



# A National Framework for Regulating Electricity and Gas (Energy) Distribution and Retail Services to Customers

## Submission Prepared for:

The Ministerial Council on Energy Standing Committee of Officials

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# TABLE OF CONTENTS

<b>KEY MESSAGES IN THIS SUBMISSION</b> .....	<b>4</b>
General .....	4
Consistency with AEMA principles.....	4
Distributor responsibilities to end-users .....	4
Retailer-distributor relationship .....	5
Liability between parties.....	5
Distributor authorisation .....	5
Enforcement.....	5
Implementation and transition .....	6
<b>BACKGROUND</b> .....	<b>7</b>
<b>STRUCTURE OF THIS SUBMISSION</b> .....	<b>7</b>
Part A – Framework issues .....	7
Part B – Other issues .....	7
<b>1 PART A - FRAMEWORK ISSUES</b> .....	<b>8</b>
1.1 MCE/ SCO objectives.....	8
1.2 Previous Jemena messages to SCO .....	8
1.3 Principles for a national framework .....	9
1.4 SCO proposed architecture.....	10
1.5 Definition of ‘distribution services’ (s 2.3).....	10
1.5.1 <i>Need for a definition of distribution services</i> .....	11
1.5.2 <i>Connection services</i> .....	11
1.5.3 <i>Network Policy Working Group (NPWG)</i> .....	11
1.5.4 <i>‘Maintaining the capability of the network’</i> .....	12
1.5.5 <i>‘Ongoing customer distribution services’</i> .....	12
1.5.6 <i>Further refinement of definition</i> .....	12
1.5.7 <i>Jemena view</i> .....	13
1.6 Distributor obligation to provide ‘distribution services’ (s 4.1) .....	13

1.7	Distributor responsibilities to end-users in a ‘deemed distribution contract’ (s	
4.3)	13	
1.7.1	<i>Deemed contracts</i> .....	14
1.7.2	<i>Distributor/end-user relationship</i> .....	14
1.7.3	<i>Content of the deemed contract (Rules)</i> .....	15
1.7.4	<i>End-user obligations</i> .....	16
1.8	The ‘Retail Support Contract’ (RSC) .....	16
1.8.1	<i>Retailer-distributor relationship</i> .....	16
1.8.2	<i>Retail Support Contract (RSC)</i> .....	17
1.8.3	<i>Degree of ‘standardisation’</i> .....	18
1.8.4	<i>‘Best practice’ model terms (Rules)</i> .....	18
1.9	Liability between parties .....	19
1.10	Considerations for existing regulatory frameworks.....	19
<b>2</b>	<b>PART B – OTHER ISSUES</b> .....	<b>21</b>
2.1	Business Authorisation.....	21
2.2	Metering and customer registration.....	21
2.3	Enforcement.....	22
2.3.1	<i>SCO policy response</i> .....	22
2.3.2	<i>Proposed extension of use of information instruments</i> .....	23
2.3.3	<i>S 8.2.5. Private enforcement actions</i> .....	23
2.3.4	<i>S 8.2.6. Use of lower courts</i> .....	24
2.4	Implementation and transition .....	24

## **KEY MESSAGES IN THIS SUBMISSION**

### **General**

The June 2008 release of the policy response paper represents a comprehensive expression of policy views from the Standing Committee of Officials (SCO) on the transfer of a number of energy distribution and retail arrangements to a national framework. Jemena welcomes the positive statement of SCO's position on these major matters.

Jemena has consistently supported the AEMA objective of greater efficiency in national regulatory arrangements by transferring diverse jurisdictional regulation to a national framework.

### **Consistency with AEMA principles**

Jemena welcomes several important elements in the policy paper. However, Jemena is concerned that key elements of SCO's framework fall short of the AEMA objectives which should guide the framework. These include: reducing overlap with other regulation, providing certainty of regulation and minimising the regulatory compliance burden and costs.

In particular:

- SCO's preference for a mixture of direct Rules obligations on distributors and obligations in 'deemed' statutory contracts is not an optimal approach to achieving a nationally consistent framework. Jemena submits that distributor obligations should simply be placed in the Rules;
- The proposed contract terms and conditions duplicate and overlap with major distributor responsibilities in the generic gas and electricity access regimes, and with other national rules;
- SCO's concept of 'two kinds of distribution services' subject to different regulation under the Rules is based on a misunderstanding of, and is not consistent with, access regulation.

Jemena emphasises that it is not opposed to placing specific obligations on distributors in the Rules so long as the obligations do not duplicate existing regulatory provisions, and do not override the national access frameworks.

### **Distributor responsibilities to end-users**

Distributors do provide certain direct services to end-users (which are consistent with access regulation - notably connection services) but Jemena submits that a formal distributor/end-user relationship through a 'deemed contract' is unnecessary, certainly for gas. Jemena recognises that there has historically been a closer distributor/end-user relationship in electricity than in gas. However, Jemena submits that this is due to incomplete unbundling of services in electricity, and consequently an incomplete introduction of access.

