

26 February 2010

Manager, MCE Secretariat
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Dear Sir

Second Exposure Draft of the National Energy Customer Framework

Integral Energy welcomes the opportunity to comment on the Second Exposure Draft of the National Energy Customer Framework (NECF2) released by the Ministerial Council on Energy Standing Committee of Officials (MCE/SCO).

Integral Energy considers that the second exposure draft of the National Energy Retail Law (NERL), the National Energy Retail Regulations and National Energy Retail Rules (NERR) represents a notable progression on the first exposure draft and introduces additional substantial elements including a new national connections regime and a new national retailer of last resort scheme.

Integral Energy notes that the policy positions in the NECF2 package, including in the Explanatory Memorandum, do not represent the final views of the MCE, or the governments of the participating jurisdictions.

Integral Energy recognises the importance of the NECF2 package and has highlighted several major issues which it considers need to be addressed to ensure the policy intention of the MCE and the provisions of the Australian Energy Market Agreement are properly incorporated in the development of the legislative framework. Integral Energy's detailed comments are provided in Attachment A.

Integral Energy also supports the submissions on the NECF2 package made by the National Stakeholder Steering Committee and that of the Energy Networks Association.

Integral Energy looks forward to participating in the further development of the national energy customer framework for distribution and retail regulation.

If you have any questions with respect to this matter, please contact Mr Erik Beerden, Regulatory Affairs Manager, on telephone number (02) 9853 6904.

Yours faithfully


Vince Graham 2/3/10
Chief Executive Officer

Going further for you is what we do

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NATIONAL ENERGY RETAIL LAW (NERL)

NATIONAL ENERGY RETAIL OBJECTIVE

113. NERL Objective:

Section 113 of the NERL sets out the national energy retail objective as follows:

“113 National energy retail objective (cf NEL s7; NGL s23)

(1) The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.

(2) The national energy retail objective should not be taken to prevent or restrict the development and application of consumer protections for hardship customers and other small customers, including the development, approval and application of customer hardship policies.”

The Explanatory Memorandum states:

“36. The effect of the provision is that the AEMC and AER will be required to carry out their respective functions in a manner that will or is likely to contribute to the achievement of the objective. The objective focuses attention on consumer interests as the ultimate goal, but within an efficiency framework.

37. To avoid any unintended diminution of specific consumer protection measures such as hardship policies, where those policies may be interpreted by some as conflicting with the economically efficient operation of energy markets, the draft NERL provides the following new provision under section 113:

“The national energy retail objective should not be taken to prevent or restrict the development and application of consumer protections for hardship customers and other small customers, including the development, approval and application of customer hardship policies.”

38. This provision is further referred to as a note in various parts of the NERL, including under section 227 which sets out the requirement for approval of customer hardship policies, to ensure that consumer protections are given appropriate weight in the application of the general statutory objective.”

As such, it would appear that the general statutory objective referred to in the Explanatory Memorandum is not the entire energy retail law objective, but rather the first limb of the energy retail law objective referring to supply as set out in s113(1) of the NERL.

Paragraphs 36, 37 and 38 of the Explanatory Memorandum clearly intend that the interpretation of the general statutory objective with respect to energy supply in the

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national energy retail objective is to be interpreted as a consumer protection provision.

The wording of the general statutory objective (being the energy supply limb) in the NERL is identical to the energy supply limb in the national electricity objective of the NEL, which is a purely economic objective.

Indeed the Explanatory Memorandum states that the objective in the NERL follows the objectives of the NEL and NGL to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply.

However, the Explanatory Memorandum is silent on the need to maintain the integrity of the economic efficiency objective of the NEL and NGL.

Should the consumer protection interpretation of the general statutory objective in the NERL also be applied to the objectives of the NEL and NGL, it would compromise the efficient investment, operation and use of energy services in the wholesale markets. The functions performed by AEMO, the AER and Market Participants to ensure the efficient investment, operation and use of energy services in the electricity and gas wholesale markets is currently undertaken on a purely economic basis. Any change to the interpretation and application of a purely economic objective in the NEL and NGL, would alter the performance of AEMO, the AER and Market Participants in carrying out their functions, and would have the effect of distorting and undermining the efficiency principle underpinning the operations of the wholesale markets.

Section 113(2) of the NERL and the Explanatory Memorandum, makes clear that the general statutory objective in the NERL is to be read as a consumer protection objective for hardship customers and other small customers.

However, the inclusion of consumer protection provisions for large customers in the NERL and Chapter 5A of the National Electricity Rules, dealing with the connections framework, indicates that this interpretation is incorrect. Rather, it extends consumer protection to large industrial businesses, and expressly inserts consumer protection into the NEL.

This appears contrary to the intention that the general national electricity objective should not be interpreted as a consumer protection objective for all customers. No justification or reasoning has been provided in support of a large customer consumer protection regime.

Accordingly, Integral Energy submits that the NERL, NERR and Chapter 5A should not provide for consumer protections for large businesses (such as contracts for large customers requiring AER approval), as this is outside the objective of the NERL, NEL and NGL.

116. Application of law, the Rules and Procedures to energy

Section 116(1)(c) of the NERL and NERR applies to distributors to the extent that the distributor supplies electricity or gas or both. The issue here is the potential for overlap and inconsistency between the NEL/NER and the NERL/NERR.

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205. Standing offer prices

Section 205 contains requirements relating to the variation of standing offer prices, including the requirement under s205(6) that a variation to standing offer prices takes effect at most once every 6 months.

Standing offer prices do not represent a single price but rather a suite of individual prices. These individual prices within standing offer prices may currently be varied at different times from each other.

An unintended consequence of the current drafting of s205 is that if some individual standing offer tariffs are varied at a point in time, other individual standing offer tariffs which were not varied at that time could not be varied within the following six month period.

To ensure that individual standing offer tariffs are able to be varied at least every 6 months, Integral Energy submits that references to standing offer prices should be amended to mean reference to a single standing offer price.

302. Obligation to provide customer connection services

Under s302(1) of the NERL, a distributor must, subject to and in accordance with the energy laws, provide customer connection services for the premises of a customer.

Under s302(2) of the NERL, customer connections services must be provided to a customer in accordance with the relevant customer connection contract.

