

26 February 2010

Manager, MCE Secretariat  
Department of Resources, Energy and Tourism  
GPO Box 1564  
Canberra ACT 2601

Dear Sir,

**National Energy Customer Framework – Second exposure draft**

I refer to the Ministerial Council on Energy (MCE) Standing Committee of Officials (SCO) release of the Second Exposure Draft of the National Energy Customer Framework (NECF) for consultation.

Please find attached ETSA Utilities' submission to the second exposure draft for consideration.

If you have any queries, questions and require clarification of our submission please contact Mr Grant Cox 08 8404 5012.

Yours sincerely,



Eric Lindner  
*General Manager Regulation & Company Secretary*  
ETSA Utilities

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Submission to the  
“Second Exposure Draft”  
National Energy Customer Framework

February 2010

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## **Glossary**

AER	Australian Energy Regulator
Deemed Contract	The NECF2 customer connection services contract detailed in the NERR Schedule 2.
ESCoSA	Essential Services Commission of South Australia
EDPD	Electricity Distribution Price Determination (2005 – 2010)
EU	ETSA Utilities
FED	First exposure draft of the NERL and NERR
FRC	Full Retail Contestability
MCE	Ministerial Council on Energy
NECF	National Energy Customer Framework
NECF1	First exposure draft of the NECF Package dated 30 April 2009
NECF2	Second exposure draft of the NECF Package dated 27 November 2010.
NEL	National Electricity Law
NEM	National Electricity Market
NERL	National Energy Retail Law
NER	National Electricity Rules
NERR	National Energy Retail Rules
NERReg	National Energy Retail Regulations
NGL	National Gas Law
NGR	National Gas Rules
RoLR	Retailer of last resort
SCO	Standing Committee of Officials

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## **1 Executive Summary**

This submission sets out ETSA Utilities' comments in response to the second exposure draft of the National Energy Customer Framework Package released on 27 November 2009.

In addition to the comments set out in this submission, ETSA Utilities notes that a submission has been lodged on behalf of electricity and gas distributors by the Energy Networks Association. ETSA Utilities endorses the contents of that submission.

### **(a) Transfer to the new NECF**

It appears to be the intent of the NECF package that both retailers and distributors transition to the new regulatory arrangements over the 2011 to 2013. ETSA Utilities considers that some of the aspects of the regime could transfer during the current regulatory control period (eg new connection framework and ROLR arrangements) and others should not be incorporated until a new regulatory control period (eg liabilities under the deemed customer connection contract).

### **(b) Liability regime**

ETSA Utilities is concerned at the position taken in the NECF2 in terms of the uncapped liability distributors being subjected to uncapped liability for negligence and bad faith. Negligence is normally determined by a court after an incidence has occurred and may not relate to actual negligence by the distributor.

In SA our current framework limits ETSA Utilities liability for negligence and acts of bad faith to customers:

- using 30MWh per annum or less to direct loss, consequential loss and personal injury which is capped at \$0.5m; and
- using more than 30MWh per annum to direct loss and personal injury which is capped at \$1m.

ETSA Utilities has received no claims from customers for compensation where the current liability caps have been invoked since the adoption of the deemed connection and supply contract (ie for the last 10 years). This means that the current monetary caps have not limited claims customers but enable ETSA Utilities to obtain reasonably priced insurance which benefit customers through lower distribution charges.

### **(c) Credit support**

ETSA Utilities supports the ENA submission NECF2 submission in regards to credit support in that the credit support allowance provided to retailers should be based on their DSCL and their credit rating.

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However, if the NECF is to continue with the proposed credit support arrangements then the maximum credit allowance provided to a retailer should reduce from the current 33.33% to 15%. This should ensure that there would be no failure of a distributor for non-payment of distribution charges by a retailer which could lead to market failure, provided that the distributor could recover this loss of revenue via a pass through.

**(d) RoLR event distribution determination**

ETSA Utilities considers that where the AER makes a ROLR event distribution determination the pass through of the costs should be to the distributors customers not to other retailers. This will align the RoLR event distribution determination with other pass through event (ie consistent treatment of pass throughs).

The Regulator in any pass through application approves the method of allocating the costs to customers.

**(e) Restoration of supply**

The requirement to restore each customer's supply "as quickly as possible" under rules 413 and 414 could create issues with our prioritisation for the restoration of supply to customers. ETSA Utilities has local jurisdictional service standards that require us to minimise interruptions to customers and restore supply as soon as practical. In addition the AER's STPIS scheme will penalise us if we do not meet overall reliability targets for both duration and frequency.

Consequently, we consider that the requirement to restore a customer's supply as soon as possible should be deleted from r413 and r414 as there are sufficient our regulatory requirements to ensure that we restore supply. Alternatively, the requirement should be modified to "as soon as practicable".

**(f) Statement of Charges**

ETSA Utilities currently issues its "statement of charges" on the 9<sup>th</sup> calendar day of the month (except where it is not a business day, and then the statement is issued on the next business day). This ensures that the due date for payment of our statement of charges occurs between the 23<sup>rd</sup> and the 25<sup>th</sup> of the month.

The NECF2 proposal of issuing the statement of charges on the 10<sup>th</sup> business day of the month will mean that payment occurs between the 26<sup>th</sup> of that month and the 3<sup>rd</sup> of the following month (ie a 7 day window). This proposed arrangement could severely impact on a distributors cashflow and their requirement for working capital for making payments. Consequently, we consider that the NECF2 not specify when a distributor can issue a statement of charges but stipulate when a retailer has to pay (eg 10 business days after the statement of charges).

**(g) Provision of information**

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ETSA Utilities considers that there should be a general provision that relates to the provision of information through the NECF2 package, in that a distributor or person is not required to provide information, that:

- (a) is subject to legal professional privilege; or
- (b) may incriminate the person or entity.

## 2 Service definitions in the NECF

### 2.1 Definitions – General

ETSA Utilities considers that to avoid confusion the definitions of terms contained in the NEL/NERL, the NERL/NERR and the NGL/NERR should have the same meaning.

### 2.2 Definition which need clarification/consistency

#### 2.2.1 Connection and energisation

The NECF2 has specifically split the connection and energisation service. The connection service is where the distributor creates/establishes or modifies the physical link between the distribution system and the customers premise's electrical installation. The physical link enables the distributor to energise, de-energise or re-energise the customers premises. Consequently, we consider the current definition of connection requires a minor modification as it seems to include energisation in the definition "allow the flow of energy".

*connection* means a physical link between a distribution system and a customer 's premises to allow the flow of energy;

*energisation* of premises means:

(a) in the case of electricity—the closing of a connection ; or

(b) in the case of gas—the opening of a connection;

in order to allow the flow of energy to the premises; and *re-energisation* has a corresponding meaning;

There is an overlap between the current definition of connection and energisation as both "allow the flow of energy". The definition of connection should be modified to be:

*connection* means a physical link between a distribution system and a customer 's premises.

This would then align with what we understand is the intent of the NECF2 package. Also, it would align the definition with the current SA jurisdictional definition and the definition contained within the NER.

#### 2.2.2 Distribution charges

The definition of distribution charges needs to be consistent across the NECF2 package. It is currently defined under r502 and r6B.1.2. See section 5.9.1 below.

#### 2.2.3 Life Support Equipment

The NECF2 NERR defines life support equipment as:

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*life support equipment* means any of the following:

- (a) an oxygen concentrator;
- (b) an intermittent peritoneal dialysis machine;
- (c) a kidney dialysis machine;
- (d) a chronic positive airway pressure respirator;
- (e) crigler najjar syndrome phototherapy equipment;
- (f) a ventilator for life support;
- (g) in relation to a particular customer—any other equipment that a registered medical practitioner certifies is required for a person residing at the customer’s premises for life support;

The allowable types of equipment is being expanded from what is currently allowed in SA. There may be a valid reason to include new equipment types over the years but it should be pointed out that care needs to be taken when assessing the need and benefit of doing this to ensure there is a valid reason. The wider the range of equipment allowed will open up the volume of customers who qualify to be assigned the status of Life Support and if numbers become too large (particularly for non life threatening reasons) then there is the potential for the watering down of the status and therefore reduce any benefits that can be provided to truly vulnerable customers.