## **Retailer-distributor relationship**

Jemena considers that SCO's proposed 'retail support contract' between retailers and distributors is a contract in name only, and is a collection of Rules. Consistency of certain matters can best be achieved by through regulatory reviews by the AER rather than through mandatory standardised contracts. However, if SCO is to implement a system of mandatory 'model contractual terms', then making these matters Rules should do this, rather than creating the illusion that the obligations are matters of genuine contract.

## **Liability between parties**

SCO proposes that a liability management regime will be established between distributors, retailers and end-users. Jemena understands that this is because SCO wishes to place specific performance liabilities on retailers, which should then be mirrored in a supporting distributor liability.

Under the access regimes, the regulator 'stands in the shoes' of end-users, and negotiates terms and conditions on their behalf (including penalties and enforcement), consistent with the overarching objective of providing outcomes which 'contribute to the long term interests of consumers'. Jemena submits that end-users would not value individual liability rights so much as effective enforcement of minimum network service standards under the Rules.

Jemena urges MCE/SCO to rely on the existing regulatory framework as the most suitable avenue for addressing distributor failure of supply (eg service target performance incentives and GSL payments) rather than a new legal framework.

## **Distributor authorisation**

Jemena generally agrees with the policy response paper's analysis of this issue, and supports retention of the jurisdictional authorisation regimes applying to distributors for the immediate future. However, this is subject to SCO confirmation that jurisdictions will not have any residual power to impose substantive regulatory obligations of the kind dealt with in national economic regulation (including this 'national energy customer framework').

## **Enforcement**

Rather than providing for a commensurate enforcement regime, SCO proposes to expand the enforcement powers of the AER to a major degree and has confirmed that these expanded powers will apply to the national electricity and gas access regimes generally, and not just to the 'national energy customer framework'.

Jemena contends that the concept of a 'pyramid' or 'hierarchy' of enforcement powers for the regulator is illusory unless the regulator is given firm and binding guidance as to how and when to use the 'hierarchy'. In practice, the regulator will feel obliged to apply the strongest of its enforcement powers. This can lead to an enforcement and liability regime entirely out of step with any initial breach.

Jemena has particular issues with the SCO's proposals for extending the use of AER information instruments, private enforcement actions and use of the lower courts

## **Implementation and transition**

While the policy paper has identified the need for a ‘smooth’ transition from existing regulatory arrangements to the new ‘customer framework’, it is very short on details as to how this will be done. There is a need to recognise firm transitional arrangements, including for regulatory resets which are impending or under way when the new legislation is introduced.

Jemena welcomes SCO’s commitment to a consultative approach at each stage of development of the Law and Rules and their implementation.

## **BACKGROUND**

Jemena (formerly Alinta) directly owns the major NSW gas distribution network and an electricity network in Victoria. Through its asset management business, Jemena provides services to other gas and electricity networks. Overall, Jemena manages \$8 billion worth of gas and electricity assets, and considers that it is uniquely well-placed to take a holistic view of the proposed SCO framework and its practical implications.

Over the past several years, Jemena has actively participated in the Retail Policy Working Group (RPWG) consultation, and have made several submissions on the various working and consultation papers released for comment.

The June 2008 release of the policy response paper represents the most comprehensive expression of policy views from the Standing Committee of Officials thus far on the transfer of a range energy distribution and retail arrangements to a national framework.

## **STRUCTURE OF THIS SUBMISSION**

### **Part A – Framework issues**

- MCE/SCO objectives
- Previous messages to MCE/SCO
- Principles for a national framework
- SCO proposed architecture
- Definition of ‘distribution services’
- Distributor obligation to provide ‘distribution services’
- Distributor responsibilities to end-users
- The ‘Retail Support Contract’
- Liability between parties

### **Part B – Other issues**

- Business authorisation
- Metering and customer registration
- Enforcement
- Implementation and transition

# 1 PART A - FRAMEWORK ISSUES

## 1.1 MCE/ SCO objectives

Based on Jemena's attendance at the July 7 Melbourne workshop, Jemena understands the basis of MCE/SCO's proposed framework is that:

- SCO intends that a number of obligations on retailers and distributors will be placed in Law and Rules;
- There have been areas where it has been uncertain whether a distributor or retailer is looking after the interests of the end-user, and that should be rectified;
- SCO believes that model terms and conditions for contracts (placed in the Rules) are a solution for establishing rights and responsibilities and providing certainty of outcomes to end-users;
- SCO emphasises that this framework is applicable only to small end-users as defined;
- SCO recognises that it is defining a 'two tier' level of distribution services – one through the access framework and one through the 'national customer framework' - but that one that can be reconciled (at least in gas) through the access regulatory process.