As currently drafted, s302(1) of the NERL creates confusion with respect to both a distributor's obligation to provide customer connection services and the formation of a contract.

Under existing jurisdictional legislation, distributors have an obligation to offer to provide customer connection services. Consistent with this approach, s306 of the NERL provides that a deemed standard connection contract takes effect on acceptance by the customer of the distributors connection offer.

In order to clarify a distributor's obligation with respect to customer connection services, Integral Energy submits that section 302(1) of the NERL should be amended to state that a distributor must, subject to and in accordance with the energy laws, offer to provide customer connection services for the premises of a customer.

311. Submission and approval of form of standard connection contracts for large customers

Under s311 of the NERL, a distributor may prepare and submit to the AER proposed standard connection contracts for classes of large customers. The AER would then determine whether to approve the contracts if it is satisfied that the terms and conditions of the contract are fair and reasonable. If it is not satisfied, the AER may indicate the kind of changes that should be made.

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It is unclear why the AER is involved in determining the terms and conditions of contractual arrangements with large customers. The general objective of the NERL is intended to be read as consumer protection for hardship and small customers only, and does not extend to large customers. Therefore, the role of the AER in protecting large customers under the NERL is inconsistent with the interpretive consumer protection limb of the NERL.

It is also contrary to the market efficiency limb of the NERL, offending the doctrine of privity of contract which underpins the efficient investment, operation and use of electricity services with respect to the supply of electricity and the national electricity system.

Section 311 of the NERL provides for the AER to effectively inject itself as a third person into a contract between two parties, by requiring that it be satisfied as to the terms and conditions of the contract between the parties and that the AER may determine the terms and conditions of the contract between the parties. This undermines the doctrine of privity of contract and exposes the parties to the risk of being bound by conditions arbitrarily set by the AER which may have the effect of undermining or changing the distributor-customer relationship and increasing costs.

These provisions also have the effect of changing the nature of the roles of both the distributor and the AER, whereby the AER is the participant determining the terms and conditions of access and the costs of connection.

Therefore, where the AER requires a change in the terms and conditions of a proposed standard connection contract before it is satisfied and will approve it, so that it can come into effect, the AER should also be responsible for enforcing the approved terms and conditions of the contract.

Where the AER approved terms and conditions of connection contracts adversely impact on the operations of the NEM, the AER should also be held accountable for its decisions and approval.

401. Definitions

The definition of a “*relevant matter*” includes “(b) *under or in connection with the NER or NGR concerning a new connection or a connection alteration.*”

It is unclear why this paragraph (b) is included in the definition of a relevant matter. The NER and NGR are concerned with the wholesale operations of the market and the technical and service standards of the energy system. To the extent that these impact on the connection contracts under the NERL and NERR as a consumer protection issue, they are expressly referred to paragraph (a) of the definition of a “*relevant matter*” in respect to connection contracts with small customers (including the deemed standard connection contract).

The inclusion of paragraph (b) in the definition of a “*relevant matter*” and the form of wording used in paragraph (b) would appear to have the unintended consequence of extending the definition of “*relevant matter*” into all aspects and operation of the wholesale electricity system. This inclusion is inconsistent with the solely economic objectives of the NEL and NER and the NGL and NGR, and has the potential to undermine efficient investment, operation and use of the wholesale market, as

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distributors would be bound to an Ombudsman decision on consumer complaints regarding its investment and operations in the wholesale market.

Large customers would also have redress to the Ombudsman as their connection agreements fall within the proposed Chapter 5A.

(as per sections 404, 405, 407 and 408 of the NERL)

RETAILER OF LAST RESORT (RoLR) SCHEME

605. Appointment and registration as default RoLR

Under section 605(1) of the NERL the AER must appoint one or more retailers as default RoLRs for a jurisdiction and register them as a retailer of last resort (a registered RoLR).

Section 605(3) of the NERL requires the AER to consult with a retailer before appointing the retailer as a default retailer, but the retailer's concurrence is not required for appointment as a default retailer.

The appointment of a default RoLR would occur in instances where no retailer submits a response to a RoLR registration EOI, or where a registered RoLR does not submit an expression of interest (RoLR event EOI) to become the designated RoLR for a particular RoLR event.

A registered RoLR would not submit a response to a RoLR registration EOI or a RoLR event EOI where it considers it would not expect full cost recovery or perceives the costs would outweigh the benefits (i.e. it is not profitable). Therefore, the appointment of a default RoLR in this instance only ensures that the AER can solely dictate loss incurring situations on individual retailers.

Under section 647 of the NERL, a default retailer is only able to recover costs in accordance with a RoLR cost recovery scheme determined by the AER. There is no obligation for the AER to ensure full cost recovery by the default RoLR and there is no certainty that a default RoLR could even recover at least its efficient costs.

As such, the NERL should be amended to ensure that a default RoLR can recover its full costs in a RoLR event. Otherwise, the AER is effectively picking retailer losers and winners (being those that have or have not been appointed default retailers) and determining the extent of their losses.

Additionally, under section 605(7) if a default retailer does not, at the time of registration as a default retailer, meet the organisational capacity criterion required to meet its RoLR obligations, it must as soon as practicable after registration implement adequate systems to meet that criterion and advise the AER that those systems have been implemented.

This provision imposes additional wholesale energy and administrative costs on the default RoLR who may be ill equipped to deal with a RoLR event. While, the AER may require one or more distributors to make payments towards these costs under s649, it also highlights the inconsistency between s605(7) and s605(5) of the NERL, and the inappropriate appointment as a default RoLR by the AER in the first instance. Accordingly s605(7) should be deleted.

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608. Designation of registered RoLR for actual or apprehended RoLR event

Section 608(7) states:

“The AER may make an appointment under this section even if it has called for but not considered or finished considering any RoLR event Eols that have been lodged, and in doing so may appoint a registered RoLR whether or not it lodged a RoLR event Eol.”

It is unclear how this provision would work. If the AER has a discretion to make an appointment where it called for but has not considered or finished considering any RoLR event Eols that have been lodged, how could it then in doing so make an appointment without a RoLR event Eol being lodged?

Accordingly, section 608(7) should be reworded to clarify the intent of the provision or be deleted.

