



25 July 2008

Manager, MCE Secretariat,  
Department of Resources, Energy and Tourism,  
GPO Box 9839  
Canberra ACT 2601  
MCEMarketReform@ret.gov.au

Dear Sir/Madam

**Re: National Framework for Regulating Energy Distribution & Retail Services**

Envestra is Australia's largest natural gas distributor, delivering gas to over 1,000,000 customers in all mainland states except for Western Australia. Being subject to numerous jurisdictional regulatory regimes, Envestra is well placed to comment on the proposed national framework. Our detailed comments to the Policy Response Paper (the "Paper") are attached.

There are two important issues which deserve highlighting, as these represent serious concerns with recommendations made in the Paper, which if implemented will result in significant retrograde steps in the achievement of a more efficient and effective regulatory regime.

The first key issue is that of jurisdictional powers. It is recommended by the SCO that jurisdictions retain licensing powers in relation to energy distribution. The powers that (currently) go hand-in-hand with licensing will inevitably result in duplication or overlap of regulation, a serious concern previously expressed by industry. Envestra believes that state requirements (service and reliability standards) can be mandated through legislation (as is done with safety and technical standards), without the need for jurisdictional licensing. In order for national regulation to achieve its objectives, it is recommended that state commercial regulators' powers be limited to those of technical regulators, ie recommending to Ministers any required changes to service standards, etc. Transferring the licensing function from the state regulator to the national regulator will, in our view, achieve the required result of minimising the prospect of double-regulation. Alternatively, it would be necessary to eliminate the powers of commercial regulators to vary licence conditions and to impose codes and guidelines without Ministerial approval.

The second key issue relates to the SCO recommendation for Retail Support Contracts (RSC). As discussed in this submission, Envestra opposes RSCs on the basis that the current access regime, through regulated default contracts, already addresses the issues that RSCs are intended to address. Furthermore, RSCs would create significant unnecessary complexity and legal uncertainty, and unwind the significant progress achieved to-date in standardisation of 'use of system' contracts between distributors and retailers. The SCO proposal attempts to divide distribution services currently provided under the access regime so that some are provided under a RSC. There is no rationale for adopting such a flawed approach, and such a disconnect will jeopardise the efficient operation of the National Gas Rules.

Envestra believes it important for the national regulatory framework to be workable, and that the end result should, as far as possible, be more efficient and accountable regulation. To this end, Envestra urges the MCE to give significant weight to the above issues in its deliberations.

Yours sincerely  
A Staniford  
Commercial Manager

**ENVESTRA COMMENTS on the  
MCE SCO Policy Response Paper – A National Framework for Regulating Electricity and Gas  
(Energy) Distribution and Retail Services to Customers**

**Comments on Policy Response Paper**

**1. Ref. pviii – Distributor – retailer mutual obligations**

**Issue**

*“In particular, the RSC recognizes that generally retailers do not control the physical aspects of supply of energy to customers, but provide collection and credit management services to distributors in relation to network charges”.*

**Comment**

While Envestra agrees that retailers do not provide the physical aspects of supply, Envestra disagrees with the notion that retailers provide collection and credit management services to distributors. A retailer provides a retail service to its customer that includes several components, including the purchase of gas and its transportation to the customer. A retailer does not provide a collection service on behalf of service providers that have provided the retailer with goods and services (any more than it provides a collection service for gas producers relating to the natural gas product). Retailers are responsible to distributors for the payment of tariffs (and to gas producers for the payment of natural gas), irrespective of whether gas consumers pay retailers.

**2. Ref. s2.3, p11 – Definition of distribution services**

**Issue**

- *“The SCO considers that it is important to clearly articulate what distribution services are provided by distributors to customers”*
- *“The NPWG is considering and addressing the obligations that may apply in relation to distribution planning and connection arrangements in electricity and gas”*

**Comment**

Envestra agrees there must be a clear definition of distribution services if there is an obligation on distributors to provide these, but believes there is ambiguity in the paper concerning this. On page 11 of the Paper it intimates that distribution services will include “the establishment of a physical connection of the premises to the distribution network”, as well as energisation “wherever a physical connection already exists”.

However, on page 12 of the Paper it states that “customer distribution services are those services provided in conveying energy to a customer’s premises after initial connection has occurred”.