Officials emphasised to stakeholders that the proposed framework is currently high-level (ie architecture only), and that the detailed regulatory obligations will be fleshed out in draft Law and Rules.

## 1.2 Previous Jemena messages to SCO

Jemena has consistently supported the AEMA objective of greater efficiency in national regulatory arrangements by transferring diverse jurisdictional regulation to a national framework. The key issues in Jemena's view have always been whether:

- the proposed new national framework offers any significant efficiency advantages over existing national frameworks which address the same issues;
- the rights and obligations proposed by SCO are efficiently and practically allocated as between distributors, retailers and end-users;
- SCO has developed an adequate policy vision for the respective roles of retailers and distributors.

Through various submissions to MCE/SCO<sup>1</sup>, and presentations to and meetings with officials, Jemena's views on the above matters have been expressed at length. For clarity, they are summarised in this submission. At the same time, Jemena expresses its future willingness to work with SCO to implement an efficient and workable system of national regulation.

### 1.3 Principles for a national framework

The policy paper (s 1.2) references the AEMA principles which have guided SCO. It is instructive to consider the exact wording of the principles<sup>2</sup>.

*In order to ensure national consistency, the Parties agree, to the extent possible and where effective regulation is not impeded, that the initial rules will:*

- (a) provide common regulatory arrangements for the electricity and natural gas sectors;*
- (b) improve the transparency of the regulatory arrangements;*
- (c) provide an appropriate level of regulatory certainty;*
- (d) reduce overlap between energy specific and generic regulation; and*
- (e) minimise the regulatory compliance burden and associated cost.*

Jemena considers that the essential message drawn from these principles is that the conditions for a new common gas and electricity regulatory framework are qualified. That is, the new Rules must reduce overlap with other regulation, must provide certainty of regulation and must minimise the regulatory compliance burden and costs.

Jemena considers that several elements of the proposed national framework do not meet these criteria because:

- Many of the proposed obligations on distributors overlap with the generic Part IIIA access obligations as expressed in the National Gas Law and Rules and the National Electricity Law and Rules. The proposed restatement of these obligations is redundant;
- The concept of 'two kinds of distribution services' is incompatible with distributors providing a complete and unbundled package of access services to network users (ie retailers or self-contracting parties). Rather than inducing certainty, the opposite will occur;

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<sup>1</sup> Submission to SCO of 20 July 2007 (and previous submissions on the AAE Working Papers).

<sup>2</sup> Australian Energy Market Agreement (Amendment) 7 June 2006, Clause 14.5.

- The proposed use of ‘deemed contracts’ is not appropriate because it creates the illusion of a contract when there is simply a set of regulatory obligations. Such a system is duplicative and inefficient. Where binding obligations on distributors are imposed under the Rules, they do not need to be restated in a deemed contract.

A deemed contract also creates potential uncertainty as to the true source of the obligation;

- The proposed use of deemed contracts to restate Rules and access obligations, opens up issues of overlapping liability and enforcement mechanisms being imposed on distributors;
- The proposed major widening of AER enforcement powers has not been sufficiently justified by SCO, and together with the overlapping liability issue above, lays the groundwork for a regime with a costly and unnecessary compliance burden. Further, the proposed widening does not recognise the significantly increased enforcement powers of the AER in the recent changes to national Electricity and Gas Laws.

In summary, Jemena considers that the proposed framework does not contribute to effective regulation as much as it should. The following sections make it clear that Jemena is not opposed to placing specific obligations on distributors in relation to retailers and (to a limited extent) end-users. However, these obligations should not duplicate or replace existing regulatory provisions, and should not override the national access frameworks. It is the duplicative and unnecessary nature of much of SCO’s framework that causes Jemena concern.

#### **1.4 SCO proposed architecture**

As set out in the policy paper, the proposed SCO architecture is broadly to have:

- A definition of ‘distribution services (s 2.3)’;
- A distributor obligation to provide ‘distribution services’ (s 4.1);
- Distributor responsibilities to end-users in a ‘deemed distribution contract’ (s 4.3);
- Distributor-retailer arrangements, expressed as a ‘Retail Support Contract’ (RSC) with model terms and conditions for a default contract placed in the Rules (ss 5.1, 5.2).

Jemena’s responses to, and alternatives to, the proposed architecture are set out below.

#### **1.5 Definition of ‘distribution services’ (s 2.3)**

SCO proposes that ‘distribution services’ initially be defined as:

- Physical connection of end-user premises to the network;
- Opening the connection (energisation<sup>3</sup>);
- ‘maintaining the capability of the network’ to permit the flow of energy through the connection;
- ‘ongoing customer distribution services.’

Jemena’s main issues are discussed below.

### **1.5.1 Need for a definition of distribution services**

Jemena submits that the proposed definition has not clarified the concept of distribution services, but has unnecessarily complicated it. Of the four legs of the definition, only connection and energisation are services to end-users. The remaining services (to the extent that they have been explained) are services to retailers.