610. Appointment of more than one designated RoLR for RoLR event

Under section 610 of the NERL, the AER may appoint more than one designated RoLR for an actual or apprehended RoLR event, and may allocate these designated RoLRs to particular areas, particular customers or classes of customers or a combination of areas, customers or classes of customers.

It is not and should not be the role of the AER to pick ‘winners’ and ‘losers’ in a market and allocate market share. Still less should it be the role of the AER to allocate individual customers to a particular retailer or particular retailers.

Whilst a RoLR would be expected to receive the customers of a failing retailer, it should receive all customers of the failed retailer unless the number of customers being transferred is disproportionate to the size of the RoLR itself or a risk of cascading failure arises from the acquisition of these customers.

The role of the AER should not be to determine which customers or classes of customers in a jurisdiction a particular retailer will receive. By identifying which individual customers or classes of customers are profitable to a retailer and which are not, and then determining which customers retailers will receive, the AER is effectively selecting the business each RoLR must accept and determining their amount of profit they may make or the amount of losses they should sustain.

Consequently, s610 should be amended to delete the reference to particular customers or classes of customers.

614. Transfer of customers

Section 614 provides for a customer of a failed retailer immediately before the relevant transfer date to become a customer of a designated RoLR immediately after ceasing to be a customer of the failed retailer.

Under this section, customers of the failed retailer who at the time of the relevant transfer were in the process of being transferred to new retailer, would be precluded

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from transferring to their new retailer and instead be transferred to the designated RoLR.

Integral Energy's experience in the recent RoLR event is that enabling customers to be moved to their chosen new Retailer is advantageous to both the customer and the RoLR, as it expedites the transfer that a customer had initiated and is expecting, and minimises the cost for the RoLR.

Accordingly, Integral Energy submits that customers of the failed retailer who at the time of the relevant transfer were in the process of being transferred to new retailer, should have their transfer to the new retailer completed, rather than be transferred to the designated RoLR.

648. RoLR cost recovery schemes

Section 648(3) provides for the AER in determining a RoLR cost recovery scheme may limit either generally or in particular cases or classes of cases the costs (and amount of those costs) that are recoverable.

In effect, this provision gives the AER the ability to arbitrarily decide the costs and the actual amount of costs which a RoLR or a distributor can recover. As such, the AER is placed in the position of determining the extent of losses a RoLR should incur.

Integral Energy notes that clause 1122 of the NERR sets out the principles to be followed by the AER in making a decision on a RoLR cost recovery scheme application, including the principle that a RoLR should be provided with a 'reasonable opportunity' to recover its efficient costs incurred with respect to the RoLR scheme.

It is unclear how the AER would be able to properly perform this RoLR cost recovery determination function in the absence of weightings being provided to the proposed criteria and a significant information burden being placed on retailers in addition to the obligation of continuous disclosure.

The purpose of the RoLR cost recovery scheme is to provide for the recovery of costs incurred by the RoLR in fulfilling its function, including its costs incurred in preparing for RoLR events and those costs incurred on and after the RoLR event.

Unless a RoLR can fully recover all its costs in complying with its RoLR obligations, it will incur a loss. Where the recovery of these costs are uncertain, the incentive to participate in the RoLR scheme is significantly diminished, and the efficiency of the RoLR scheme is compromised.

Consistent with the NERL objective, a RoLR cost recovery scheme should ensure full cost recovery by a RoLR of costs incurred in fulfilling its RoLR function.

Accordingly, Integral Energy submits that s648(3) of the NERL be amended to provide for the AER to ensure full cost recovery by the RoLR under a RoLR scheme and the principles or factors taken into consideration by the AER with respect to RoLR cost recovery schemes under s651(1)(c) of the NERL and clause 1122(2)(a) of the NERR include the requirement for full cost recovery by the RoLR.

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649. RoLR cost recovery scheme distributor payment determination

Section 649(1) provides for the AER to make a RoLR cost recovery scheme distributor determination, whereby one or more distributors are to make payments towards the costs of the scheme.

Under s649(2) a distributor is compelled to make payments under the RoLR cost recovery scheme distributor determination.

No discussion, rationale or debate has been provided as to why distributors should be required make payments under a RoLR cost recovery scheme. Distributors do not purchase or sell energy, and as such do not participate in the energy market except to the extent of allowing access to their network for the delivery of energy.

Furthermore, it is also questionable why only the customers of a distributor's network should face the costs of a failed retailer. The effect of doing so is to place on the existing network customers in a distribution system (who were not with the failed retailer) a disproportionate burden of the energy costs because a failed retailer targeted customers in their distribution area.

If such an approach were adopted price shocks for network customers may well result, and disparities exposed as additional prices paid by a customer on one side of a street may be significantly increased compared to a customer on the other side of street in a neighbouring distribution system.

As such, allocating RoLR costs to all customers of a distribution network, including the customers that were not customers of the failed retailer, seems inappropriate and unfairly penalises these customers out of the perceived convenience for cost pass through arrangements.

Under s649, a distributor can only seek the recovery of these costs under a cost recovery scheme, as it is prevented under sections 645(c) and 647 from seeking a pass-through of any costs not captured under the cost recovery scheme under the NEL and NER.

In the event, a distributor was able to have recourse to a pass-through under the NEL and NGL, it should be noted that in its NSW distribution determination for 2009-14, the AER expressly rejected a RoLR event as a pass-through event (to facilitate the pass-through of costs incurred by industry) on the basis that a RoLR event is not foreseeable.

Further, had the AER accepted a RoLR event as a pass-through event, a distributor would only be able to recover its costs once it has exceeded a materiality threshold determined by the AER.

As stated in s648 above, unless a distributor can fully recover all its costs in complying with its RoLR obligations (and not just be afforded a 'reasonable opportunity' to recover their efficient costs), it will incur a loss.

As a national RoLR scheme provides an energy sector wide 'insurance' in case of failing retailers, all customers in the energy market benefit from the scheme. On this basis, a more efficient and equitable outcome would be to have the costs of a national RoLR scheme spread amongst the market as a whole.

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An appropriate mechanism would be for the payment and recovery of RoLR costs to be effected through AEMO. This function is also consistent with AEMO's market functions under the NEL, NGL and the NERL.