On page 26 of the Table of Recommendations it states that “For the avoidance of doubt, once a physical connection is established with a customer’s premises, that customer will have the benefit of the distributor’s obligation to provide customer distribution services to those premises”. This implies that a distributor is not obliged to install a service connection in order to connect a new customer. This interpretation appears to be reinforced by the definition of “customer distribution services” set out in the glossary on page 111 of the

Paper, which only mentions energisation. However, it is noted that the definition is 'inclusive' rather than 'exclusive'.

Envestra believes that the distributor's obligation should therefore be clarified to ensure that the obligation does not include the unqualified expenditure of capital, ie that the obligation relates to energisation only.

In relation to the obligations that may apply in relation to distribution planning and connection arrangements in electricity and gas, it is not clear what the Network Policy Working Group is considering or attempting to address. Such issues appear to be adequately covered by technical requirements and standards. Envestra requests that consultation with industry occurs at an early stage on any such matters.

### 3. Ref. s2.5, p13 – Joint services - metering

#### Issue

*"There are significant jurisdictional differences in the arrangements that apply to the various aspects of metering services".*

#### Comment

Envestra does not believe there are significant jurisdictional differences in relation to metering. In each of the 5 jurisdictions where Envestra operates, the gas distributor is responsible for all metering services, and this is also the case in Western Australia where Envestra does not operate.

### 4. Ref. s2.7, p14 – Liability between parties

#### Issue

*"A liability management regime will be established as it is a necessary part of a regulated contractual model for distribution and retail services. The SCO will be developing and drafting the details of the liability regime within the proposed contractual model, to provide appropriate levels of protection and accountability. The SCO is interested in the view of stakeholders on best practice in this area".*

#### Comment

Envestra agrees with the SCO's comment that a liability management regime is a necessary part of a regulated contractual model for distribution and retail services.

As a distributor, Envestra wishes to comment on this issue from the distributor's perspective. From that perspective, Envestra believes that the liability management regime should have the following features:

1. implied terms and warranties on the part of the distributor should be excluded to the extent permitted by law;
2. the distributor should have no liability for supply interruption or disconnection to the extent that the distributor is entitled to interrupt or disconnect supply;
3. the distributor should have no liability for reliability or quality of supply, except to the extent caused by the distributor's default or negligence;
4. the distributor should have the benefit of a contractual force majeure clause which relieves the distributor of liability for events and circumstances that are beyond its reasonable control;



5. the distributor should have no liability for economic or financial loss (that is, the distributor should only be liable to compensate for death, personal injury and physical damage to property);
6. the distributor's liability for death, personal injury or property damage should be limited at a level that is equal to the insurance which a prudent distributor would carry (which Envestra believes should be in the order of \$100 million per event);
7. the distributor should not be subject to contractual indemnities that extend its liability beyond the liability to which the distributor is subject at common law;
8. the distributor should only be liable for claims that are notified or made within a defined period of time (which Envestra believes should be three months);
9. the limitations of liability described in the foregoing paragraphs should apply to all claims, irrespective of the juridical basis for the claims (ie irrespective of whether the claim is founded on a contractual right of indemnity or on breach of contract, breach of statutory duty, negligence or another tort);
10. the limitations of liability described in the foregoing paragraphs should apply both as regards customers (in the distributor-customer contract) and as regards retailers (in the distributor-retailer contract).
11. the distributor should have a statutory immunity that relieves the distributor from liability in relation to the supply of gas;
12. the limitations of liability described in the foregoing paragraphs should not exclude or prejudice any statutory immunities that are available to the distributor; and
13. the proposed limitations of liability should not exclude a distributor's liability for any guaranteed service level payments.

Envestra offers the following observations in relation to these proposals.

#### 1. Exclusion of Implied Terms

Envestra believes that it is a necessary part of any liability management regime to ensure that the regime is self-contained and effective. If implied terms are not excluded then they potentially provide retailers and customers with a means of pursuing a claim that is not controlled or regulated by the liability management regime.

Envestra recognises that implied terms should only be excluded to the extent permitted by law. Some statutory implied terms cannot be excluded by contract. This is generally the case where there are public policy reasons for the implied term. Usually, the public policy reasons are based on consumer protection. Envestra does not propose that the liability management regime should override implied terms where public policy reasons support the continuation of that term.



Envestra's view is that where statutory implied terms contemplate their own permissible limitations of liability, these should be reflected in the liability management regime.

## 2. No Liability for Permitted Interruption or Disconnection

Envestra believes that this proposition is self-evident. A distributor should not be liable for an interruption or disconnection where the distributor is entitled to interrupt or disconnect.