### **1.5.2 Connection services**

The service that SCO is attempting to define is essentially a connection service – ie connecting the end-user to the network so that energy can move. After that, the transportation function is an access matter and therefore is the focus of an access arrangement/pricing determination (access regulation).

Physical connection and energisation<sup>4</sup> are currently addressed in jurisdictional distribution codes and are reflected in the relevant terms and conditions of an access arrangement (gas) or Use of System Agreement (electricity).

Jemena would support a standard connection obligation on distributors to be placed in the Rules, which would include for each (small) end-user premises:

- commencement of the obligation;
- termination of the obligation;
- connection, disconnection and reconnection matters.

### **1.5.3 Network Policy Working Group (NPWG)**

The policy paper also says that a ‘Network Policy Working Group’ *‘is currently addressing obligations that may apply in relation to distribution planning and connection arrangements in electricity and gas’* (p 11). Jemena submits that the nature of these obligations being developed by the NPWG must be disclosed at the

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<sup>3</sup> Jemena notes this is an electricity term. The equivalent in gas would be meter ‘turn on’.

<sup>4</sup> Essentially the same activity - there is no point in making a connection which has no prospect of being energised.

earliest possible opportunity to allow stakeholders to evaluate them in relation to SCO's proposed framework.

#### **1.5.4 'Maintaining the capability of the network'**

It is unclear what SCO intends by this provision. If it means maintaining an efficient operating network capable of delivering energy to end-users, then this is clearly fully addressed in access regulation (for gas and electricity), the jurisdictional licensing regimes and also the Chapter 6 Rules (for electricity). It does not require restatement as an obligation.

On the other hand, the provision may simply mean maintaining the connection to the network. If it does, then this would be a normal part of a standard connection agreement.

#### **1.5.5 'Ongoing customer distribution services'**

This is the vaguest component of the proposed definition. The policy paper alludes to this provision in various ways. The formulation on page 12 seems most complete:

*'Customer distribution services encompass the energisation, maintenance and delivery service components of the distributor's overall obligation. Thus, customer distribution services are those services provided in conveying energy to a customer's premises after initial connection has occurred. A distributor will be responsible, for example, for the delivery of energy to the required standards, and will in many instances provide a meter reading service.'*

Jemena cannot discern what this provision is designed to do. First, it reiterates previously identified obligations (energisation, and maintenance of the system (or connection)). Second, it cites 'delivery' obligations (such as network standards and metering) which are (to the fullest possible extent) dealt with in distribution codes, the Chapter 5 and 6 Rules, NEMMCO Rules, VENCORP Rules and Gas Market Rules<sup>5</sup>. Network performance standards are also addressed in the national gas and electricity Rules. These external sources of obligations are already picked up in access arrangements and pricing determinations.

#### **1.5.6 Further refinement of definition**

Jemena notes SCO's comment that:

*This definition will be capable of elaboration and specification in the Rules (p 11)*

It is unclear if SCO is proposing a 'once only' definition in the Rules or an open-ended definition, which could be used to introduce new and unspecified obligations in the future. Jemena considers the first interpretation to be the correct form of definition, and requests clarification that this is the case.

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<sup>5</sup> The latter two organisations will be subsumed into AEMO but the current rules would be expected to continue.

### **1.5.7 Jemena view**

It is unclear what the proposed definition of 'distributor services' is designed to do. It appears that it is basically dealing with distributor obligations surrounding connection to the network. In that case, Jemena considers that all that is needed is a definition of 'connection services' in the Law with attendant distributor obligations placed in the Rules.

## **1.6 Distributor obligation to provide 'distribution services' (s 4.1)**

The policy paper states that the Law will provide that distributors must provide distribution services in respect of a retail customer's premises. As noted above, Jemena considers that the proposed definition of distribution services simply reduces to a connection obligation.

In response to a Jemena comment, the policy paper says (p 59):

The obligation to connect is subject to the relevant requirements on customers relating to the establishment of a connection. However, where a connection is established with a customer of a retailer, and energisation of a connection point occurs, the SCO considers that there should be obligations imposed on the distributors that enable the retailer to meet its obligations for that connected customer (i.e. customer distribution services).

While not entirely clear, this explanation seems to suggest that the SCO focus is on the post-connection distributor obligations to support retailers. Jemena reiterates the point in section 5 above that when these obligations are dealt with in distribution codes, the Chapter 6 Rules, NEMMCO Rules, VENCORP Rules, Gas Market Rules, and access arrangements/pricing determinations, there is no need to restate them.

On the other hand, there may be a need to replace certain existing jurisdictional obligations if and when the jurisdictional instruments cease to have effect. This is, in Jemena's view, the essential task of MCE/SCO's 'national framework' – to formulate these future obligations nationally.