Under this arrangement, AEMO would make payments under a RoLR cost recovery scheme. AEMO would then be able to recover these costs from market participant fees. This form of cost recovery would be administratively simple, cost efficient and effective as the AEMO architecture for payments and cost recovery is already established and market participant fees are already charged annually by AEMO.

Accordingly, Integral Energy submits that s649 to be deleted, and a provision be inserted making AEMO responsible for payments and recovery of RoLR costs under a RoLR cost recovery scheme approved by the AER.

Alternatively, Integral Energy submits that s649 of the NERL be amended to expressly provide for the AER to ensure full cost recovery by the distributor under a RoLR cost recovery scheme distributor payment determination and the principles or factors taken into consideration by the AER with respect to RoLR cost recovery scheme distributor payment determination under s651(2)(c) of the NERL and clause 1122(2)(a) of the NERR include the requirement for full cost recovery by the distributor and the RoLR.

651. Rules regarding schemes and determinations

Section 651(2) provides that Rules may be made for or with respect to RoLR cost recovery scheme distributor payment determinations. For the reasons stated above, integral Energy considers that s649 concerning RoLR cost recovery scheme distributor payment determinations should be deleted. In that event, this sub-section should also be deleted.

654. Immunity

Section 654(3) defines a protected person as:

“(3) In this section—

***protected person** means—*

(a) the AER; or

(b) AEMO; or

(c) a designated RoLR ; or

(d) a distributor; or

(e) an officer or employee of a person referred to in paragraphs (a) to (d).”

Under this definition, only one person named in the section can be a protected person at any one time. For example the AER and a distributor could not both be protected persons at the same time. Accordingly, the definition should be amended to replace the word 'or' with 'and', so that the definition would read:

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“(3) *In this section—*

protected person means—

(a) *the AER; and*

(b) *AEMO; and*

(c) *a designated RoLR ; and*

(d) *a distributor; and*

(e) *an officer or employee of a person referred to in paragraphs (a) to (d).”*

SMALL COMPENSATION CLAIMS REGIME

701. Small compensation claims regime

Section 701(2) provides that small customers may make claims for compensation from distributors who provide connection services to their premises to their premises without having to establish fault, negligence or bad faith on the part of a distributor in order to receive compensation.

No such provision currently applies in New South Wales, and it is not appropriate that a distributor should pay claims for an incident which it has not caused or over which it had no control. No rationale or justification has been provided for the lack of this threshold responsibility in establishing a claim, and in the absence of this threshold section 701(2) should be deleted accordingly.

If this small compensation claims regime has been conceived as a broader consumer protection regime for dealing with the energy industry interaction with the Australian Consumer Law, that intent should be expressly stated and the interaction explained. However, in the absence of this rationale and understanding of the interaction between the NERL and the Australian Energy Law, section 701(2) should be deleted.

703. Claimable incidents - meaning

The Explanatory Memorandum states that the small compensation claims regime would only apply in those jurisdictions that specifically provide for small claims compensation via a State or Territory instrument that nominates the specific circumstances for which the compensation regime will apply.

However, under section 703(1)(a) of the NERL, a claimable incident also includes an event or circumstance of a kind prescribed by the National Regulations. Consistent with the intent of the provision as stated in the Explanatory Memorandum, section 703(1) of the NERL should be deleted.

705, 706 and 708. Maximum amount, Minimum amount and Repeat claimant – meaning

Under sections 705(2) and 706(2) of the NERL, if a jurisdiction does not determine a maximum or minimum amount which a distributor pays to a small customer for a small compensation scheme, the AER may determine that maximum amount or the minimum amount. Further, the maximum amount or minimum amount determined by the AER may differ both between jurisdictions and differing claimable incidents.

Under section 708(2) of the NERL, the AER also determines, and notifies the distributors concerned, the maximum number of claims for compensation that a small

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customer may make before a distributor may reasonably consider the claim forms part of an abuse of the small claims regime.

It is both inconsistent and inappropriate for the AER to determine and discriminate between and within jurisdictions, the minimum and maximum amounts of small compensation claims and the number of times a small customer can claim compensation under the small compensation claims regime.

To ensure consistency, certainty and uniformity, and to avoid perceptions of bias, conflict of interest, and inappropriate rule making, Integral Energy submits that where no minimum and maximum amounts of small compensation claims are set by jurisdictions, the maximum and minimum amounts be set in the National Regulations.

1210. AER Compliance Procedures and Guidelines

Section 1210(6) provides that the AER Compliance Procedures and Guidelines may form a part of similar guidelines under this law or the NEL or the NGL.

Section 1210(1) requires the AER Compliance Procedures and Guidelines to be made in accordance with the retail consultation procedure. However, neither the NEL nor the NGL are subject to the retail consultation procedure. As such, it is inappropriate require the AER Compliance Procedures and Guidelines to apply to the NEL nor the NGL. Accordingly, s1210(6) of the NERL should be deleted.

1501. Immunity in relation to failure to supply energy

Under the model terms and conditions for standard retail contracts and deemed standard connection contracts, retailers and distributors cannot limit their liability for the failures or deficiencies in supply or services provided under the contracts due to negligence.

The reason for this is that section 1501 of the NERL expressly excludes the ability of a retailer or a distributor to vary or exclude the operation of a contract with a small customer which would seek to limit liability for any partial or total failure to supply energy for negligence.

Clauses 232 and 407 of the NERR also prohibits a retailer or a distributor from including any terms or condition in a negotiated contract with a small customer that limits the liability of the retailer or distributor for breach of the contract or negligence by the retailer or distributor.

Where a distributor wishes to include a clause limiting its liability for any partial or total failure to supply energy for negligence in a standard connection contract applying to a class of large customers only, the approval of the AER is first required.

The Explanatory Memorandum outlines the rationale of these restrictions as follows:

“71. 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.

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72. *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.*
73. *Current arrangements for distribution networks in most States and Territories do not provide capped and/or statutory immunity for negligence. NECF2 reflects these arrangements.*
74. *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.”*

This stated rationale underpinning the exclusion of the retailers and distributors liability for negligence is contrary to the existing liability regime in the NEL and the existing practices of distributors and retailers, inconsistent with NSW jurisdictional legislation, and fails to provide or properly address appropriate accountability and economic incentives for reliability.