## 3. No Liability for Reliability or Quality of Supply

Again, Envestra believes that this proposition is self-evident. Legal liability should and can only attach to a distributor where the distributor has breached a legal obligation or duty (ie the distributor has defaulted under the terms of a contractual obligation or breached a legal duty of care). If liability is extended to other circumstances (where a distributor has not breached a legal duty or obligation) then that amounts to the imposition of strict liability on distributors. Strict liability means that a distributor is liable to compensate for reliability or quality of supply issues even where the distributor has done nothing wrong and is not at fault. Strict liability is generally not imposed on persons except where there are strong public policy reasons for the imposition of strict liability (such as in the context of some legislation relating to occupational health and safety). Envestra does not believe there are any public policy reasons that would support the imposition of strict liability on gas distributors to supply gas.

## 4. Force Majeure Relief

Envestra believes that this point is much the same as the preceding point.

Liability at common law invariably depends on proof of acts or omissions that breach a legal duty. Thus, for example, liability at common law for negligence depends on proof of acts or omissions that are negligent. Thus, the common law does not render persons liable for events or circumstances that are beyond their reasonable control.

Liability for breach of contract arises where the terms of the contract are breached. If the literal terms of a contract are breached, then it does not matter whether the defaulting party was able to control the events or circumstances that resulted in the breach. Liability will be imposed simply because the defaulting party has breached the contract. If parties have contracted on the basis that they are liable for events or circumstances beyond their control, the courts will hold the parties to their contract and impose liability. This is contractual strict liability.

Envestra believes that it would be inappropriate to impose strict liability on gas distributors. Envestra believes that distributors should only be liable where damage results from events or circumstances that were within the reasonable control of the distributor. That is, distributors should only have liability where their own acts or omissions have resulted in loss or damage.

## 5. No Economic or Financial Loss

Envestra believes that distributors should have no liability for economic or financial loss (that is, distributors should only be liable to compensate for death, personal injury and physical damage to property).



In the context of gas distribution, Envestra considers that this issue relates primarily to businesses that are supplied with gas through a gas distribution network. This is because domestic gas consumers are unlikely to suffer economic or financial loss as a result of problems with reliability of supply or quality of supply. If there are problems with reliability or quality of gas supply, domestic consumers may suffer inconvenience and might possibly suffer physical injury or damage to gas appliances (ie property damage). Domestic consumers are not likely to suffer economic or financial loss.

On the other hand, it is obvious that, if there are problems with reliability of supply or gas quality, businesses may suffer economic or financial loss due to business interruption or economic or financial loss consequential upon damage to plant. It is difficult to quantify or assess the extent of the possible economic or financial losses that business might suffer in the event of problems with reliability or quality of supply. The economic or financial losses could be quite small or extremely large. It all depends on the nature of the business and the impact of reliability or quality problems on the business.

If economic or financial loss results from reliability or quality problems, the fundamental question is whether that loss should be borne by gas distributors or not. Envestra believes that there are a number of reasons why gas distributors should not be expected to bear economic or financial loss.

- (a) First, to expose distributors to liability for economic or financial loss will represent a significant departure from the position that has applied since the introduction of the former National Third Party Access Code in 1997. Envestra's standard terms and conditions for its reference services have always excluded liability for economic and financial loss and, as far as Envestra is aware, the same approach is evident in the terms and conditions published by all other gas distributors and transmission pipeline owners. This position has been thoroughly discussed with regulators and gas distribution system users and represents the position that has been approved by regulators. The exclusion of liability for economic and financial loss has been reflected in tariffs and in other aspects of the business, such as insurance.
- (b) Second, gas distribution businesses are generally perceived as low risk businesses and, historically, regulated tariffs have been set on this basis. If gas distribution businesses are exposed to the risk of economic or financial loss then that risk ought to be reflected in the tariff. A prudent service provider would either effect insurance to cover its exposure to economic and financial loss or self-insure that risk (through making an appropriate provision or reserve to cover the potential liability). The costs of either approach should be reflected in the operating costs allowed to be recovered from reference tariffs. Moreover, it would be appropriate to use a higher beta in the regulated rate of return to reflect a greater exposure to risk.
- (c) Third, if gas distribution businesses are exposed to claims for economic or financial losses, and the costs are reflected within reference tariffs then those costs are borne by all gas consumers, rather than by the relevant businesses. Envestra believes that this is inappropriate and will result in domestic consumers subsidising industrial and commercial consumers. If gas distributors are not liable for economic or financial loss then each business which is a gas consumer must determine how they wish to manage the risk of reliability/quality problems and must then also bear the cost of whatever steps they might decide to take. These steps could include business interruption insurance, contingency plans to use other energy sources, etc. The costs are borne by industrial and commercial consumers that are best placed to understand and manage the risk of economic or financial loss.