The classification of a customer as a life support customers imposes significant additional obligations on both retailers and distributors. Consequently, we consider that a rigorous assessment of any equipment is required against some specific criteria prior to it being added to the list of life support equipment. In Attachment A page 34 of the Explanatory material provided with NECF1, the following SCO response was provided for life support equipment “A list of authorised life support systems would be kept and maintained by the AER”.

We consider that by allowing a medical practitioner to specify other equipment as life support equipment will lead to inconsistencies between jurisdictions, retailers and distributors. Consequently, we suggest that sub-clause (g) of the definition of life support equipment be modified to:

- (g) other life support equipment as advised by the AER from time to time.

This would mirror the current local jurisdictional definition which permits the regulator to advise of other equipment that has been added to the definition of life support equipment.

### **3 National Energy Retail Law**

#### **3.1 Classification of customers (s105, s106 and s107)**

The classification of a customer as either small or large seems to revolve around the customer and a premises. This concept is acceptable for the contract and for connection but not for classifying the customer. Currently, customers are classified in the NEM by a National meter identifier (NMI). The consumption of the customer at the NMI is recorded and used to determine if they are small or large (in SA a large customer uses greater than 160MWh).

A customer can have multiple NMIs that supply their premises (eg for a farm one is residential and one business). There is no mechanism within the NEM currently that aggregates the consumption of a customer at a premises. Consequently, the concept in the NECF of classifying a customer consumption at a business premises needs to be altered to a customer at a connection point (ie NMI).

#### **3.2 Obligation to provide customer connection services (Part 3, Division 2)**

Our interpretation of s302(2) is that a distributor can suffer a civil penalty if it does not use the relevant customer connection contract (eg the deemed connection contract for small customers). A wider interpretation of the clause could be that a distributor would incur a civil penalty under this sub-section if it did not comply with the relevant customer connection contract.

We consider that the sub-clause should specifically exclude the wider interpretation.

#### **3.3 Deemed standard connection contract**

##### **3.3.1 Current SA Contract**

The current deemed contract between a distributor and customers in SA is a "connection and supply contract". This contract contains obligations on ETSA Utilities and customers other than those covered by the NECF2 deemed contract (NERR Schedule 2). This single contract applies to both small and large customers except where a large customer has negotiated a separate "connection and supply" contract.

##### **3.3.2 NECF2 Deemed standard connection contract**

Consequently, we consider that there is a requirement for the ongoing supply contract (ie the deemed contract) to include additional obligations on distributors and customers that the NECF2 package envisages would be in the connection contract approved by the AER. We consider that the NECF2 deemed contract is insufficient to cover the ongoing supply for a move-in customer.

We consider that aspect of the content of these “connection and supply” contracts may vary from customer to customer depending on the supply arrangements (eg customer had a distribution transformer located on their property). Consequently, we consider that a distributor could apply to the AER for a modified deemed contract for move-in customers that contains the NECF2 envisaged standard connection contracts. These contracts would then apply to move-in customers and would need to be published on distributor websites.

### **3.4 Small customer complaints and dispute resolution (Part 4)**

#### **3.4.1 Information and assistance requirements (s407)**

Distributors and retailers should be required to provide information and assistance to the energy ombudsman for the resolution of customer complaints.

Section 407(1) requires a distributor to provide information and assistance relating to a small customer complaint on request by the energy ombudsman. Section 407(2) then requires that if there is a dispute as to the nature or scope of the information and assistance to be provided, the distributor must comply with the decision of the ombudsman (and failure to do so attracts a civil penalty).

We note section 407 is consistent with clause 6.2(c) of the charter<sup>1</sup> of the Energy Industry Ombudsman (SA) Limited. However, we consider there is some material difference that should be retained like:

- The information (documents) provided is relevant to the dispute, but excludes documentation containing confidential information of a third party, where they do not consent to provision of that document;
- The Ombudsman’s request for documents relevant to the dispute must be subject to reasonable time limits; and
- There is no fine for non-provision of the document but the ombudsman could find in favour of the customer bring the dispute.

Also, we do not provide documents that are subject to legal professional privilege.

Consequently, we consider that section 407 should not be a civil penalty provision and expressly note that the ombudsman may not call for information:

- (a) unless it is relevant to the dispute;
- (b) subject to legal professional privilege;

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<sup>1</sup> The charter can be accessed via the following link  
<http://www.eiosa.com.au/images/publications/Charter%202008.pdf>

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- (c) that may incriminate the entity or its directors or employee; or
- (d) that contains confidential information about a third party where they have not agreed to its provision.

### **3.5 Retailer of last resort scheme (NERL Part 6)**

We agree that a retailer(s) are best placed to fulfil the retailer of last resort role, as provided for in the NECF2 Package.

#### **3.5.1 RoLR cost recovery schemes (Part6 Division 8)**

We agree with s645 in that “this Division and the RoLR cost recovery scheme under this Division have effect despite anything in the NEL and NER and any distribution determination”.

However, we are concerned about the wording of s649(4) in that “Retailers are required to make payments to distributors in accordance with their liability under a RoLR cost recovery scheme distribution determination ...”. We consider that a RoLR cost recovery scheme distribution determination should be treated in the same manner as “pass throughs’ that apply under any distribution determination. Currently, under the electricity pass through arrangements, a distributor applies to a regulator who approves how the costs are recovered from customers (ie added to distribution charges). This is an effective means of recovering additional costs like for a RoLR event.

ETSA Utilities submits that a RoLR cost recovery scheme should be treated in the same manner as other pass throughs, in that distributors would recover the approved costs from our customers not from retailers.

### **3.6 Small compensation claims regime (Part 7)**

ETSA Utilities considers that distributors should not be required to pay compensation to customers under this regime where the outage cause is related to either a third party (ie car hit pole) or due to storm damage (eg lightning strike). We currently do not pay claims in these circumstances in SA.

We consider this section should expressly provide that it is a criminal offence for a customer to bring a fraudulent claim.

It should also be a civil penalty or criminal offence for a qualified person to provide information that is, knowingly or due to recklessness, false or inaccurate (see section 715(1)).

Section 122, which allows a small customer to appeal a distributor’s decision in respect of a compensation claim, should expressly state the energy ombudsman may not, in a decision, award more than the maximum amount.

## **3.7 Compliance and performance**

### **3.7.1 Compliance information (s1203)**

Section 1203, which obliges a regulated entity to provide information to the AER as to its compliance with the Law, should make clear an entity does not have to provide information which is subject to legal professional privilege or that may incriminate the organisation or its Directors or employees.

### **3.7.2 Compliance audits (s1204 to s1206)**

At present, there is no restriction in these sections on how often the AER can require compliance audits. We consider there should be i.e. that audits only be conducted every one or two years or otherwise if the AER has some reasonable basis to suspect there may have been non-compliance.

We also note that the AER arranges for section 1204 audits and then passes on the costs of these to the entities. This will presumably encourage auditors, who will bill the AER but who will then simply be passing on the costs, to charge high fees given the auditors have no responsibility to the person paying the costs of the audit. Some control on the auditor's fees should be included – for example that auditors may only charge reasonable fees and/or that the auditors be selected through a process of competitive tender.

## **3.8 Enforcement (Part 13)**

### **3.8.1 Proceedings for breaches of this Law, the National Regulations or the Rules (s1306)**

Section 1306 provides a person who suffers loss or damage by conduct of another person in breach of a conduct provision "*may recover the amount of the loss or damage by action against that other person in a court of competent jurisdiction.*"

This section should make it clear:

- (a) whether the claimant has a duty to mitigate their loss;
- (b) whether there is any limitation on the damages that may be recoverable (for example that only those reasonably foreseeable are recoverable);
- (c) whether the entitlement to damages is to be apportioned where the claimant is partly responsible for their own loss.