Section 120 of the NEL states:

- “(1) A Registered participant or AEMO, or an officer or employee of a Registered participant or AEMO, does not incur any civil monetary liability for any partial or total failure to supply electricity unless the failure is due to an act or omission done or made by the Registered participant or AEMO, or the officer or employee of a Registered participant or AEMO, in bad faith or through negligence.*
- (2) A Registered participant or AEMO may enter into an agreement with a person varying or excluding the operation of subsection (1) and, to the extent of that agreement that subsection does not apply.”*

Accordingly, the existing provisions of the NEL expressly provide for retailers and distributors to vary their contracts to exclude liability for any partial or total failure to supply electricity through negligence.

This express provision extends to all customers of the retailer and distributor, including small customers.

The relationship between retailers, distributors and customers in NSW is also governed by the *Electricity Supply Act, 1995* and the *Electricity Supply (General) Regulation, 2001*. This legislation does not prevent retailers or distributors from limiting their liability for partial or total failure to supply electricity through negligence under contract with their customers.

All Integral Energy customer contracts currently limit its liability for partial or total failure to supply electricity through negligence. This limitation has consistently delivered lower prices to customers.

Distributors are currently subject to extensive accountability and economic incentives for network service reliability, notwithstanding existing immunity to liability for actions attributable to negligence.

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The existing economic framework ensures that in order for distributors to recover their costs to maintain network service reliability, they must minimise failures to supply electricity. The AER determines the revenues a distributor may obtain to meet its costs in providing network services and the prices a distributor may charge to customers. Where there are network outages, a distributor is not able to ensure that it will recover its costs through the prices it can charge to customers.

Additionally, the AER has in place a Service Target Performance Incentive Scheme which penalises distributors for not meeting network service performance standards, and under NSW legislation, a distributor must make Guaranteed Service Level payments to customers for failure to supply electricity.

The imposition of a limitation on immunity to liability for actions attributable to negligence would merely have the effect of increasing costs to customers with no change to the accountability and economic incentives for network service reliability.

Contrary to the statement in the Explanatory Memorandum that:

“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”,

it has been demonstrated that the NERL and NERR provisions do change the general arrangements for immunity and liability provisions in the national energy market. To ensure consistency with the intent of statement that *“the arrangements are not being reconsidered as part of the development of the NECF”,* s1501(2) of the NERL should be deleted and replaced with s120(2) of the NEL.

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NATIONAL ENERGY RETAIL RULES (NERR)

206. Pre-contractual duty of distributors

Clause 206(2) of the NERR requires a distributor, when contacted directly or on referral by a retailer, by a small customer who is seeking customer retail services to, among other things, advise a small customer which retailer has an obligation to make a standing offer to the customer.

It is inappropriate for a distributor to be placed in the position of being the publicity agent and call centre functionary for customer retail services of every retailer in the NEM. It should be the retailer contacted by the customer which advises the small customer which retailer has an obligation to make a standing offer.

The inefficiencies created through the increased costs to distributors should they provide this information would be passed on to customers for little or no benefit. Whereas if retailers were to provide this information, they would initially obtain access to NMI information which they currently do not receive and which would allow them to better ascertain the state of the retail market and better tailor product offerings to customers.

211. Bill smoothing

Clause 211 of the NERR requires bill retailers to review bill smoothing arrangements after 6 months. This requirement does not currently apply in NSW, and would result in additional costs to both retailers and customers for little, if any, benefit.

Accordingly, Integral Energy submits that clause 211 be amended consistent with current practice that bill smoothing arrangements be reviewed annually, but that they be at least monitored and adjusted as required.

226. Payment of security deposit

Clause 226 provides that a small customer who is required under clause 225 to pay a security deposit to a retailer, must do so when requested by the retailer.

Under clause 225(7) of the NERR, the non-payment or partial payment of a security deposit is not a ground for refusing to sell energy under a standard retail contract and under clause 225(8) partial payment of a security deposit is not a pre-condition to the formation of a standard retail contract.

In order for a retailer to have confidence that the risk that the security deposit is covering will be managed, clause 226(1) should be amended to provide that where a small customer who is required under clause 225 to pay a security deposit to a retailer, that they must pay the security deposit in full when requested by the retailer to do so.

Alternative security deposit arrangements may be made for hardship customers.

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232. Liabilities and immunities

See comments s1501 (NERL).

234. Termination of standard retail contract

Clause 234(1) sets out the matters of when a standard retail contract terminates. The clause includes the requirement that the standard retail contract terminates “*at the end of the period of 10 business days commencing on the day the small customer’s premises are de-energised, if there is no contractual right to re-energisation.*”

Where a customer’s premises is de-energised, such as for non-payment, it is not clear what purpose is served by not terminating the contract at that time, where there is no contractual right to re-energisation. Accordingly, a retailer should have the option of terminating the contract following de-energisation where there is no contractual right to re-energisation.

Similarly, a contract should be terminated where a retailer has exercised their right to disconnect a customer under the standard retail contract.

Clause 234(1) should also be amended to include the termination of a standard contract in the event of a RoLR arrangement being implemented with respect to the customer premises.

407. Liabilities and immunities

See comments at s1501 (NERL).

Part 6. De-energisation (or disconnection) of premises

Part 6 of the NERR setting out the requirements for de-energisation of a customers premises, makes no distinction between small customers and large customers. While these type of provisions apply to small customers in participating jurisdictions in the NEM, they do not currently apply to large customers.

As discussed above, the consumer protection interpretation to the NERL objective relates to hardship and small retail customers. Large customers have sufficient bargaining power to negotiate fair and reasonable contract terms. As such, there is no need to provide consumer protections to large industrial customers.

Integral Energy submits that Part 6 of the NERR be amended to clarify that the de-energisation (or disconnection) of premises provisions relate to small retail customers only.

1122. Decision (RoLR Cost recovery scheme and RoLR Cost recovery scheme distributor payment determination)

See comments at sections 648 and 649 of the NERL above.

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Schedule 2 – Model terms and conditions for Deemed Standard Connection Contracts

Clause 5.1

- **Clause 5.1(a)**

Clause 5.1(a) of the deemed standard connection contract states:

“(a) Under this contract we agree to provide customer connection services at your premises. We also agree to perform other obligations that are set out in this contract and to comply with the energy laws.”