- (d) Fourth, it would be unfair to expose gas distribution businesses to claims for economic or financial loss because gas distribution businesses are not in a position to assess or control the risks. Gas distribution businesses are unlikely to have adequate information about industrial and commercial consumers to enable gas distribution businesses to assess their potential exposure to financial loss and, in any event, a gas distributor cannot control or manage the activities of industrial and commercial consumers, or changes in those activities, in a manner which enables gas distributors to manage their exposure to financial loss. Moreover, the effect of the National Gas Law is that a gas distribution business can be ordered to provide haulage services to a gas consumer. A gas distribution business might have no choice but to supply gas to a business, irrespective of the potential for economic or financial loss.
- (e) Fifth, it is common for commercial parties to exclude liability for economic or financial loss because of the risk of large financial exposures, especially where they are providing a service and the fee for service is relatively small when compared to the potential liability for economic or financial loss.

Even though Envestra believes that gas distributors should have no liability for economic or financial loss, Envestra accepts that gas distributors should have liability to compensate for death or injury and for physical damage to property and, if it is considered appropriate, liability for GSL payments.

#### 6. Cap on Maximum Liability

Envestra believes that a distributor's liability for death, personal injury or property damage should be limited at a level that is equal to the insurance which a prudent distributor would carry.

The reasons for this limitation are much the same as the reasons for the exclusion of liability for economic and financial loss. It is designed to ensure that a gas distributor that acts prudently, and carries prudent levels of insurance, is not exposed to the risk of claims beyond the level of prudent insurance.

Envestra believes that the limit should be in the order of \$100 million per event. This is a high level of insurance which should be adequate to meet all but the most unusual of claims for death, personal injury or property damage.

#### 7. Limited Contractual Indemnities

Envestra believes that gas distributors should not be subject to contractual indemnities that extend their liability beyond the liability to which the distributor is subject at common law.

Public liability insurance policies are invariably subject to standard exclusions by which the insurer will exclude liability under contract to the extent that the contractual liability exceeds the common law liability. Insurers insist on this exclusion because it is impractical for them to inspect every contract to which the insured is a party and to assess whether insurance should be provided against the risk of contractual claims.

If it is contemplated that contracts contain contractual indemnities by gas distributors, those indemnities should be drafted so that liability for claims under the indemnity does not exceed the common law



liability. If indemnities are not drafted in this way, gas distributors will have an exposure to uninsured or uninsurable claims. This is undesirable for the same reasons as were discussed in the context of the exclusion of economic and financial loss.

#### 8. Time Limit for Claims

Envestra believes that gas distributors should only be liable for claims that are notified or made within a defined period of time (which Envestra believes should be three months).

This is important because access arrangements are revised on a five yearly basis and it is necessary to ensure that all claims, and the associated costs, are known to a gas distributor before reference tariffs for the next access arrangement period are determined. In the absence of a time limit in a contract, a claimant would be able to lodge a claim within the period permitted by the statute of limitations (which, in the case of many claims will be a period of up to 6 years).

A three months claims notification period balances the interests of the gas distributor and the claimant. It gives a claimant a fair period of time within which to notify a claim (for death, personal injury or property damage). It gives a gas distributor some assurance that there are not claims of more than three months in age that are still to be lodged.

#### 9. Juridical Claims Basis

Envestra believes that the limitations of liability described in the foregoing paragraphs should apply to all claims, irrespective of the juridical basis for the claims (ie irrespective of whether the claim is founded on a contractual right of indemnity or on a breach of contract, breach of statutory duty, negligence or another tort).

This is necessary to ensure that the liability management regime is not subverted because of the form of the claim. For example, if economic or financial loss cannot be recovered in a breach of contract claim, the claimant should not be able to recover economic or financial loss by framing the claim as a negligence claim.

#### 10. Statutory Immunities

Envestra believes that a gas distributor should have a statutory immunity that relieves the distributor from liability in relation to the supply of gas.

A contractual liability management regime will only bind the parties to the relevant contract. It will not necessarily preclude claims by others who are not party to the contract.

Thus, for example, if the liability management regime excludes claims for economic or financial loss, an industrial gas consumer who is a party to a deemed contract would be prevented by the liability management regime from recovering economic or financial loss against the gas distributor. The industrial gas consumer has recourse to its own insurance or other risk management tools.