### **3.8.2 Breach of civil penalty provision (s1311)**

Section 1311(c) provides:

*“A civil penalty provision or conduct provision that does not itself directly impose an obligation on any person but that is associated with another provision that directly imposes an obligation on a person is taken to impose an obligation on that person.”*

We consider the meaning of this section particularly ambiguous. Either its meaning and intended operation should be made clear or, if that is not possible, it should be deleted. It is highly inappropriate that provisions which have the effect of exposing natural persons to substantial fines should be so ambiguously expressed.

### **3.8.3 Cost of a review (s1320(3))**

Section 1320(3) sets out the limited circumstances in which the AER may be required to pay the costs of a party bringing a review application. The circumstances only relate to the way in which the AER conducts its case. However it would seem to us that if the original AER decision being appealed against was wholly unreasonable or capriciously made that the AER should also have to pay the costs of the party responding to the review application.

### **3.8.4 Review of AER decisions**

Division 5 of Part 13 provides for judicial review of AEMC decisions, Section 1319 provides for review of AER decisions relating to the disclosure of information. Otherwise the Law is silent on how other decisions by the AER and AEMC are to be reviewed. Presumably they can be challenged on the basis they have not been made in accordance with the Law, but it would be preferable if the matter were made clear.

## **4 National Energy Retail Regulations**

### **4.1 Large customer definition**

The NECF2 large customer electricity consumption threshold of 100MWh will introduce confusion into the majority of jurisdictions as they apply a different threshold currently under the NER for large customers (160MWh in SA, Vic, NSW & ACT, 150 MWh Tasmania and 100MWh Queensland). As stated previously we consider that definitions should be harmonised across the NEL/NER and the NERL/NERR, in that one threshold for large customers should be adopted.

The adoption of a single threshold will provide consistency across all areas (MSATS, metrology etc) of the NEM to avoid confusion and complications when required to store, disseminate and maintain different threshold for different purposes. As advised above, the threshold needs to be applied at NMI level not at customer premise level.

## 5 National Energy Retail Rules

### 5.1 Consumption threshold matters (Part 1, Division 2)

ETSA Utilities has no mechanism to automatically combine the consumption of two business premises owned by the same customer as envisaged by this division, as ultimately the distributor is required to hold the classification.

### 5.2 Classification of customers (Part 1 Division 3)

ETSA Utilities supports the definition of a large customer contained within the NERRegs, in that a customer is defined as large where their annual electricity consumption is 100MWh or greater.

Also, see our comments about this issue in section 3.1 and section 4.1 above about the same threshold applying across the NERL and the NEL etc.

#### 5.2.1 Retailer classification of customers

We consider that r108(4) should be amended to:

- (4) The distributor must keep a record of the reclassification of the customer *where notified by the retailer under sub-clause (3)*.

### 5.3 Customer retail contracts – pre-contractual procedures (Part 2, Division 3)

Rule 205 (3) (b) - creates work for the distributor and seems to be an inefficient step for the Retailer to send the customer to the distributor and then the distributor sends the customer to the AER website under r206 (2) (c). The Retailer should just refer the customer to the AER website in the first instance where the information could be held.

### 5.4 Historical billing information (SRC and MRC)

Rule 216 provides that a retailer must promptly provide a small customer with historical data for the previous 12 months on request. Such data must be provided without charge. However a reasonable charge may be imposed for data requested for an earlier period or for data provided more than once in any 12 month period.

In contrast rule 216(3) says that where requested by a retailer a distributor must provide the information at no cost. So a retailer can levy a reasonable charge for data more than 12 months old or where more than one request is made in a 12 month period. This is clearly inequitable – a distributor should be entitled to levy a reasonable charge on the retailer in the same circumstances as the retailer may levy a reasonable charge upon the customer.

The provision of historic billing information can not include billing information about a previous customer due to confidentiality obligations and the rule should be amended to only require the provision of historic customer that relates to the requesting customer.

## 5.5 Provision of information to customers (r404)

The information detailed under r404(1) is contained in our electricity customer charter. ETSA Utilities considers that we should be able to charge a customer for a paper version of information where a customer requests that information more than once within a 12 month period. Currently, we are able to charge for provision<sup>2</sup> of information for a second and subsequent times to a customer within a 12 month period.

## 5.6 Liabilities and immunities (r407)

The operation of rule 407 is, in our view, unclear (which will be a significant issue for a distributor given failure to comply with the rule is a civil penalty provision).

The rule provides:

*“A distributor must not include any term or condition in a negotiated connection contract with a small customer that limits the liability of the distributor for breach of the contract or negligence by the distributor, but the distributor’s liability may be limited as contemplated by section 68A of the Trade Practices Act 1974 of the Commonwealth or by equivalent State or Territory legislative provisions.”*

Section 68A of the Trade Practices Act allows liability for breach of its warranties to be limited to resupply, or payment of the cost of resupply, of the relevant good or service but only where fair and reasonable and only where the goods/service is not of a kind ordinarily supplied for personal, domestic or household use. Arguably electricity is a good of a kind ordinarily supplied for personal, domestic or household use and so section 68A can never be used to limit liability in relation to electricity supply.

What is unclear is whether the rule allows (or depending on one’s perspective, limits) the distributor to:

- (a) limit its liability only for breach of the warranties implied by the Trade Practices Act and only in the manner contemplated by section 68A (in which case the rule may never operate as section 68A may not allow liability for a small customer contract to be so limited); or
- (b) limit its liability for any breach in the manner contemplated by section 68A (ie to resupply or payment of costs of resupply). This interpretation also has its issues, as presumably it is not intended a distributor can limit liability for personal injury, for example, to resupply of electricity.

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<sup>2</sup> See SA Electricity Distribution Code Version EDC/06 clause 1.1.3(c).

Also, see detailed comments on the liability provision in Section 9.

## **5.7 Distributors obligations to customers (Part 4, Division 5)**

### **5.7.1 Distributor service standards and GSL schemes (r408)**

ETSA Utilities previously provided a GSL payment to the customer via their retailer, however this payment proved problematic as retailers did not provide information on why a credit (ie GSL payment) was provided to the customer. Consequently, ETSA Utilities had its obligation amended so that it could provide a payment through a retailer or direct to the customer. However, our direct payment to customers is reliant on the retailer providing information to us (eg postal address) to enable the payment.

ETSA Utilities considers that retailers should be required to provide assistance to distributors to make GSL payments whether the payment is made via the retailer or not (ie r408(3) applies whether subclause(2) applies).

### **5.7.2 Provision of information (r410)**

Rule 410 provides:

*“A distributor must, on request by a customer or a customer’s retailer, provide information about the customer’s energy consumption or the distributor’s charges.”*

This rule is particularly vague. There is no notion of reasonableness, in terms of the information requested, or limit on the time period or level of detail to which the request may relate. A customer could, for example, request information for the past twenty years and the distributor would have to provide it (rule 410 is a civil penalty provision).

We consider the rule should be modified to either incorporate:

- (a) a notion of reasonableness; and/or
- (b) a time limit or other appropriate limit on the type of information that may be sought (e.g. consumption for the previous 12 or 24 months and charges prevailing during that period).

Modelling the rule on rule 216 would seem a preferable alternative.

## **5.8 Distributor interrupt to supply (Part 4, Division 6)**

### **5.8.1 Definition unplanned interruptions (r411)**

Paragraph (a) of the definition of unplanned interruption refers to *“an interruption in circumstance where, in the opinion of the distributor, a customer’s installation or the distribution system*

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poses an *immediate* threat of injury or material damage to any person, any property or the distribution system.”

We consider that the use of “immediate” is too strict a test. A better test for unplanned interruption would be to delete “immediate” and add to the end of the sentence “of sufficient seriousness such that it would not be safe, in the distributor’s reasonable opinion, to remedy the matter as part of a planned interruption.”

We also note that paragraph (a) of the definition of unplanned interruption seems to overlap heavily with paragraphs b(i) and (ii) such that it is difficult to see, on the current drafting of (a), where it would apply and (b)(i)/(b)(ii) would not.