However, it appears to Jemena that the policy paper is confusing two pathways of 'service' obligations for a network:

- (a) The general transportation function of the network (including network standards);
- (b) What the network does specifically for the end-user (connection and associated activity).

Item (a) is covered by access regulation, while (b) is a statutory obligation which supports retail competition. There is a clear need to distinguish the two. In Jemena's view, a confusion between these services results from an inadequate vision of the appropriate roles of retailers and distributors (see section 8 below).

## **1.7 Distributor responsibilities to end-users in a 'deemed distribution contract' (s 4.3)**

The policy paper states that the distributor's responsibilities to the (retail) customer will be specified in a 'deemed' distribution contract. Jemena discerns four issues here:

- the appropriateness of deemed contracts as a regulatory tool;
- the necessity for a distributor/end-user relationship;
- the proposed content of the deemed contract; and
- end-user obligations.

### **1.7.1 Deemed contracts**

Jemena has consistently put a strong view to the RPWG and SCO officials that 'deemed' contracts which impose regulatory obligations are simply Rules and should be treated as such. It is clear from the policy paper that the contract will be a set of rules, since the 'model terms' can be changed only by application to the AEMC (p 63).

The policy paper's rationale for the deemed contract is (p 62):

The SCO believes there is a need to formalise the obligation with respect to ongoing distribution services to small customers. Standardisation of the terms of a distribution contract simplifies the offer process and removes uncertainty about what a fair and reasonable offer is.

SCO's basic aim is standardisation, and this is most efficiently and effectively achieved by putting the standard obligations directly in the Rules.

Also, there is an issue of the degree of standardisation which SCO will propose. An unduly detailed specification of 'services' would preclude operational flexibility for both retailers and distributors, and be counterproductive for the efficient provision of services.

### **1.7.2 Distributor/end-user relationship**

Jemena has also consistently submitted that a formal distributor/end-user relationship is unnecessary, certainly for gas. At the same time, it was recognised that in electricity nationally, there was a closer distributor/end-user relationship than in gas.

Jemena submits that electricity regulation has developed with a minimal focus (or understanding) of access regulation, and as a result has not evolved as completely as gas regulation. This may be due to the lack of full disaggregation of major parts of the supply chain in electricity (in contrast to gas).

The Allens Arthur Robinson (AAR) Composite Paper of June 2007 put the view that a three-way contractual model between distributor, retailer and end-user:

- was most consistent with current arrangements;
- best facilitated a consistent model across the electricity and gas sectors; and

- should not involve material costs in establishing a consistent approach.<sup>6</sup>

In response, Jemena took the position that these generalisations were not supportable.

AAR themselves recognised that while jurisdictions sought to apply a direct contractual relationship between the distributor and end-user in electricity, this was not the case in gas where the linear model applied through the operation of the national Gas Access Regime<sup>7</sup>.

Jemena pointed out that retailers are the access seekers on behalf of the very large numbers of end-users they supply, and it is retailers who are parties to access contracts with the monopoly elements of the supply chain (transmission and distribution), not the end-user.

It appears that SCO may have taken partial note of Jemena's concern in the following statement (p 57):

While a deemed contract will apply to the relationship between distributors and customers, the content of those obligations will be relatively minimal, but supplemented by direct obligations on distributors in the Rules. The reason for this design approach is that the SCO recognises that while electricity distributors are familiar with the use of a regulated contract with customers, this has not been the case for gas distributors.

Nevertheless, Jemena cannot see the rationale for having a confusing mixture of both Rules and a 'deemed contract' to govern distributor obligations. Consistent with the AEMA policy to *minimise the regulatory compliance burden and associated cost* Jemena submits that the existing linear contractual model should continue to apply in gas. If, as is evident, SCO wishes to standardise certain distributor obligations, this should be done through the Rules.

### ***1.7.3 Content of the deemed contract (Rules)***

Jemena notes the policy paper's statement that (p 62):

The SCO's policy position is that a minimum level of service to end-use customers should be required of distributors. There are areas, particularly those related to connection/reconnection and disconnection, fault reporting and correction and standards of supply where the distributor is inherently best placed to address issues that arise. In these instances, the customer would benefit from having a direct relationship with the distributor.

Jemena acknowledges that:

- Connection/disconnection;

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<sup>6</sup> Composite paper June 2007 section 5.3 p 34

<sup>7</sup> Ibid

- Fault correction: and
- Standards of supply

are most certainly distributor activities, and that it is possible to require some minimum level of performance in relation to these activities. However, as Jemena has pointed out, this does not require that a direct relationship be established between the distributor and end-user and that Rules obligations are the appropriate mechanism.

#### ***1.7.4 End-user obligations***

The policy paper puts the view that (p 62):

Similarly, end-use customers have obligations to interact safely and responsibly with the energy system and thus the contractual arrangement between distributors and customers should specify the obligations that a customer has to the distributor.