However, a contractual liability management regime might not preclude a claim to recover economic or financial loss brought against a gas distributor for negligence by a customer of the industrial gas consumer who has suffered consequential loss as a result of the impact of a supply failure on the industrial consumer.

Envestra believes that statutory immunities are an essential element of any liability management regime to ensure that the regime is effective as regards persons who are not parties to the contractual liability management regime.

#### 5. Ref. s3.3, p41 – Terms and conditions of market retail contracts

##### Issue

*“Meter access – The standard requirements for meter access are not minimum terms for a market retail contract and different arrangements may be contained in those contracts”.*

##### Comment

It is essential that all contracts ensure that access to the meter is available to the distributor. Apart from meter reading and meter maintenance issues, access to the meter is imperative for safety/emergency reasons. Notwithstanding this, access to the meter is an issue dealt with in the deemed contract between the distributor and customer, and therefore does not need to be addressed in retail contracts.

#### 6. Ref. s5.2, p64 – retail support contract

##### Issue

*“SCO Recommendations – The Law will include provision for a Retail Support Contract between each distributor and retailer that provides (respectively) distribution and retail services to customers connected to the distributor’s infrastructure.”*

##### Comment

Envestra believes that the implementation of RSCs is an unnecessary and retrograde step that will only serve to add a further layer of complexity to the regulatory regime and provide potential for additional cost and inefficiency. All of the obligations proposed to be covered by a RSC are currently contained in the terms and conditions of the Victorian gas access arrangements, which constitute the haulage contracts (or ‘use of system’ agreements) between distributors and retailers. The SCO proposal would see numerous terms and conditions essentially stripped from those contracts, placed into a RSC, and then other generic terms (liability provisions, payment provisions, dispute mechanisms, etc) duplicated in the RSC.

There are several key flaws and disadvantages with this approach:

- (a) The creation of another contractual arrangement, when the issues concerned can be and are adequately dealt with by existing arrangements, represents an unnecessary regulatory burden, inefficiency and complexity which appears contrary to the aims of the MCE;
- (b) The creation of another contractual arrangement has the potential to create inconsistencies between contractual obligations and give rise to disputes between parties, as there would be close links between distribution services in both contracts;
- (c) It is impossible to separate access arrangement services from those in the RSC. For example, haulage agreements obligate distributors to provide distribution services, as will the RSC. How can two separate contracts cover the same service? Under which contract will payment and dispute terms apply?

The RSC has been proposed to include services which retailers require to support the provision of retail services to customers. As such, the RSC would need to be linked to the haulage contracts, so that the RSC



and the haulage contracts contain common or linked termination provisions, liability management regimes, billing processes and payment terms that work in tandem. Given that the framework of RSCs will need to mirror the haulage contracts, it is unclear why it is necessary to create a separate contract and how that separate contract will be made to mirror existing haulage agreements.

Logic dictates that the requirements of the proposed RSC should be incorporated into haulage agreements. But that is already the case, so the question arises as to the benefit of segregating some obligations into a new agreement. Clearly there is no benefit, but significant disadvantages, most of all being the workability of such an arrangement.

If there is a demonstrable need to ensure that certain matters must be incorporated into a contractual arrangement between distributors and retailers, then clearly the best way of doing this is by ensuring that those matters are incorporated into haulage contracts. The National Gas Rules is the appropriate mechanism for this. The National Gas Rules require distributors to provide a reference tariff for any service that is sought, or is likely to be sought, by a significant part of the market. If retailers require services to support haulage services, it is unclear why these cannot be regulated through access arrangements. The National Gas Rules provide a mechanism for calculating the tariffs that should apply to support services and for public review of gas distributor's proposals and for regulatory approval of the service and the tariff.

Envestra believes that none of the arguments set in section 5.1 of the Paper supports the need for a RSC. For example:

*"The RSC is the regulatory instrument that ensures that wherever customers are entitled to the provision of energy, that this entitlement is supported by clearly prescribing how the distributor and retailer are to interface to deliver, for the benefit of the customer, a seamless service."*

Haulage contracts clearly prescribe how the distributor and retailer interface to deliver the service.

*"The SCO believes that failure to adequately prescribe the requirements of the interface between distributors and retailers via a RSC at the same time as obligations are placed on retailers to offer distributor-dependent services to customers risks the integrity of the framework for retail service provision."*

Haulage contracts adequately prescribe the requirements of the interface between distributors and retailers and currently recognise, and can continue to recognise, obligations/limitations placed on retailers. For example, Victorian gas haulage contracts prevent distributors from recovering undercharged amounts from retailers where the retailer "is precluded from recovering those costs from the relevant customers by operation of the regulatory instruments".

