposed under the Policy Response Paper, that parallel enforcement mechanisms between generic competition law and sector specific market regulation are necessary or appropriate.

ActewAGL is not aware of any incident or stakeholder concern in respect of the scope of AER powers having been raised ahead of this issue being introduced by the Retail Policy Working Group. ActewAGL considers that any decision to introduce new enforcement powers under the NEL and NGL should be based on evidence rather than a slow creep towards greater regulatory intervention on the basis of the powers available to regulators under other legislation or in other jurisdictions.

5.2 Compliance reporting systems

The NEL and NGL both contain specific powers for the AER to obtain information from any person by issuing a notice. In addition to these powers, the AER can issue regulatory information instruments to network service providers to provide information to the AER under the instrument, and prepare, maintain and keep information in accordance with an instrument.

ActewAGL seeks further clarification of the SCO's intent in extending the AER's current regulatory information instruments to retail businesses. The AER's powers to issue such instruments was limited to network service providers under the NEL because of the intrusive nature of the powers and the nature of transmission and distribution networks as regulated monopoly service providers.

Extending any similar power to the AER to issue regulatory information instruments to retail businesses appears to be an inappropriate extension of the AER's regulatory intervention powers beyond those anticipated when the instruments were developed. ActewAGL seeks

clarification as to why the current NEL s. 28 information gathering powers would be insufficient for the AER's purposes.

ActewAGL supports, in principle, the SCO recommendations for compliance reporting systems, and the use of tiered obligations reflecting the seriousness of breaches in each tier. ActewAGL considers that a reporting regime for type 2 and 3 obligations that is based on a 12-month reporting standard, with the AER having the authority to require a distributor or retailer report on a 6 monthly basis where they have not demonstrated a high level of compliance, or there has been serious continuing demonstrations of low or no compliance would be appropriate. This approach would balance the need for regular compliance reporting with the significant costs of reporting regimes. It would also focus regulatory attention on obligations where breaches have serious implications for customers, and on businesses where compliance has been an issue.

ActewAGL is also concerned to ensure that the reporting and auditing requirements envisioned under the national customer framework replace rather than duplicate current jurisdictional compliance and reporting requirements.

5.3 Private enforcement

ActewAGL questions the intent behind introducing into the national customer framework the ability for customers to enter into private actions against distributors and retailers. The Policy Response Paper emphasises the importance of the AER establishing a consistent compliance regime that identifies enforcement priorities on the basis of graduated risks. The stated benefits of this approach are to focus the attention of the regulated entity on priority areas.

Private enforcement of provisions has the potential to distort the regulated entity's focus on an otherwise orderly compliance regime towards issues where private enforcement is available, and where private action is or has been taken in the past. This may be despite there being any public interest in focusing on this area. This outcome is even anticipated by SCO where it is stated that conduct provisions may be appropriate if "there is an advantage to litigants to resolve the dispute and *little public interest* in the litigation being pursued by the regulator" (emphasis added)⁹.

This approach would move away from the intent in establishing a compliance framework. It may also undermine the role of the AER, by creating a perception that the AER does not or cannot adequately regulate and enforce areas related to retailer/distributor/large customer relations, as it assumes that the AER will focus on small customer "mass market" compliance issues rather than issues related to individual customers. ActewAGL does not believe that this is a necessary outcome of a compliance regime that focuses on priority issues. Instead, ActewAGL believes that an appropriate compliance regime considers all stakeholders, and does not create special rights for some parties which may undermine or complicate the compliance approach to others.

⁹ MCE SCO Policy Response Paper, p.101

ActewAGL considers that the AER is in the best position to determine whether there has been non-compliance, and consider the circumstances of a particular instance of non-compliance. The AER is sufficiently independent of any dispute, and has the relevant expert industry knowledge, to make an objective decision as to whether action is warranted. It is also unclear as to what remedies would be available to an aggrieved party through private enforcement: would they for example have the right to seek to compel performance of the alleged non-compliance or would they be able to only seek damages for loss they have incurred as a result of the alleged non-compliance?