The key end-user requirements for both gas and electricity are that there must be safe and unhindered access to meters and that there must be no tampering with them. These matters are generally covered in distribution codes which are picked up in access arrangement terms and conditions or Use of System Agreements. One notable exception appears to be the 'deemed electricity distribution contract' in Victoria, which does 'bind' customers in certain ways. Nationally, however, deemed contracts have not been the usual method for establishing end-user safety requirements and meter access.

Again, Jemena notes that the terms and conditions of a 'deemed contract' cease to be contractual when they are a statutory obligation on a party.

## **1.8 The 'Retail Support Contract' (RSC)**

### ***1.8.1 Retailer-distributor relationship***

Jemena has consistently put the proposition to the RPWG and SCO that access regulation (via national Law and Rules) provides a complete and efficient mechanism to govern distributor – retailer contractual relations. Nevertheless, SCO appears to have discounted this view in the following statements:

Market rules and access regulation rules provide some of the necessary support for joint provision of services to customers. However, there are a range of operational and coordination issues arising from the new national customer framework between the distributor and retailer that must be managed to ensure a customer receives supply and to facilitate the functioning of the competitive retail market.

The monopoly position of the distributors means that some form of regulation must govern this relationship to ensure that all retailers have access to a fair set of terms and conditions in the contractual arrangement with the distributor (p 64).

Jemena is aware that national retailers have submitted that a negotiated distributor-retailer contract to govern some access-related issues is a difficult exercise and that therefore some form of regulation must apply. Jemena does not presently wish to reopen this debate.

However, it must be said that the SCO policy paper's position on retail responsibilities offers a minimalist view of what should be the role of retailers if they are to add real value to the supply chain. The paper (p 13) simply lists a number of billing-related activities, with a reference at the end to 'facilitation and communication' with distributors. In reality, 'facilitation' is the very core of what retailers should be doing. Retailers should ensure that energy gets delivered to their customers' connections in the way customers want it; that is, retailers should provide a full and complete retail service.

The value of a retailer in providing a service becomes questionable if it does not provide a bundled service and declines to fully managing the relationship with the distributor. Prior to utility unbundling, the customer had only one party to deal with. If the retailer does not take full responsibility for managing distributor matters in delivering energy to customers, customers will be obliged to deal with both the distributor and the retailer in a significant way on an ongoing basis. It is then open to question whether full retail competition can be of any long term benefit to consumers.

The 'seamless service' to retail customers referred to in the policy paper (p 66) can most certainly be delivered by a retailer. However, SCO has declined to accept this position.

### ***1.8.2 Retail Support Contract (RSC)***

Jemena contends that the RSC is an artificial device and is a contract in name only. As with the 'deemed distribution contract', rules which impose regulatory obligations in a contract format are simply Rules, and should be treated as such.

Again, the policy paper envisages that distributor obligations will be imposed by a confusing mixture of statutory and contractual obligations (p 65):

In the SCO's view, substantive obligations (such as an obligation to comply with the requirement of the regulated contract) should be direct obligations in the Law and Rules. However, where the obligations are between parties and are reciprocal and ongoing, then these are appropriately embodied in a regulated contract format.

Jemena does not understand the apparent distinction being drawn between an overall obligation in the Law to comply with a regulated contract and a contractual obligation to comply with particular terms of the contract ('reciprocal obligations'). By definition parties must comply with contracts. Jemena's essential point is that parties have not entered into a contract when they must comply (as a default) with mandated terms and conditions.

A genuine contractual framework under access regulation would involve submission of a regulatory proposal (including all contractual terms and conditions) for regulatory appraisal against the Rules, review by the regulator and final approval (or revision). The Rules could specify acceptable contractual terms and conditions broadly, thus leaving substantial discretion with the regulator; or they could be defined narrowly, reducing discretion. Either way, the regulator could issue guidelines as to how it will interpret the Rules, and this itself would bring a measure of uniformity.

SCO has rejected this approach in favour of mandatory terms and conditions – in other words, statutory standardisation. Given SCO's approach, the most logical and efficient avenue for achieving it is by putting the terms and conditions into the Rules directly, and ensuring that those matters are incorporated into access (transportation)

contracts. Direct use of the national Gas and Electricity Rules is the appropriate mechanism for national standardisation, rather than the totally unnecessary device of a 'retail support contract'.

Jemena again stresses that it does not object to a degree of standardisation of obligations in the Rules. But where a specific obligation is already imposed under the national access framework or other instruments, there is no need for the Rules to restate the obligation.

### **1.8.3 Degree of 'standardisation'**

The policy paper says (p 67):

The model terms for the RSC will be drafted based on best-practice examples from jurisdictional use-of-system/coordination agreements already in place. They will cover the subject matters originally proposed by AAR but fleshed out in the drafting process by the SCO in response to stakeholder comments.