### 5.8.2 **Mandatory requirement to notify all customers (r413(1))**

ETSA Utilities current obligation to notify customers of planned interruptions is to use its “best endeavours” as the obligations recognises that under certain circumstances all customers will/can not be notified. In about 2% of our planned interruptions, all customers are not notified of the interruption. This non-notification is due to human error, complexity of the supply arrangements, physical location of the outage etc. Consequently, ETSA Utilities would be unable to comply with r413 as it currently stands. ETSA Utilities reports to our jurisdictional regulator quarterly about the number of instances where all customers are not notified on a planned interruption.

We consider that the obligation to notify customers of planned interruptions should be of a “best endeavours” nature.

### 5.8.3 **Definition of planned interruption**

The NERR r413 only treats a planned interruption as one where the DNSP provides the customer with at least 4 business days notice prior to the date of the interruption. Under our current jurisdictional requirements, ETSA Utilities is only required to provide notice of a planned interruption where its duration is longer than 15 minutes.

If the NECF2 requirement is retained, either ETSA Utilities will have to treat planned interruptions (where less than 15 minutes) as unplanned interruptions or notify customers in these circumstances. Either way this will have significant operational issues for ETSA Utilities in additional penalties under the AER Service target performance incentive scheme (STPIS) or additional costs changing our operational practices including notifying customers who experience these short duration interruptions. ETSA Utilities has not experienced a significant number of complaints associated with our practice and it has been widely accepted in SA by customers.

We consider that the notification of customers of planned interruptions should enable the retention of the current approved jurisdictional practices.

#### 5.8.4 Restoration of supply (r413 and r414)

Rules 413(3) and 414(c) require a distributor to, after a planned or unplanned interruption, restore each affected customer's supply as quickly as possible.

While unobjectionable on its face, these provisions may lead to some uncertainty in practice (again undesirable given rule 414, but for some reason not rule 413(3), is a civil penalty provision). For example suppose there are two unplanned interruptions in a heat wave, the first affecting 1000 customers and the second 500 customers. If all work crews are assigned to interruption 1 supply can be restored in 30 minutes but then the other 500 customers will not have their supply restored for 3 hours. Alternatively the work crews could be split in which case the 1000 customers will have their supply restored in 2.25 hours and the 500 customers their supply restored in 2.5 hours. Which option is the distributor to choose?

We consider a qualification to 414(c) (and possibly also 413(3) may be desirable). For example:

*“For the purposes of rule 414(c), where in a period of time multiple customers are affected by an unplanned interruption or there are multiple unplanned interruptions affecting a number of different customers, a distributor may be required to determine the priority with which, and the resources which it allocates, to deal with each unplanned interruption and a distributor will not be regarded as in breach of rule 414(c) merely by virtue of making such determination and allocation unless the distributor acted in a manner:*

- (a) in breach of any jurisdictional energy legislation; or*
- (b) which was wholly unreasonable.”*

We consider that this requirement to restore a customers supply as soon as possible should be deleted as there is sufficient other regulatory requirements to restore customers' supply. In the SA Electricity Distribution Code clause 1.2.3.4 (ie jurisdictional service standards) requires the distributor to:

##### **1.2.3.4 Minimise interruptions**

*A distributor must use its **best endeavours** to:*

- (a) minimise interruptions or limitations to supply caused by:*
  - (i) carrying out maintenance or repair to the distribution network;*
  - (ii) connecting a new supply address to the distribution network;*
  - (iii) carrying out augmentations or extensions to the distribution network, and*
- (b) restore **supply** as soon as practicable*

Further we are required to meet overall reliability service standards and the AER operate an incentive scheme (ie Service Target Performance Incentive Scheme (STPIS)) where we are penalised if we don't achieve reliability standards. In addition, we are subjected to GSL payments where we don't restore supply within defined periods.

Consequently, we consider that this requirement to restore a customer's supply as soon as possible should be deleted or modified in accordance with our EDC obligation (ie as soon as practicable).

## 5.9 Relationship between distributors and retailers – retail support obligations

### 5.9.1 Definitions

The definition of distribution charges needs to be expanded to include other charges included in the distributor's bill to retailers (eg special read charges, disconnection charges etc). Consequently, the definition of distribution charges should be replaced with distribution service charges with same definition as that proposed in NER clause 6B.1.2. the definition is:

*distribution service charges means charges for distribution services in respect to shared customers.*

*Note: Distribution service charges may be distribution use of system charges or charges that are not distribution use of system charges.*

### 5.9.2 Information on Planned Interruptions (r508)

ETSA Utilities currently has a requirement contained within the standard coordination agreement with retailers to use our best endeavours to notify retailers of planned outages. However, we currently do not advise retailers of planned outages and have had no retailer requests for information about planned interruptions to their customers.

Further, we note that a retailer can not object to a planned outage and if a customer contacts a retailer about a planned outage the retailer is required in the first instance to direct the customer to the distributor (r508(4)). We agree with the requirement that the retailer direct the customer to the distributor about a planned or unplanned outage as we have the latest information about the interruption.

ETSA Utilities does not have systems or process to enable us to comply with this obligation. Further, we can not see the need for this obligation as we have effectively operated in SA without providing this information to retailers without any complaints from customers or retailers for more than a decade.

We consider that providing information to retailers has additional costs without any material benefit to retailers. We consider that this additional costs is inefficient and therefore does not meet the NERL Objective of being efficient. Consequently, we consider that this obligation can be removed from the rules.

A retailer should not be able to provide information about interruptions to customers on the grounds that it has the potential to become a Safety Issue that may endanger the life of

customers. A third party should direct any query about interruptions, whether planned or unplanned directly to the Distributor. The very fact of giving unplanned interruption information to a third party leaves it up to their discretion to use. We would not want the scenario whereby a Retailer's front line call centre is giving out advice to a residential consumer about whether it is safe to undertake electrical work on their property during planned interruptions.

### **5.9.3 Enquiries or complaints relating to the retailer.**

Rule 510(4) should not require the distributor to provide to the retailer information which is subject to legal professional privilege.

### **5.9.4 Notification of de-energisation (r513)**

Rule 513 (1) requires distributors to provide a copy of the disconnection warning notice it issues to a customer to their Retailer. This would require the distributor to develop a manual process as there is no automated process (eg B2B) within the NEM for provision of this notice to retailers. We currently do not have this obligation.

We consider that there is no benefit to providing this notice to retailers and if required to comply with this obligation this would create additional costs that would appear to fail the NERL Objective. We note that there is no requirement on retailers (as distributor also have a direct contractual relationship with the customers) to provide us with a copy of their disconnection warning to our customer nor would we want to be provided with a copy.

Consequently, we consider that this requirement should be removed from the NERR.

### **5.9.5 Liability of retailer for ongoing charges (r514)**

Rule 514 is worded on the basis that if we can't complete a retailer's disconnection request, for any reason, then we become liable to waive distribution charges and pay for energy purchases unless the retailer can recover thus from the customer. There are many reasons why we can't complete disconnections in accordance with a retailer's request, like:

- Customer has denied access to enable disconnection;
- Retailer has provided insufficient information to perform the disconnection.

Consequently, this rule should be amended so that the distributor is not liable where it has used best endeavours to complete this request and notified the retailer of why the disconnection was not completed.

## 5.10 De-energisation (or disconnection) of premises (Part 6, Division 3)

### 5.10.1 Definition of protected period

In SA, we are unable to disconnect a premises (supply address in SA) where the SA State Emergency Services have issued a Extreme heat watch or Extreme heat warning. Retailers are also prevented from requesting disconnections on those days. Consequently, ETSA Utilities considers that the definition of a protected period under r601 needs another clause (e) which states "other days or times as specified by the local jurisdictional regulator".

This will ensure that ETSA Utilities is not liable under r514, for waiving any distribution charges or pay charges for energy consumed at the premises.