*"The SCO considers that the provision of standardized and deemed contractual arrangements between distributors and retailers (in the form of the model terms and conditions of the RSC) where customers require a standard form of service, will facilitate enhanced competition within geographic markets."*

Standardised contractual arrangements already exist between gas distributors and retailers in Victoria, and are substantially the same in other states. Through the National Gas Rules and the AER, the mechanism already exists for further standardisation. The Essential Services Commission in Victoria, when approving access arrangement terms and conditions, has to-date enforced the standardisation of contract terms in order to facilitate enhanced competition. There is



no need to introduce a new form of regulation in order to continue what is already in place, and which will be further controlled under the AER.

*"Removing the hurdle of negotiating terms for the provision of services which are substantially the same wherever they are provided will increase the speed at which retailers may leverage the benefits of a truly national retail energy market. Furthermore, distributors are a monopoly provider of distribution services within their geographic area. Thus retailers wishing to use the distribution networks are placed in an inferior bargaining position for the negotiation of terms and conditions. This is considered an appropriate area for the regulatory framework to provide a default arrangement as a baseline for acceptable bargaining."*

The existing access arrangement process already provides default terms and conditions which are used in the market, removing the hurdle of negotiating terms for the provisions of services. Hence there is no need to introduce another form of regulatory framework.

*"Both an electricity RSC and a gas RSC must regulate the respective obligations consistently with the existing national regulatory frameworks applicable in each sector."*

As discussed earlier, a gas RSC has the potential to give rise to inconsistencies between haulage contracts and the RSC.

*"The model terms for the RSC will be drafted based on best-practice examples from jurisdictional use-of-system/coordination agreements already in place."*

As discussed earlier, creating a RSC will be duplicating what already exists and is working well, for no benefit, with such duplication giving rise to uncertainty, complexity and additional cost.

We believe that the Paper also incorrectly infers that retailers support the proposed RSC arrangement:

*"Retailers generally favoured the proposed retailer-distributor contractual arrangements. Aurora Energy noted:*

*[We] agree with the statements...that once a tripartite arrangement is accepted the terminology used to describe it becomes less important. The real issue is what rights and obligations are included in the three separate contractual relationships established. It follows that the distributor to retailer contract could be called a UoS agreement provided that the previous use of this terms and the definition of 'use of system' in the NER do not operate to cause confusion as to each party's respective rights and obligations."*

Contrary to what the Paper suggests, Aurora Energy's statement appears not to support the creation of a RSC. Aurora Energy simply states that it supports a tripartite arrangement (not a RSC) and that "use of system agreements" (or haulage contracts in the case of gas) are an appropriate mechanism. Furthermore, Aurora Energy stresses the need to avoid confusion as to each party's rights and obligations. But RSCs will certainly cause such confusion.

In conclusion, Envestra believes that the whole basis that has given rise to the proposal for a RSC is fundamentally flawed:

*"AAR noted the intent of the contractual arrangements proposed was (especially in the case of gas) to draw a distinction:*



...between requirements relating to the pricing and provision of distribution services, which are addressed by economic access regulation, and provisions dealing with the operational and coordination aspects of the joint provision of distribution services to retail customers” (p65)

Envestra stresses that it is non-sensical to segregate the provision of distribution services. Under access regulation, the provision of services provided by means of a covered pipeline entails all of the services associated with the delivery of gas to a customer, including ancillary services that no other party can provide. The cost of provision of a bundle of services, and the associated terms, are integral to the access regime and cannot be unbundled. Any attempt to do so will result in an extraordinary and unnecessary level of regulatory complexity, and will undermine the significant work to date in implementing an effective and efficient access regime.

#### **7. Ref. 4, p71 – distributor-customer deemed contracts**

##### **Issue**

*The need for deemed contracts.*

##### **Comment**

Envestra believes that no compelling case has been made for the introduction of (or continuation of) deemed contracts between distributors and customers. If obligations of the distributor and customer are able to be contained in appropriate regulatory instruments or law, there appears to be no benefit in using a deemed contract approach. The latter implies a common offer and acceptance by the parties involved when none exists in practice.

It is recommended that the rules set out the obligations of the parties, but allow for the negotiation of a contract in those rare instances which might apply.