5.4 Use of lower courts

Similar to the above stated issues for private enforcement, ActewAGL believes that the use of lower courts for enforcement by private parties further increases the scope for small matters to be brought to courts under private enforcement action. This has the potential to further undermine, complicate and distort the compliance regime.

In addition, ActewAGL considers that the issue of the scope for actions to be brought in lower courts has much wider sectoral implications than to those parties associated with consultations on the customer framework. ActewAGL considers that wider notification and consultation is necessary on this proposed change.

6. Implementation and Transition

6.1 Application of the national regime

The SCO Policy Response Paper appears to anticipate that individual jurisdictions would not automatically transfer to new regulatory arrangements at the commencement of the national customer framework, but instead have the option to transfer to the national customer framework at a later, unspecified, date. ActewAGL considers that it is important to establish an orderly transition to the new national arrangements, which is timed to coincide with the removal of jurisdictional arrangements, as noted below. An “optional” arrangement for jurisdictions to transfer to the new framework may not achieve this outcome, and may undermine efforts to meet the MCE objectives to streamline regulation and achieve a national framework within a reasonable amount of time.

ActewAGL therefore seeks clarification as to the proposed application of the national customer framework with respect to current jurisdictional arrangements, expected transition dates, and possible arrangements for transferring functions.

6.2 Duplication between jurisdictional and national regulation

The SCO Policy Response Paper anticipates that the national customer framework will replace a number of obligations currently regulated by jurisdictional governments and regulators.

ActewAGL has identified a number of instruments currently in place in the ACT that would require amendment, or in some cases complete removal, with the introduction of the national customer framework. These instruments include (but are not limited to):

- *Utilities Act 2000* (ACT)
- Utility Services Licence
- Consumer Protection Code
- Electricity Network Use of System Code
- Electricity Distribution (Supply Standards) Code
- Electricity Metering Code
- Prepayment Meter System Code
- Electricity Customer Transfer Code
- Use of System Agreement

- Electricity Supply Standard Customer Contract
- Electricity Connection and Distribution Standard Customer Contract

The *Utilities Act 2000* (ACT) and ACT Utility Services Licence include significant obligations on retail and distribution businesses with respect to compliance reporting, consumer protection, service standards and technical and safety regulation. The licence also enables application of multiple codes and guidelines that are superseded by the national customer framework (such as the ACT Consumer Protection Code). While some of the areas covered by codes and guidelines are expected to move to the national framework, other areas are expected to remain under the jurisdictional licence. This is particularly important given the proposed approach to distribution licensing, which involves a continuing role for jurisdictional distribution licences.

ActewAGL is concerned to ensure that appropriate transitional arrangements are in place to manage the move to national arrangements, and changes to jurisdictional legislation, licences and codes occur within a process that is aligned with the transitional arrangements. The problem of overlapping obligations has already arisen with respect to the economic regulation of distribution networks, where ActewAGL is subject to compliance reporting and auditing requirements to the AER and the ACT Independent Competition and Regulatory Commission through the NER, and remaining provisions under the *Utilities Act 2000* (ACT) and the ACT Utility Services Licence.

Transitional arrangements will be important in ensuring that ActewAGL is not subject to duplicating, overlapping and potentially inconsistent regulatory obligations that will drive costs and increase regulatory complexity for customers. ActewAGL considers that the SCO should commit to ensuring that the overall compliance burden is not increased through the introduction of the national framework, by ensuring there is no duplication or overlap in reporting requirements between national and jurisdictional frameworks.

ActewAGL also notes that the framework is intended to operate independent of whether retail price regulation is still in place in a particular jurisdiction. ActewAGL considers that this framework approach should not be used as an opportunity to delay any decision to remove retail price regulation in a particular jurisdiction, or to reregulate aspects of service delivery where retail price regulation is not in place.