### 5.10.2 Distributor de-energisation of premises (r613)

Under r613(3) we are required to provide prior written notice before disconnecting a customer for tampering with a meter. However, under clause r613(2)(a) we are able to disconnection without notice (ie fraudulent acquisition or energy). In general any tampering with a meter results in fraudulent acquisition of energy and therefore we are able to disconnect without notice which is in conflict with clause r613(3).

### 5.10.3 When distributor must not de-energise premises (r614)

Rule 614 provides a distributor must not de-energise a customer's premises "*where the customer has made a complaint, directly related to the reason for the proposed de-energisation, to the energy ombudsman and the complaint remains unresolved.*"

We consider that:

- (a) the rule should make clear it only applies if the complaint is made prior to the period allowed under the disconnection warning notice and the customer has notified the distributor of this fact. The distributor would not wish to be placed in a position where it is unsure whether it can de-energise because it does not know whether a complaint has been made or in a position where it is held to be in breach because a complaint is made, without its knowledge, while its personnel are in the process of implementing disconnection;
- (b) the rule should not apply where the retailer has instructed the distributor to de-energise – the distributor should be able to rely on notification from the retailer without further inquiry, with the consequences of any incorrect notification falling on the retailer. Also if the customer has taken the retailer to the energy ombudsman and failed, the customer should not be able to further delay the process by raising a further dispute with the energy ombudsman when the distributor starts disconnection;
- (c) we note that the fact the distributor cannot implement disconnection until a complaint has been resolved by the energy ombudsman puts the distributor at a disadvantage in

enforcing its rights, particularly as there is no obligation on the ombudsman to make a decision within any specific time period

#### **5.10.4 Distributor obligations life support (r703(2)(c))**

Currently, in SA the distributor holds the records of life support customers and reports annually to the regulator on the number of life support customers on our list. Further, the distributor is required to receive a copy of the medical certificate prior to designating the customer as life support. This second check of the process has prevented customers from being placed on the life support register where a retailer provided thousands of false notifications.

The distributor is best place to keep the record of life support customers in their supply area as it provides a central location for the information.

### **5.11 Retailer of last resort scheme (Part 11)**

#### **5.11.1 RoLR arrangement in SA**

ETSA Utilities is the designated RoLR in SA. We have complied with our obligations by contracting with AGL SA to undertake the ROLR event on our behalf if a ROLR event occurs. ETSA Utilities effectively indemnifies AGL SA for their additional costs above what they collect from the RoLR customers for a period of three months.

ETSA utilities will then apply to the regulator for a pass through of those additional costs, from our customers, similar to the ROLR cost recovery distributor payment determination under the NECF.

#### **5.11.2 RoLR cost recovery schemes (Division 4, r1122)**

ETSA Utilities' considers that where the AER makes a ROLR event distribution determination the pass through of the costs should be to the distributor's customers not to other retailers. This will align the RoLR event distribution determination with other pass through event (ie consistent treatment of pass throughs).

The Regulator in any pass through application approves the method of allocating to the customers to customers.

## 6 Model terms and conditions for deemed standard connection contracts (NERR Schedule 2)

### 6.1 General

ETSA Utilities considers that distributors should have the ability to develop and have approved standard connection contracts that include additional requirements relating to ongoing obligations on customers that currently would be included in the AER's standard connection contracts under Chapter 5A of the NER.

### 6.2 Clause 6.7

Clause 6.7 provides if the customer is not the owner of the premises, they are not in breach of the contract if they take all reasonable steps to ensure that the owner or other person responsible for the premises fulfils the obligation.

So if the distributor is dealing with a lessee as a customer the customer may only have a reasonable endeavours type obligation to fulfil the contract.

The contract, and the Law/Rules, are unclear as to how the distributor enforces its rights against an owner where the customer is not the owner (and the customer is relieved from liability because of that fact).

Further, there needs to be clarity about how a distributor can fulfil its obligations under the contract if it is prevented by an owner.

### 6.3 Clause 7(b)

Clause 7(b) would be better drafted as:

*"Pursuant to section 68A of the Trade Practices Act 1974 this clause applies in respect of the goods or services supplied under this contract which are not of a kind ordinarily acquired for personal, domestic or household use or consumption, but this clause will not apply if a party establishes that reliance on it would not be fair and reasonable.*

*Liability for breach of a condition or warranty implied into this contract by the Trade Practices Act 1974 (other than a condition implied by section 69) is limited:*

- (a) *in the case of goods, to any one of the following as determined by us:*
  - (i) *the replacement of the goods or the supply of equivalent goods; or*
  - (ii) *the payment of the cost of replacing the goods or acquiring equivalent goods; and*
- (b) *in the case of services, to any one of the following as determined by us:*

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- (i) *the supplying of the services again; or*
- (ii) *the payment of the cost of having the services supplied again."*

(Note this form of clause is, with very minor modifications, taken from that recommended in J D Heydon's "Trade Practices Law" publication).

This clause differs from that in the model contract in that it notes:

- (a) the limitations only apply where the good/service is not of a kind ordinarily acquired for personal, domestic or household use;
- (b) the limitations do not apply if a party establishes the clause is not fair and reasonable;
- (c) the limitations do not apply to the title warranties implied by section 69 of the *Trade Practices Act* (which they are forbidden to do by section 68A).

This form of clause is more consistent with the requirements of section 68A (noting that a clause which does not comply with section 68A is void). Also arguably the form of clause in the model contract is misleading by not noting that a distributor has liability in some circumstances, i.e. where goods/services are of a kind ordinarily acquired for personal, domestic or household use. This may lead to staff of a distributor who handle complaints to make incorrect representations to customers as to how the clause operates in practice, in turn exposing distributors to liability for misleading and deceptive conduct.

That said, we note these deficiencies exist in the existing clause used in ETSA Utilities' standard connection contract.

Arguably note (b) to clause 7 is misleading in failing to note that the exclusion would operate subject to the *Trade Practices Act 1974* (unless the *Trade Practices Act* is going to be amended). The notes are also arguably misleading in failing to note the existence of the small customer compensation regime (given that is a no-fault regime whereas note (b) suggests the distributor is only liable where it acts negligently or in bad faith).

The fact the notes are inaccurate is not, in itself, an issue for ETSA Utilities since the law requires it to adopt this contract. However it may become an issue if its staff, relying on the notes, then provide inaccurate information to customers about their rights (given that would be misleading and deceptive conduct in breach of the *Trade Practices Act 1974*).

In addition to the comments above, the reference to section 68A is unlikely to be effective to limit liability under warranties implied under other legislation. A clause along the lines of the following should be used:

*"Our liability for breach of any condition or warranty implied into this contract by legislation other than the Trade Practices Act 1974 is limited or excluded to the maximum extent permitted by that legislation."*

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We also consider the following should be added to clause 7:

*“Nothing in this clause 7 or otherwise in this contract affects any, or is a waiver of any, immunity from liability to which we are entitled by law, including, without limitation, that under section 1501 of the National Energy Retail Law.”*

#### **6.4 Clause 8.1**

We consider the words “Under energy laws” should be deleted. The way the clause is written it effectively is saying you must give us access but only if energy laws require it. The clause should simply impose an obligation on the customer to provide access as per the terms of clause 8.

#### **6.5 Clause 9.1**

We consider it preferable if the opening line to this clause read:

*“We may interrupt the supply to the premises where that interruption:*

*(a) is one permitted by the energy laws; or*

*(b) is carried out for the following reasons:”*

We note that clause 11 is drafted consistently with this modification we have suggested to clause 9.

We also suggest paragraph (c) be modified consistently with our suggested modification to Rule 411.

#### **6.6 Clause 9.3**

It does not make sense to make clause 9.3(a) subject to clause 9.3(b) as the two clauses deal with different matters. Clause 9.3(a) deals with planned interruptions and clause 9.3(b) unplanned interruptions.

#### **6.7 Liability – See separate section on Liability**

See section 9.