As currently drafted, this clause requires a distributor to provide customer connection services over energy infrastructure which it may neither own or control (such as consumer mains and exempt embedded networks). The reason for this is that customer connection services are to be provided at the premises of the customer rather than to the premises of the customer.

As such, numerous issues relating to the reliability and quality of supply of electricity arise including property rights, access, maintenance and operation of the infrastructure. It would also result in additional costs to customers for no appreciable benefit.

Consequently, clause 5.1(a) should be amended to provide for customer connection services “to” the premises of the customer rather than “at” the premises of the customer.

- **Clause 5.3(a)**

Clause 5.3(a) of the deemed standard connection contract states:

“(a) We must provide, install and maintain equipment for the provision of customer connection services at your premises in a manner that is safe and in accordance with the energy laws.”

In NSW, customers currently have a choice to have an Accredited Service Provider (ASP) provide and install connection assets. As currently drafted, clause 5.3(a) would require a distributor to provide, install and maintain those connection assets. The effect of this would be for NSW distributors to crowd out these private sector participants and shut down a secondary market, or alternatively, project manage ASPs on behalf of prospective customers.

Further, clause 5.3(a) also requires a distributor to provide, install and maintain energy infrastructure which it may neither own or control (such as consumer mains and exempt embedded networks). The reason for this is that under clause 5.3(a) the customer connection services are to be provided at the premises of the customer, rather than to the premises of the customer.

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Consequently, clause 5.3(a) should be amended to require a distributor to provide, install and maintain equipment for customer connection services “to” the premises of the customer rather than “at” the premises of the customer.

Schedule 1 - Dictionary

“**Connection Point**” is defined in Schedule 1 – Dictionary as meaning “*the point at which a distribution system connects to an energy installation or equipment that services the premises of one or more customers*”.

This definition of “connection point” in the deemed standard connection contract specifies the connection point at the customers premises. Under this definition, the connection point must be at the point where electricity is delivered between the connection asset and the premises. This is because a distribution system in the NEL (to which the NERL refers) is defined to include both the distribution network and connection assets.

Any equipment between the premises and the distribution network is a connection asset. These connection assets include, among other things, consumer mains and exempt embedded networks.

To ensure that a distributor is not responsible for the delivery of energy on assets which it does not own or control, the definition of “connection point” should be amended to read:

“**connection point** means the point at which a distribution **network** connects to an energy installation or equipment that services the premises of one or more customers”.

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DEFINITIONS

Definitions of connection and connection point

Under clause 5.1 of the deemed customer connection contract, a DNSP agrees to provide *customer connection services* at the premises of the customer.

Under clause 5.3 of the deemed connection contract, a DNSP must provide, install and maintain equipment for the provision of *customer connection services* at the customers premises in a manner which is safe and in accordance with the energy laws, and, its obligations extend up to the *connection point* for energy to be supplied to the customers premises.

Customer connection services are defined in the NERL by a reference to a new connection or connection alteration, in addition to other services such as energisation, de-energisation and supply.

Connection is defined in the NERL to mean a physical link between a distribution system and a customer's premises to allow the flow of energy.

Distribution system is defined in the NEL to mean "*the apparatus, electric lines, equipment, plant and buildings used to convey or control the conveyance of electricity that the Rules specify as, or as forming part of, a distribution system*"

The National Electricity Rules (the Rules) define a distribution system as:

"A distribution network, together with the connection assets associated with the distribution network, which is connected to another transmission or distribution system.

Connection assets on their own do not constitute a distribution system."

The **connection assets** associated with a DNSP's network are components of its distribution system which are used to provide an entry service or an exit service at a single connection point.

The Rules define an entry service as:

"A service provided to serve a Generator or a group of Generators, or a Network Service Provider or a group of Network Service Providers, at a single connection point."

The Rules define an exit service as:

"A service provided to serve a Transmission Customer or Distribution Customer or a group of Transmission Customers or Distribution Customers, or a Network Service Provider or a group of Network Service Providers, at a single connection point."

As such the entry and exit services provided by a DNSP are delivered at the connection point on DNSP's network to serve its customers, generators or other

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Network Service Providers and the connection assets associated with its distribution network are used by the customers to access the service at the connection point.

This is consistent with the Rules requirement for charges payable for an entry service by an embedded generator to relate to an entry service at a distribution network connection point. A similar Rules requirement applies for charges payable for an exist service at a distribution network connection point.

Therefore any equipment between the premises and the distribution network is a connection asset. These connection assets include, among other things, consumer mains and exempt embedded networks.

From a practical perspective, the Rules definitions are both sensible and reasonable as a DNSP should not be in a position where it is obligated to provide services (including the reliability and quality of supply) to customers over connection assets which it does not own or control.

Similarly, a DNSP should not be required to provide the connection assets where an existing ASP scheme is in place, crowding out private sector participants and shutting down secondary markets, or project managing ASPs on behalf of prospective customers.

Accordingly, the definition of **connection point under the Rules** is stated as:

“The agreed point of supply established between Network Service Provider(s) and another Registered Participant, Non-Registered Customer or franchise customer.”

This accommodates the DNSP’s connection contract that connection services (including the supply of electricity) extend up to the connection point (as agreed between the DNSP and the customer).

Where a connection point is defined to be between the distribution system (which includes connection assets) and the premises of the customer, the DNSP would be required to ensure the customer connection services over connection assets.

Connection point is defined in Schedule 1 Dictionary of the deemed standard connection contract as meaning *“the point at which a distribution system connects to an energy installation or equipment that services the premises of one or more customers.”*

Under this proposed definition, the connection point must be at the point where electricity is delivered between the connection asset and the premises.

Therefore, under clause 5.1 of the deemed connection contract, a DNSP would be responsible for customer connection services over connection assets (which it may not own or control) to a connection point at the premises of the customer.

To ensure that a distributor is not responsible for the delivery of energy on assets which it does not own or control, the definition of “connection point” should be amended to read:

“connection point means the point at which a distribution **network** connects to an energy installation or equipment that services the premises of one or more customers”;

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and the definition of **connection** in the NERL and Chapter 5A should be deleted or replicate the definition of “connection” in the Rules.