As Australia’s largest gas distributor, Envestra has operated its networks adequately and without the need for deemed contracts, with no issues arising from this. It is therefore questionable whether the introduction of deemed contracts represents a step towards more efficient regulation.

#### **8. Ref. s6.1, p73 – distributor authorisation**

##### **Issue**

*“As agreed under the AEMA, not all distributor functions are to be transferred to the national regime at this point. Distributors will continue to have functions relating to service standards, reliability standards and technical and safety functions under continuing jurisdictional laws and codes.*

*As a result, it will be necessary to maintain the current jurisdictional licensing regimes for distributors in both gas and electricity.”*

##### **Comment**

Envestra strongly disagrees with the retention of jurisdictional licensing as this will undoubtedly result in double regulation and increased regulatory costs and barriers. Jurisdictional licensing is the mechanism currently used by state regulators to impose conditions (licence conditions) that include the proliferation of codes and guidelines to which licensees must adhere. These conditions, code and guidelines can be imposed with relative little public scrutiny or accountability, and unlike much legislation are introduced with no public benefit test or hurdle.

The introduction of national rules and framework for distributors in addition to the current jurisdictional framework will only compound the regulatory burden and be contrary to the intended purpose of a national framework and the goals of the MCE.

It is recommended that jurisdictional licensing be removed (and if necessary replaced by national licensing) and that service and reliability standards be incorporated in jurisdictional law, as is already the case in relation to technical and safety standards. For example, in South Australia the Gas Act and Gas Regulations provide the necessary (and adequate) framework to govern technical and safety aspects of gas supply. Changes to those laws can only occur with transparent parliamentary approval. It is inconsistent for service and reliability standards to be treated differently.

Once incorporated into state law, jurisdictional “commercial” regulators would be able to moot changes to those standards, in the same way that a technical regulator may moot changes to safety regulations. This would ensure that service standards are truly set by jurisdictions rather than by jurisdictional regulators.

It is noted that in relation to the state licensing regime, “The SCO considers that these existing regimes provide sufficient safeguards to guarantee a capability for providing efficient delivery of distribution services to customers”. Envestra disagrees with this proposition, as the dual effect of two regulatory regimes will result in inefficiency. It is therefore important and economically efficient for the jurisdictional licensing regime to be replaced with legislative oversight and control.

An alternative, but less efficient option, would be for state commercial regulators to retain licensing powers, but for those powers to be severely curtailed by removing the discretion to embellish licence conditions or to create codes and guidelines without Ministerial approval.

### Comments on Table of Recommendations

#### **9. Ref. s1.26, p23 – distributor information requirements**

##### **Issue**

*There is certain information that the distributor must “provide to a customer”.*

##### **Comment**

Many distributors (particularly in gas) do not currently have any material contact with customers, due to the lineal contractual relationship. Furthermore, retailers are the primary point of contact for most customers in relation to obtaining connection to a network and seeking an energy supply. Consequently, distributors are not in a good position to supply customers or potential customers with the information referred to above.

When customers are seeking an energy supply/connection through a chosen retailer, and that retailer supplies the customer with the required retailer’s information, it makes sense for the retailer to supply, at the same time, the relevant information pertaining to the distributor. This represents an efficient market outcome. Any other solution (eg retailer notifying retailer of customer details and distributor posting information to customer) will result in significant additional transactional and administration costs, which will ultimately be reflected in tariffs.

Envestra therefore recommends that there be a specific obligation on retailers to provide customers, where requested by the relevant distributor, information that the distributor is obliged to provide. Such an obligation can be subject to a reasonableness test, eg the information is made available to the retailer in a suitable format.

It is important to note that, even subsequent to connection (eg where there is a change of customer at premises), distributors may not be able to provide information directly to customers. While Envestra supplies gas to over one million customers, Envestra does not know the identity of any of its residential customers. Properties, or more precisely delivery points, are assigned identification numbers. Envestra is not aware of who the customer is at any point in time. Importantly, even if Envestra were to provide information to “the householder”, this would not fulfil the need for delivery of the deemed contract to the party responsible for fulfilling the obligation under the deemed contract, ie the party that contracts with the retailer. This issue does not arise if the information is an integral part of a package of information supplied by the retailer.

#### 10. Ref. s1.2B, p25 – connection requirements

##### Issue

*Connection prerequisites.*

##### Comment

The following must be included as a connection prerequisite:

*“the customer has a contract with the retailer and the retailer has a contract with the distributor that allows the retailer to supply gas at the premises”.*

The contractual arrangements cannot operate without the above condition. The latter part of the above clause is important since some retailers may have contracts in place with a distributor that do not cover the injection of gas in all sub-networks owned by a distributor.