#### **6.8 Interruptions to supply (clause 9.4(b))**

There should be no requirement to provide notice to customers where we do not provide 4 business days notice as those interruptions are treated as unplanned interruptions in accordance with the NECF2.

We consider that our current approved deemed standard connection and supply contract take a more practical approach and states:

**15.2 Notice of interruption**

We must give you reasonable notice before interrupting or limiting the electricity supply to your *supply address* unless:

- (a) the interruption is for less than 15 minutes;
- (b) it is an emergency; or
- (c) the occupier of the *supply address* has agreed.

We consider that the deemed contract should adopt this wording.

**6.9 Clause 14.2**

Clause 14.2, which allows the distributor to charge a reasonable fee for providing information, is inconsistent with Rule 410 which makes no mention of an entitlement to levy a fee. Consequently, r410 should be modified to permit us to charge a reasonable fee as previously detailed.

**6.10 Force Majeure (clause 16)**

ETSA Utilities is not required under force majeure provision to make GSL payments associated with supply interruptions where we have been prevented from gaining access to restore supply by say, flood, denied access by a police officer or other authorised officer (eg access to area experiencing bushfires etc).

We note the style of this clause does not fit the rest of the contract – the rest of the contract is drafted in a plain English customer friendly style whereas this clause retains a more legalistic tone.

More significantly the clause is quite impractical. If the distributor cannot comply due to force majeure then the customer is not going to want or need “*prompt notice of that fact including full particulars of the force majeure event, an estimate of its likely duration, the obligations affected by it and the extent of its effects on those obligations and the steps taken to remove, overcome or minimise those effects.*”

The customer will presumably wish to know how long till supply is restored and this information is best conveyed by telephone or website. If a particular customer does want more information and to probe the cause of the force majeure, they can rely on clause 9.4.

Equally where a customer is affected by force majeure, it is highly unlikely the customer will be issuing a formal force majeure notice complying with clause 16.1(b).

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We consider clause 16.1(b) should be recast to reflect a more practical regime. In respect of notifications from the customer, ETSA Utilities should consider when it will wish to receive notice and how (e.g. by telephone).

Clause 16.1(a) is expressed to only suspend obligations where they are affected by force majeure. In our view, a force majeure clause should be expressed to provide that a party is relieved from liability for failure to perform an obligation due to force majeure rather than state an obligation is suspended. If a Monday passes without electricity being supplied then it is not the case the obligation to supply was suspended such that double the amount of electricity is then supplied on the Tuesday. The obligation is not suspended, it is simply not performed.

Clause 16.2 in its reference to widespread is ambiguous – what is “widespread” – 10, 20, 100 or 1,000 customers? We consider either what is meant by widespread should be defined or all notices should be given by way of the telephone line to avoid any need to define “widespread”.

## 7 National Electricity (Retail Support) Amendments

### 7.1 Definition of distribution charges

See previous comments in Section 5.9.1

### 7.2 Current SA arrangements

The current SA coordination agreement which details the issuing of the statement of charges and the payment of these by retailers, does not specify when the statement of charges is to be issued to retailers. However, it details when retailers are required to pay the charges. The obligation for payment is detailed in clause 10.1 of the coordination agreement which is reproduced below:

#### 10.1 Pay statement of charges

Subject to clause 10.6, and unless otherwise agreed between the parties, the Retailer must pay the Distributor the amount set out in the Distributor's *statement of charges* by 12.00 noon on the later of:

- (a) the 10<sup>th</sup> *business day* after the receipt by the Retailer of a *statement of charges* issued under clause 9.1; or
- (b) the 15<sup>th</sup> *business day* after the end of the *billing period* to which that *statement of charges* relates.

ETSA Utilities currently provides its statement of charges on the 9<sup>th</sup> day of the month, unless a weekend or public holiday when it is provided on the next business day. The retailer then has 10 business day to make payment.

In SA, we are required to make payment of the transmission companies' "statement of charges" which is issued on the 5<sup>th</sup> business day of the month, within 10 business days.

### 7.3 Obligation to pay (6B.2.1)

As we read clauses 6B.2.1, 6B.2.5 and 6.20.1 their intent appears to be that the retailer must pay the distributor the "distribution service charges" whether or not the retailer successfully collects them from the customer.

We consider that the rule should be drafted along the lines of the wording in our default coordination agreement which states (clause 10.7):

*Except to the extent provided in clause 12.5, the obligation of the Retailer to pay the statement of charges issued by the Distributor in accordance with this clause 10, will not be affected by any failure of a customer to pay the distributor charges set out in a bill issued by the Retailer to that customer.*

## 7.4 Distributor to inform retailer of direct customer billing (6B.2.2)

Rule 6B.2.2(c) seems to imply that the retailer still has to pay the distributor for charges that the distributor does not bill directly to the customer. Consequently, we consider this rule should make clear that the agreement between the distributor and the shared customer may relate to some or all of the distributor service charges and the retailer must continue to collect any charges not being paid directly to the distributor.

## 7.5 Statement of charges (6B.2.4)

ETSA Utilities considers that it is inappropriate for the NECF to specify when a distributor can issue its statement of charges to a retailer. However, it is appropriate for the NECF to specify when a retailer is required to pay the statement of charges like in the current SA Coordination agreement. The only requirement to issue a statement of charges should be that the data used in the bill is available and been verified.

The NECF proposal of DNSP providing a statement of charges to retailers on the 10<sup>th</sup> business day of the month will delay their payment by on average 5.4 days (varies between 3 and 10 days for calendar year 2010). Further, if the NECF requirement was in force in calendar year 2010, two statement of charges would not be paid until the following month.

This changed payment regime will impact ETSA Utilities with us incurring about \$0.75m per annum in extra interest or opportunity costs due to the significantly later payment. Further, as this impacts our cash flow and our balance sheet, it could have an impact on our credit rating .

Consequently, we consider that the clause 6B.2.3(a) should be modified to read as provided below:

*"A distributor must provide a statement of charges ("statement of charges") to a retailer ~~on~~ **by** the 10 business day of each retailer billing period for distribution charges for the previous retail billing period. The statement must include: ...."*

Alternatively, clause 6.B.3.3(a) and clause 6B.3.1(b) could be modified to align with the SA Coordination agreement as detailed above.

## 7.6 Matters related to billing and payment (6B.3)

### 7.6.1 Adjustment of distribution charges

Rule 6B.3.1(a) states that a distributor cannot adjust charges in order to recover costs where a retailer is not permitted to recover those costs from the customer. We can accept this requirement except where the reasons for the non-recovery is due to a retailer's error. Under

these circumstances we should be able to recover from the customer even if the retailer can't recover those costs from the customer.

## 7.6.2 Disputed statement of charges (6B.3.3)

Rather than refer to *"If a retailer has given notice under paragraph (a) and payment of the statement of charges has not yet been made"* we consider the clause should refer to *"Provided the retailer gives notice under paragraph (a) within 10 business days of receipt by the retailer of the statement of charges."*

Under clause 6B.2.5 payment of a statement of charges is due within 10 business days.

On the current wording the retailer could hold back their notice to, say, 15 business days and provided they have given notice under paragraph (a) prior to the time they pay, the retailer could underpay.

Rule 6B.3.3(d) should allow either the distributor or the retailer to refer a matter to dispute resolution. Currently it only allows the retailer to do so, which puts the distributor in a compromised position if, for whatever reason, the retailer does not so refer the dispute.

From a practical perspective we issue invoices to the retailer at a NMI level and currently those invoices are disputed at that level. Rule 6B.3.3 should not be interpreted that it permits a retailer to dispute the whole distribution charges invoice for a dispute with a few individual invoices.

## 7.7 Requirements for credit support (6B.6)

This clause should make clear that the distributor may recalculate the retailer's required credit support amount whenever there is a change in the retailer's circumstances – i.e. change in its credit rating, withdrawal of a guarantee, change in customer number or customer charges. This should apply irrespective of whether the retailer advises the distributor of the change (though the retailer should, of course, be obliged to provide such advice). Currently if the retailer's credit rating changed but the retailer did not advise the distributor, the rules, on their literal reading, would not entitle the distributor to revise the credit support.