Jemena withholds comment on model terms until they become available. However, Jemena considers that several considerations should guide officials in their drafting:

- 'standardisation' may reduce retailer costs, but the impact on end-user prices can be expected to be minimal. A significant element of the cost reduction is simply transferring costs to distributors - which balances out the benefits of retailer cost reductions flowing from a consistent approach across jurisdictional boundaries;
- There is considerable potential for a reduction in service to end-users if excessive numbers of obligations are standardised and transferred to distributors. This will place a greater burden on customers in having to look after themselves in managing a relationship with a distributor;
- Only national retailers would see the benefit of standardisation. SCO's preferred 'standardisation' approach must not be capable of being used as a method of entrenchment for large retailers against new entrants.

### **1.8.4 'Best practice' model terms (Rules)**

Jemena notes the policy paper's comment that '*model terms for the RSC will be drafted based on best-practice examples from jurisdictional use-of-system/coordination agreements already in place*'. This could suggest that only where an 'agreement' has been formulated by a jurisdiction will it be considered as 'best practice'. In certain jurisdictions – notably Victoria – Jemena understands that Use of System Agreements in electricity were designed by the regulator after the failure of retailers and distributors to mutually agree terms.

Jemena submits that SCO should not confine itself to a narrow spectrum of agreements in order to arrive at model terms (which Jemena has urged should simply be Rules). Further, it is quite possible that a 'model term' may be suitable for either electricity or gas, but not both. SCO should take account of this possibility and not seek to impose inappropriate uniformity.

## 1.9 Liability between parties

SCO proposes that a liability management regime will be established ‘as it is a necessary part of a regulated contractual model for distribution and retail services’ (p 14).

The policy paper notes some major issues for consideration (p 15), including whether distributors should be liable to the customer for economic loss.

As an example, the paper cites ‘distributor failure’ to deliver energy, or to deliver acceptable quality energy, and states:

The SCO considers that where a failure of service delivery to customers results from a failure in provision of distribution services, to the extent the failure is within the distributor’s control responsibility for managing that failure lies with the distributor (p 15)

Under the access regimes, the regulator ‘stands in the shoes’ of end-users, and negotiates terms and conditions on their behalf (including penalties and enforcement), consistent with the overarching objective of providing outcomes which ‘contribute to the long term interests of consumers’. Jemena submits that end-users would not value individual liability rights so much as effective enforcement of minimum network service standards under the Rules.

Jemena also submits that the existing regulatory framework remains the best avenue for addressing distributor failure of supply (eg service target incentive schemes and GSL payments) rather than a new legal framework (see 1.10 below).

If MCE/SCO still pursues the avenue of a new liability regime, Jemena considers that a number of key principles must guide SCO including:

- Distributors should not be forced to accept potential liability to an extent that would create uninsurable risks or excessive insurance costs;
- Evidence of a material degree of negligence should be established before any assignment of liability to a distributor;
- Indemnities between parties must reflect their particular areas of control;

## 1.10 Considerations for existing regulatory frameworks

- Up until recently, deficiencies in supply by distribution businesses have not resulted in liabilities to customers. This is because an obligation to provide fault free supply is either close to practically impossible or so costly that a acceptance of a lower level of supply was economically and socially optimal;
- Increased accountability for supply reliability has been introduced in most jurisdictions and is suitably resolved by incentive schemes such as GSLs and S-factors. It could be counterproductive and confusing to add further to this approach. The AER has recently published its guidelines for a Service Target Performance Incentive Scheme and this is comprehensive. SCO should not seek to duplicate the coverage of these matters in Chapter 6 of the NER;

- The establishment of distributor liability to the customer for economic loss would create a “double penalty” regime whereby distributors would be penalised both through the regulatory regime and legal liability. This would be additional to regulator initiatives through the compliance and enforcement framework – which SCO proposes to expand in a major way (see below);
- SCO should bear in mind the solid supply record of gas distributors, where significant supply failures have been due to either producer plant failure or inadequate retailer contracting.

## 2 PART B – OTHER ISSUES

### 2.1 Business Authorisation

#### *Jemena's former position*

In previous submissions to the RPWG, Jemena has:

- supported a national framework for business authorisation, administered by the AER, for distributors and retailers of gas and electricity;
- submitted that substantive regulatory obligations on distributors must not be contained in licences/authorisations.

The policy paper discusses distributor authorisation at length (s 6.10) and concludes that a national authorisation for both gas and electricity would duplicate other national market requirements, both existing (electricity) and potentially (gas).

Other reasons cited are (p 73):

- under the AEMA, not all distributor functions are to be transferred to the national regime. 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;
- SCO considers that these existing regimes provide sufficient safeguards to guarantee a capability for providing efficient delivery of distribution services to retailers and end-users.