#### 11. Ref. s1.27, p27 – duration of contract

##### Issue

*Duration of contract not robust.*

##### Comment

The words contained in the recommendation are not robust enough to define the duration of the contract. The words should make clear that the deemed distribution contract will remain in effect “while the customer has a contract with the retailer and the retailer has a contract with the distributor that covers the customer’s premises”.

#### 12. Ref. s1.31, p31 – reconnection

##### Issue

*A distributor must “reconnect a disconnected customer if the reason for the disconnection has been removed”.*

##### Comment

The wording for the obligation is deficient and should read:

*A distributor must “reconnect a disconnected customer if the reason for the disconnection has been removed and the customer continues to satisfy the requirements for connection”.*

For example, if a customer is de-energised for safety reasons, but in the meantime ceases to have a contract with a retailer for the supply of energy, the distributor cannot be obliged to re-energise the customer.

**13. Ref. s1.31, p32 – information provision**

**Issue**

*Provision of information from distributor to customers.*

**Comment**

See Issue 8 (distributor information requirements) above

**14. Ref. s4.1, p71 – commencement of contract;**

**Issue**

*Commencement of contract between distributor and customer.*

**Comment**

The commencement of the contract must be subject to the customer having a contract with a retailer and the retailer having a contract with the distributor. (See also Issue 10 – duration of contract).

It should also be noted that the term “reconnection” and “connection” in the paper actually refer to re-energisation and energisation. Confusion over the terminology should be avoided by adopting solely the terms ‘re-energisation’ and ‘energisation’ in subsequent publications.

**15. Ref. s4.3, p71 – termination of customer distribution services**

**Issue**

*Cessation of contract.*

**Comment**

Notwithstanding the cessation of the deemed contract upon de-energisation, it is imperative that the customer still allow access to the distributor’s assets, protects them from harm, etc. Therefore it is inappropriate for certain obligations on the customer to cease. It is recommended that the customer obligations set out in section 4.11 (p75) be embodied in regulation (and apply to ALL person, not just customers), and that a term of the deemed contract explicitly require the customer to abide by relevant/applicable regulations (in addition to setting out those obligations in section 4.11).

**16. Ref. s4.6, p72 – liability and warranties**

See Issue 4 above.

**17. Ref. s4.6, p73 – liability and warranties - GSLs**

**Issue**

*Ambiguous wording: “The contract should state that none of these limitations will limit any obligation to make a GSL/compensation payment”.*

**Comment**

The intent of the wording is that “the contract should state that the contract will not limit any obligation to make a GSL/compensation payment”. However, as worded, it could be interpreted to mean that the specifically stated limitations, eg force majeure, will not limit an obligation to make a GSL payment, when in fact GSLs are commonly subject to such limitations.

**18. Ref. s4.7, p73 – provision of information**

**Issue**

*“The customer distribution contract may include an obligation on the distributor to provide information to a customer or its retailer on request about that customer’s consumption, connection or applicable network tariff.”*

**Comment**

As discussed in issue 9 above (distributor information requirements), Envestra does not know the identity of its residential consumers. Hence, Envestra believes it would be contravening privacy legislation if it were to divulge such information to a person purporting to be the person that had a contract with the retailer for that delivery point.

In any event, many distributors, like Envestra, do not have call centres that can respond to customer requests for such issues. Such requests are handled by retailers, and if a retailer is unable to fulfil a customer request and requires information from the distributor, the retailer and distributor correspond through established electronic communication protocols.

Hence the reference to the provision of information “to a customer” should be deleted.

**19. Ref. s4.8, p74 – reconnection**

**Issue**

*Misuse of the term ‘reconnection’ –obligation to undertake reconnection within one business day.*

**Comment**

As discussed earlier, the term reconnection is used in the Paper when the correct term is energisation. “Disconnection” and “reconnection” is often used in the gas industry to refer to disconnecting and reconnecting a service in the street, a process that requires pre-planning and excavations by a field crew in a road or footpath. Hence whilst re-energisation can be performed within one business day, reconnection (in the case of the gas industry) cannot be performed within one business day.



**20. Ref. s4.11, p75 – customer obligations**

As discussed in Issue 15 above (termination of customer distribution services), customer obligations must be incorporated into law, with the contract obliging customers to comply with their obligations under law.