These amendments would also accommodate situations where energy plant and equipment is “gifted” to DNSPs (such as work performed by ASPs on behalf of customers), as the gifted assets which the DNSP agrees to accept would then form a part of the DNSP’s network.

These revised wordings of the “connection” and “connection point” definitions would also properly reflect the intention stated in the Explanatory Memorandum that “*the new connection framework covers arrangements for the establishment of a new physical connection to a distribution network*” (see Explanatory Memorandum Attachment A, paragraph 6).

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CHAPTER 6B

CREDIT SUPPORT REGIME

6B.4 Credit support regime

Integral Energy is concerned that the design of the credit support regime outlined in Chapter 6B.4 of the Rules (the credit support rules) fails to adequately protect distributors and customers of distributors from risk exposure to retailers failure to pay for network use of system services.

Paragraph 65 of the Explanatory Memorandum states the rationale underpinning this approach is that “*credit support arrangements should not be so onerous as to impose unreasonable costs on retailers or effectively create a barrier to entry in the retail market.*”

On this rationale, AEMO also should not have credit support for debts incurred by retailers in the purchase of power on the energy market, and other prudential requirements for a retailer market entry should be removed.

Integral Energy considers that credit support arrangements are provided for the efficient operations of the energy market. In the case of credit support requested by distributors, it is used as a debt recovery mechanism.

It should be explicitly recognised that in order for NUOS charges to a retailer to arise in the first instance, the retailer must be operating in the energy market. A distributor must have provided network services to the retailer in the first instance and incurred the costs associated with the provision of those services. Therefore, the NUOS charges payable by the retailer is merely a payment for services it has already received.

It is only when a retailer fails to pay its NUOS services debts, that the distributor seeks recovery of those debts, including through the exercise of credit support arrangements. This clearly demonstrates that credit support is a function of cost recovery for the distributor, not a barrier to entry for the retailer.

However, to address any concerns or perception of credit support introducing a barrier to entry for retailers, Integral Energy submits that credit support should be obtained by a distributor only after a retailer has not paid its NUOS charges when they have fallen due.

Integral Energy also submits that the NERL provide for the AER to enforce the provision of credit support by a retailer when requested by a distributor.

6B.5 Requirements for credit support

Clause 6B.5.2 of the Rules, increases the exposure and costs of distributors and their customers to the non-payment of outstanding NUOS services charges by retailers, by significantly restricting the amount of credit support that a distributor may request.

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Under clause 6B.5.2 , a the amount of credit support which a distributor may request is calculated as the difference between the distribution services charges liability and a credit allowance that a distributor must give to a retailer.

6B.6 Determining credit allowance for a retailer

Clause 6B6.2 sets out the credit allowance a distributor must give a retailer as (33.33% X total annual retailer charges billed to all retailers) X the credit allowance percentage for a retailer based on the credit rating of the retailer. In the case of a retailer with a BB- credit rating, Integral Energy would need to carry outstanding NUOS charges of approximately \$12 million for that retailer before it could ask for any credit support.

Where a retailer cannot raise funds through its shareholders or through financial institutions to pay its debts, it is inappropriate and uncommercial to require a distributor to finance working capital for the retailer. This mechanism encourages potentially insolvent trading of retailers, increases losses to distributors and exposes more customers to higher prices, while undermining the efficient operations of the wholesale and retail energy markets.

To avoid encouragement or reward for undercapitalisation and lack of business acumen, the credit support arrangements should not be linked to what costs a distributor can bear, but rather to the debt outstanding only and reinforcing a retailer's obligation to pay for NUOS services.

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CHAPTER 5A

5A.A.1 Definitions

The definition of “connection” in Chapter 5A and the NERL should be identical to the definition of “connection” in Chapter 10 of the National Electricity Rules, to ensure consistency and clarify that “connection assets” are not a part of the distribution network. This would ensure that distributors are not responsible for providing a service over assets which they do not own or control “at the premises” of the customer.

See commentary in Definitions above

5A.B Standardised offers to provide basic and standard connection services

- **5A.B.1**

Integral Energy supports the use of negotiated connection contracts for distribution services other than negotiated distribution services. This application to distribution services other than negotiated distribution services should form an express provision in Chapter 5A of the Rules.

- **5A.B.3(a)**

Under clause 5A.B.3(a)(2) the AER may approve a standing offer for basic connection services if, among other things, it is satisfied that the connection charges are consistent with the connection charge principles and the connection charge guidelines.

As the AER determines the prices distributors can charge for their standard connection services (being a direct control service) under Chapter 6 of the Rules, there is no requirement for this 5A.B.3(a)(2) provision to be included in the amendments to the NER.

Under clause 5A.B.3(a)(3) the AER may approve a standing offer for basic connection services if, among other things, it is satisfied that the terms and conditions are fair and reasonable. The requirement for terms to be fair and reasonable should be contained in the NERL and reflected in the model terms and conditions in the deemed standard connection contract in the NERR.

It is both unnecessary and contrary to the NEL objective to include consumer protection provisions in the NER. Under the NERL and NERR, the AER has sufficient powers to approve and enforce standing offers for basic connection contract terms to be fair and reasonable, including the power to monitor, investigate, report and institute and conduct proceedings in relation to breaches of the NERL, NERL Regulations and the NERR.

Accordingly, the requirement for terms to be fair and reasonable should be contained in the NERL and reflected in the model terms and conditions in the deemed standard connection contract in the NERR, under which the AER has more than sufficient powers to decide and enforce.

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- **5A.B.3(b) and 5A.B.5(b)**

A boxed note to Chapter 5A.B.3(b) states:

“An amendment is proposed to the definition of AER economic regulatory function or power in the NEL to include the exercise of functions under this new Chapter. In that event there would be no need for paragraph (b)(1) above. “

Chapter 5A.B.3(b)(1) provides for the AER to have regard to the national electricity objective in deciding whether to approve an offer to provide basic connection services on specified terms and conditions.

An identical boxed note appears in Chapter 5A.B.5(b) with respect to standard connection services, and a provision under Chapter 5.B.5(b) for the AER to have regard to the national electricity objective in deciding whether to approve an offer to provide standard connection services on specified terms and conditions

As stated in section 113 above, the wording of the general statutory objective (being the energy supply limb) in the NERL is identical to the energy supply limb in the national electricity objective of the NEL, which is a purely economic objective.