### 7.7.1 Current SA Regime

ETSA Utilities is currently permitted to require credit support for any retailer that does not have a BBB- credit rating or better. The Credit support is required for 90 days of distribution charges.

### 7.7.2 NECF Credit Support Proposal

Credit support within the national electricity market is required to ensure that there is no market failure or that customers are not exposed to significant additional costs where a retailer

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who has been paid by the vast majority of its customers, defaults on payments. Retailers are currently required to provide credit support (generally in terms of a bank guarantee) to:

- AMEO for energy purchases from the pool (all retailers are required to provide this form of credit support); and
- Distributors for distribution charges (not required of all retailers and dependent on jurisdictional rules and retailers credit rating).

The NECF2 proposal is that the maximum available credit allowance that a distributor is required to provide a retailer is 33.33% of its previous years distribution revenue which includes transmission charges. It is very likely that if a distributor did not receive 33.33% of its previous year's revenue it would eventually lead to that distributor failing, which would lead to a market failure for customers supplied by that distributor.

ETSA Utilities supports the Energy Network Association (ENA) submission to the NECF2 package, in relation to credit support, in that a retailer's credit support allowance should be based on their Distribution Services Charges Liability (DSCL) and their credit rating not on the distributors revenue and the retailers credit rating.

However, if the NECF2 retains the current form of the credit support arrangements then the maximum credit allowance provided by distributors to retailers needs to be significantly reduced. For ETSA Utilities where about 60% of our revenue is received from quarterly billed customers and the remainder from monthly billed customers, our average DSCL period is 76 days which equates to on average 20.82% of our revenue considerably less than the 33.33% allowed as the maximum credit allowance under the NECF2.

ETSA Utilities considers that a distributor, even with a pass through of the full economic impact to customers would suffer serious cash flow shortfalls if it lost 15% of its revenue<sup>3</sup> for a 76 day period. This loss of revenue could impact on its credit ratings (eg under a credit watch) and its ability to comply with its regulatory obligations with potential for loss of licence. Consequently, to protect a distributor's financial viability, we consider that the maximum credit allowance a retailer should receive is 15% of the distributor's previous years distribution revenue. Further we consider that a retailer with an equivalent Dunn and Bradstreet Dynamic Risk Score of moderate should not be provided with any credit allowance.

Our proposed maximum credit allowance of 15%, and the Table provided in Schedule 1 of the Draft National Electricity (Retail Support) Amendment Rule would permit a AAA rated retailer to have a 72% market share of a distributor's revenue prior to providing any credit support and a BBB (investment rated) retailer permitted to have 35% market share prior to providing any credit support etc.

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<sup>3</sup> Note: the AER have established a materiality threshold for ETSA Utilities in their draft determination at 1% of revenue (excluding transmission charges).

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We consider that our proposal provides an appropriate degree of credit allowance to retailers depending on the credit worthiness to ensure that a distributor should not fail which would lead to market failure in that jurisdiction.

We agree with the NECF2 package in that the economic impact of a retailer failure on a distributor should be recovered from customers (ie the distributor can seek a pass through of the economic impact).

### **7.7.3 Credit rating for a retailer (6B.6.3)**

This clause should make clear the references to credit ratings are to external credit ratings and not to self-generated/assessed credit ratings from using Moodys or other's software (to avoid the issues ETSA Utilities have experienced with one retailer). Rather than clause 6B.6.3 stating the distributor must use the credit rating advised by the retailer, the clause should oblige the distributor to use the credit rating which the retailer demonstrates to the distributor that it actually has.

### **7.7.4 Calculating credit allowance where guarantor(6B.6.4)**

This clause should require the guarantee of the retailer to be in a form satisfactory to the distributor (possibly acting reasonably) or a template form of guarantee should be set out in the National Electricity Rules.

To merely state that the guarantee should be "unconditional" is insufficient as there are many ways to express a guarantee as unconditional but at the same time water it down (for example by including onerous notice requirements, obliging the distributor to first pursue the retailer or by not including the standard clauses incorporated to exclude the protection the common law would otherwise give to guarantors).

### **7.7.5 When no credit support will be extended to a retailer (6B.6.5)**

We note that if the retailer fails to pay the distributor as required by this clause 6B.2.1, then the distributor may, under section 72 of the National Electricity Law, commence a court action to recover the debt but only if the amount is not paid within 28 days of when it is due. This means that a distributor can take court action to recover the debt but still be required to provide credit support under 6B.6.5(a)(iii) (ie retailer hasn't paid a statement of charges within 25 business days).

We consider this to be an anomaly in that any credit allowance provided to a retailer must be withdrawn prior to a distributor taking court action. We consider that credit allowance should be withdrawn when a retailer has not paid a statement of charges in accordance with the NECF within 15 business days (ie 25 business days from providing the statement of charges to the retailer).

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Clause 6B.5(b) should read: *“For the purposes of clause 6B.6.5(a), a retailer will not be regarded as having failed to pay a statement of charges where the only amount of that statement of charges not paid was part thereof payment of which was validly withheld by the retailer because of a dispute and where, once the dispute was resolved, the retailer paid any outstanding amount within the time required by these Rules.”*

Currently on its literal reading the clause would exclude the operation of clause 6B.6.5(a) where a disputed payment was withheld, even if it was not withheld in accordance with the requirements of the Rules.

Rule 6B.6.5(c) should require AEMO to notify the distributor that it has called upon credit support, particularly given a retailer in financial difficulties has a strong incentive to not comply with this requirement.

#### **7.7.6 Provision of credit support where dispute arises (6B.7.3)**

While Rule 6B.7.3 does now give the distributor an additional mechanism in dealing with credit support disputes the issue arises what if, despite rule 6B.7.3(b), the retailer does not provide credit support. For example, what if the retailer argues that, because the distributor’s request (for some reason) does not comply with the Rules, it is not required to provide credit support. What does the distributor do?

If the distributor refers the matter to the dispute resolution panel under the Rules then the distributor is back using the same cumbersome process as presently and rule 6B.7.3(b) is of no real use.

In our view, if a retailer does not comply with rule 6B.7.3 then the distributor should be entitled to seek injunctive relief from a court requiring the production of the credit support.

Similarly the credit support rules do not give the distributor any clear remedy if a retailer stops providing credit support. Again in our view in such circumstances the distributor should be entitled to proceed directly to court.

Rule 6B.7.3(b) should also be expressed to apply to Rule 6B.8.1.

If an existing credit support is about to expire and replacement credit support has not been provided, the distributor should be entitled to call on the existing credit support and hold the cash until such time as the replacement credit support is provided.

## **8 National electricity (retail connection) amendment rules**

### **8.1 General**

We consider that the proposed requirement in the NECF2 package for an offer and acceptance for the AER approved connection contracts to apply, will significantly delay the connection of customers. This delay will lead to many complaints from customers.

Our current regime does not require an offer and acceptance for the proposed NECF2 basic connection services. The customer or their agent applies for a connection (our standard prices are published and known) and the customer signs an application form which binds them to the deemed contract (regulator approved) and to pay the applicable charge. This regime expedites the connection unlike the proposed regime in the NECF2.

We consider that the current SA regime works well, is efficient and leads to the minimum number of customer complaints. We consider that the NECF2 offer and acceptance requirement for connection will significantly increase costs for no benefit to the customers (ie introduce inefficiencies).

Consequently, we consider that the NECF package should adopt the current regime that operates in most jurisdictions which do not require an offer and acceptance for basic connections.

### **8.2 Current SA arrangements**

Currently customers within SA are entitled to a "standard connection" where an explicit charging regime applies which is contained in the Electricity Distribution Code, Chapter 3. We consider that this regime could be incorporated into the proposed NECF2 "standard connection services" regime at a local jurisdictional level.

### **8.3 Standard Connection Services**

ETSA Utilities considers that the AER approval of standard connection services r5A.B.5(b) should be the same as for basic services (ie include sub-r5.A.B.3(b)(1) and (2)).