Indeed the Explanatory Memorandum states that the objective in the NERL follows the objectives of the NEL and NGL to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply.

Therefore the proposal to amend the AER economic and regulatory function or power in the NEL if the NERL objective is not applied, may be read as to ensure the exercise by the AER of its economic regulatory functions under the NEL is done as a consumer protection measure.

While the network businesses support customer protection, they would not support a diminution in the economic efficiency objective of the NEL. By exercising its functions and powers under the NEL in a consumer protection approach, rather than exercising its functions and powers under the NERL, the AER would be acting contrary to the economic efficiency objective of the NEL and adversely impacting on the efficient investment, operation and use of electricity services in the wholesale electricity market.

The Explanatory Memorandum for the NERL and Chapter 5A reinforces the consumer protection interpretation of the general statutory objective, but fails to address the issue that the economic objective of the NEL may be compromised as the consumer protection limb of the NERL is meant to qualify the general economic objective of the NEL.

Integral Energy considers that the AER has sufficient existing regulatory powers under the NEL and NERL (as currently drafted) to exercise its functions, without the need to adopt a circuitous approach to introducing consumer protection into the NEL through a reference to the defined AER economic regulatory function or power as proposed in Chapter 5A.B.3 and 5A.B.5.

Consistent with this position, Integral Energy considers references to the effect that terms and conditions are fair and reasonable, should remain in the NERL/and

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NERR (which have consumer protection in their objective) and should not be introduced into the NEL and NER (which have a purely economic objective).

Where it is proposed that the AER adopt a prescriptive consumer protection policy role (as contemplated under par. 45 of the Explanatory Memorandum), that role should be accommodated under the NERL (as reflected in the Explanatory Memorandum) and not the NEL.

In the alternative, the national electricity objective in the NEL should be amended to expressly state that it is not consumer protection legislation.

As discussed in s113 above, the consumer protection interpretation to be applied to the NERL objective relates to hardship and small retail customers. Chapter 5A.B.5 relates to standard connection services for large customers only. It is not clear why consumer protections should be specified for large customers. For these large customers, it is unnecessary and inappropriate to require the AER to approve terms and conditions such as liability exclusion clauses.

It would be preferable to insert a new provision in the NERL to provide for distributors to have the discretion to use terms and conditions, such as a liability exclusion clause, for standard connection contracts on a case by case basis.

- **5A.B.3(c) and 5A.B.5(c)**

Clause 5A.B.3(c) and 5A.B.5(c) requires the AER to give the distributor written reasons for its decision not to approve a proposed standing offer to provide basic connection services or a proposed standing offer to provide standard connection services. A distributor must then re-submit the proposed terms and conditions with appropriate amendments as reasonable practicable.

Where a distributor disputes an AER decision with respect to an agreement for a basic connection service or a standard connection service, it can only do so on the basis of legality, not on the merits of the decision. It would appear contrary to the intent that fairness and reasonableness underpin the terms and conditions of a basic connection contract and standard connection contract, to have those terms and conditions determined arbitrarily by a third party decision maker (the AER) whose decisions are themselves not subject to (a review of) fairness or reasonableness.

Where the AER approves or dictates terms and conditions of deemed contracts to which it is not a party, these should be reviewable.

Accordingly, Integral Energy submits that the decision of the AER to not approve proposed standing offers to provide basic connection services or standard connection services, be a reviewable decision.

- **5A.B.4**

Chapter 5A.B.4 relates to standing offers to provide standard connection services. As discussed in 5A.B.5 above, these services relate to large customers only and should not be the subject of consumer protection by the AER.

Accordingly, Integral Energy submits that the standing offers and in particular the terms and conditions for these contracts, not be subject to AER approval.

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5A.C Negotiated connection

At its NECF Forum held in Melbourne on 3 February, 2010, the SCO stated that it was not the intention that a negotiated connection contract be limited to negotiated distribution services only.

To ensure certainty to the regulatory framework and the provision of negotiated connection contracts, Integral Energy seeks an amendment to Chapter 5A to expressly state that a negotiated connection contract can apply to distribution control services.

5A.D Application for connection service

Clause 5A.D.2(c) states:

“A distributor that publishes any of the above information on its website may comply with its obligation to disclose information under this rule by referring the enquirer to the relevant part of the website.

Exception:

If the enquirer asks for a written reply or asks for specific advice about the enquirer’s particular situation, the distributor must reply to the enquiry in writing.”

Integral Energy submits that the words “may comply” in clause 5A.D.2(c) be amended to read “complies” to ensure certainty that a distributor will meet its obligations to disclose information by referring the enquirer to the relevant part of the website, unless the exception applies.

5A.E Connection charges

- **5A.E.1**

Chapter 5A.E.1(a) requires distributors to apply connection charge principles for large customers and non-registered embedded generators to make appropriate capital contributions towards the cost of augmentation of the network to make the connection. This principle raises a number of issues with respect to the operation of the capital contributions framework in place in NSW and the AER connection charge guidelines under Chapter 5A.E.3.

In NSW, capital contributions to distributors are determined in accordance with IPART Determination No1, 2002 on “Capital Contributions and Repayments for Connections to Electricity Distribution Networks in New South Wales”.

Among the effects of implementing the capital contributions principles under Chapter 5A.E.1(a) is a significant expansion in the number of customers making a capital contribution to NSW distributors and an increase in the costs and complexity of operating a reimbursement scheme.

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- **5A.E.3**

Clause 5A.E.3(c)(3) provides for the AER to develop and publish guidelines including establishing principles for defining the connection point.

As discussed in the Definitions section of this submission above, the definition of a connection point underpins the operations of the energy market and any changes to it will have a far reaching effect on the design and operation of the wholesale market and the retail market, and will have significant cost implications for consumers.

It is incompatible with the function and powers of the AER and inappropriate for the AER to dictate the design and operation of the energy market. This role properly rests with the AEMC as the rule maker in the energy market in accordance with Part 4 of the NEL and Part 9 of the NERL.

Accordingly clause 5A.E.3(c)(3) should be deleted.