### **8.4 Preliminary enquiry (5A.D.2)**

ETSA Utilities receives many applications/enquiries for supply where we are required to spend time and resources, site visits to determine the cost of connection, which then don't proceed. They don't proceed because the enquiry was part of the customer's deliberations on the purchase of a property. Currently, ETSA Utilities is able to charge customers upfront for this service. We consider that this ability should be incorporated into the Retail Connection regime under chapter 5A.

## **8.5 Distributors response to application**

Currently, ETSA Utilities is required to use its best endeavours to provide a customer with an offer for connection, once the customer has satisfied specified pre-conditions and provided all the required information, within 20 business days or where complex within 35 business days.

ETSA Utilities is concerned about the 10 business days required contained r5A.F.1(a) based on how we consider we would implement the standard connection services regime contained in proposed Chapter 5A. We recommend that the 10 business days be increased to 20 business days.

Further, in our dealing with customers some customers approach us early in their planning to agree on the method of supply, capacity, location etc. These customers normally require a firm quotation at a specified point in time. Consequently, the rules should allow distributors to make offers at a time agreed with the customer and not be obligated to provide a quote within the time specified in the rules. The rules as currently drafted do not permit this arrangement without ETSA Utilities incurring a compliance breach.

## **9 Liability Regimes**

### **9.1 NECF2 position**

ETSA Utilities is concerned that the proposed NECF position is that distributors' liability should be uncapped for negligence and acts of bad faith. The reasoning provided in the explanatory material is:

- (a) In line with the existing liability regimes in the NEL, the NERL contains a statutory immunity from liability, excluding liability arising from negligence and/or bad faith. The NERL also contains a mutual indemnity provision between retailers and distributors.
- (b) By not extending immunity to liability for actions attributable to negligence and/or bad faith, the immunity provisions retain appropriate accountability and economic incentives for network service reliability.
- (c) Current arrangements for distribution networks in most States and Territories do not provide capped and/or statutory immunity for negligence. NECF2 reflects these arrangements.
- (d) General arrangements for immunity and liability provisions in the national energy markets have already been established. The arrangements are not being reconsidered as part of the development of the NECF.

### **9.2 Existing SA framework**

In SA our current framework limits ETSA Utilities' liability for negligence and acts of bad faith to customers:

- using 30MWh per annum or less to direct loss, consequential loss and personal injury which is capped at \$0.5m; and
- using more than 30MWh per annum to direct loss and personal injury which is capped at \$1m.

ETSA Utilities has received no claims from customers for compensation where the current liability caps have been invoked for the last 10 years, since the current deemed connection and supply contract has been in operation. This means that the current caps are not experienced by customers but enable ETSA Utilities to obtain reasonably priced insurance which benefit customers through lower distribution charges.

### 9.3 Immunity (NERL, s1501)

Section 1501(1) of the Law provides:

*“A retailer or distributor, or an officer or employee of a retailer or distributor, does not incur any civil monetary liability for any partial or total failure to supply energy unless the failure is due to an act or omission done or made by the retailer or distributor or the officer or employee of the retailer or distributor, in bad faith or through negligence.”*

Partial or total failure to supply energy is defined to include “a defective supply of energy.”

However these sections may not be effective to protect a distributor, as contemplated, in all circumstances.

The *Trade Practices Act 1974* implies warranties in contracts for the supply of goods and services. While ETSA Utilities would generally regard itself as supplying services, as the *Trade Practices Act 1974* defines electricity as a “good” ETSA Utilities may be regarded, for the purposes of that Act, as supplying goods.

The warranties implied by the *Trade Practices Act 1974* include:

- (a) for goods, that they are of merchantable quality and reasonably fit for their purpose;
- (b) for services, that they will be provided with due skill and care and be reasonably fit for their purpose.

The service warranties are contained in section 74 of the *Trade Practices Act 1974*. However section 74(2A) of that Act provides:

“2A) If:

- (a) *there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and*
  - (b) *the law of a State or Territory is the proper law of the contract;*
- the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract.”*

(Section 74(2A) was introduced as part of the 2004 reforms limiting liability for professional standards).

So, in respect of the service warranties, they will apply, for contracts made after 14 July 2004 (when section 74(2A) commenced) subject to section 1501.

However for the goods warranties, section 1501 (state law) will apply subject to them (as they are implied by a Commonwealth law which will prevail over the inconsistent State law). So to the extent ETSA Utilities is regarded as a supplier of electricity then its contracts will contain

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implied warranties electricity will be of merchantable quality and be reasonably fit for its purpose and section 1501 will not apply to limit liability for breach of these warranties.

It is an unresolved legal question whether electricity surges and other “faults” in supply, even if they are not preventable, constitute supply of a good which is not of merchantable quality.

The only manner in which to address this issue and give section 1501 its proposed intended effect would be to amend the Trade Practices Act 1974. A query as to whether this is proposed should be raised with the persons drafting the Law.

It would also be preferable if section 1501 provided it prevailed over any inconsistent State law to the contrary (for example the Fair Trading Act 1987 which will shortly have replicated in it the consumer warranties implied into the Trade Practices Act 1974 but without any ability to limit liability for breach of these warranties).

#### **9.4 Indemnities (NERL s1502)**

The NECF package was established to ensure that the party who had control of an aspect of service to customers was responsible for that aspect. Consequently, we consider that there should no be mutual indemnities as the customer must be required to bring any claims for damages etc to the party that is responsible for that aspect of their service.

However, if the NECF package continues with the mutual indemnities then the following information should be used to modify the current s1502.

While it is currently implicit, it would be preferable if s1502 provided a party can enforce the indemnity given to it by this section by action in a court of competent jurisdiction (particularly given the Law is unclear as to when energy industry participants can bring claims relying on its provisions against other industry participants).

Arguably the indemnities should be subject to an obligation on the indemnified party to mitigate their loss.

#### **9.5 Liability to Customers**

ETSA Utilities is concerned at the position taken in the NECF2 in terms of the uncapped liability distributors will be subjected to for negligence and bad faith. Negligence is normally determined by a court after an incidence has occurred and may not relate to actual negligence by the distributor.

ETSA Utilities is not arguing that we should not be liable to customers for acts of negligence or bad faith but that a cap apply to that liability. ETSA Utilities considers that the current liability regime within SA (where caps apply to liability due to negligence and faith) satisfy the reasoning provided under section 3.8 of the explanatory material (reproduced under section 9.1 above). In particular:

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- The current caps in SA comply with the reasons provided above in section 9.1(a) above, in that we are not exempt from liability for negligence or bad faith;
- We are not exempt from liability attributable to negligence and bad faith as required by section 9.1(b) above. Further our caps which are on an individual customer basis which provide appropriate accountability and economic incentives for network reliability;
- Reason detailed under Section 9.1(c) is a false statement as the only regimes where liability is uncapped is for electricity in Victoria and Queensland; and
- In accordance with section 9.1(d) above our current arrangements for immunity and liability exist under the current national electricity markets.

Further, ETSA Utilities has received no claims from customers for compensation where the current liability caps have been invoked for the last 10 years, since the current deemed connection and supply contract has been in operation. This means that the current caps are not seen by customers but enable ETSA Utilities to obtain reasonably priced insurance which benefit customers through lower distribution charges.

In addition ETSA Utilities has operated under this liability regime for 10 years and ESCOSA (local regulator) has not determined that we have not complied with our reliability service standards. ESCOSA monitor our payments to customers in accordance with our contracts and have not raised any concerns about those payments or our practices.

Consequently, we consider that our current arrangements where we are liable to customers for negligence and bad faith but that liability is cap will not result in inappropriate actions by ETSA Utilities, should be adopted within the NECF Package.

## **10 Transitional regimes**

We consider that the local jurisdictions should consult extensively with local energy entities prior to finalising the Application Act and the associated timetable for induction of the full NECF package. The jurisdictions will need to be mindful of the impact on entities and their ability to mitigate those impacts arising from the NECF package.