Jemena generally agrees with these propositions, and supports retention of the jurisdictional regimes for the immediate future. However, this is subject to SCO confirmation that jurisdictions will not have any residual power to impose substantive regulatory obligations of the kind dealt with in national economic regulation (including this 'national energy customer framework'). Jemena observes that certain jurisdictions have used licence conditions as an important tool of economic regulation, but that such a power would be totally contrary to the AEMA national governance framework to separate rule making from rule enforcement.

Jemena notes SCO's comment that *'the content of the existing distributor licenses will be reviewed against the relevant elements of the national retail regime, and any duplication of obligations will be removed'* (p 74). Given the critical importance of allocating distributor obligations to the correct instruments, Jemena urges that this review process be public and involve consultation.

### 2.2 Metering and customer registration

This is a complex topic and is very much 'work in progress'.

- SCO has endorsed a national approach to customer registration and transfer, and agrees that the Law and Rules should clarify the relationship between the National Electricity Rules, MSATS and jurisdictional instruments. Jemena accepts this approach, and also supports grandfathering of gas arrangements and a move to a nationally consistent set of Rules at some point (subject to cost effectiveness). There may be a need to consider whether the various jurisdictional market structures and rules can usefully merge;
- SCO accepts that the metering empowerment provisions in the NEL should be replicated for the NGL so as to authorise the making of Rules for customer registration and transfer and for metering. This is considered to be more efficient than current jurisdictional regulation. Jemena again supports nationally consistent metering arrangements where possible.

## 2.3 Enforcement

### *Jemena's former position*

The key concerns of Jemena in previous consultation were to establish a requirement on the regulator to apply an enforcement mechanism that was commensurate with the obligation breached and the nature of the breach, and only allowing the regulator to move to a stronger enforcement mechanism when previous approaches were exhausted.

Jemena was concerned that:

- There was a risk of the AER considering itself obliged to apply stronger rather than lighter remedial action;
- The fact that there were strong powers available encouraged a general view that because they were there, they ought to be used.

### *2.3.1 SCO policy response*

Rather than providing for a commensurate enforcement regime, SCO proposes to expand the enforcement powers of the AER to a major degree and has confirmed that these expanded powers will apply to the national electricity and gas access regimes generally, and not just to the 'national energy customer framework'.

SCO's apparent rationales for its proposals are that (p 91):

- 'The development of the new national customer framework provides an opportunity to enhance the enforcement frameworks by expanding the suite of compliance and enforcement tools to include enforceable undertakings and compliance reporting'.
- 'These tools appropriately form part of the pyramid to which the PC referred in commenting on what a good compliance and enforcement framework is: a pyramid of options where sanctions of escalating severity are imposed on a hierarchy of regulatory breaches'.
- 'The inclusion of the additional enforcement tools will contribute, by introducing flexibility for graduated enforcement responses by the AER, toward more effective compliance and enforcement and thus greater confidence in the framework regulating the energy sector.'

Jemena contends that the concept of a 'pyramid' or 'hierarchy' of options for the regulator to use is illusory unless the regulator is given firm and binding guidance as to how and when to use the 'hierarchy'. In practice, the regulator will feel obliged to apply the strongest of its enforcement powers. This can lead to an enforcement and liability regime entirely out of step with the initial breach.

Jemena comments on particular aspects of the (proposed) AER expanded powers below.

### ***2.3.2 Proposed extension of use of information instruments***

The SCO policy response paper raises the potential for a significant extension of existing regulatory information instruments applied for economic regulatory purposes.

The proposed widening does not recognise the significantly increased information and enforcement powers of the AER in the recent changes to national Electricity and Gas Laws. Jemena is unaware of any deficiency in current AER information gathering powers which requires the widening proposed by SCO. Further, the new AER powers have not to date been used as an enforcement instrument.

Section 28 of the National Electricity Law and the equivalent National Gas Law provisions provide the AER with more than adequate powers to operate a compliance and enforcement regime, provided that such a scheme is established in the Law and Rules.

Jemena strongly submits that a potential need for extending the use of new information powers should be very carefully balanced against any evidence of deficiencies in recently introduced Laws and Rules (and observes that any such evidence at this early stage would be very tentative at best). Even in national predecessor regimes (eg Gas Pipelines Access Law) the need for such powers was never demonstrated.

In summary, Jemena submits that:

- there has been no need demonstrated for the proposed new powers;
- SCO's overall policy approach appears contradictory. On the one hand, SCO desires a highly standardised framework to govern distributor/end-user and distributor-retailer obligations. On the other hand, SCO proposes implementing an individual and unstructured approach to enforcing those obligations.

### ***2.3.3 S 8.2.5. Private enforcement actions***

The SCO recommendation for allowance of private enforcement action risks creating substantial uncertainty for energy networks, and is contrary to the MCE's established governance framework of establishing the AER as the enforcement body for the Law and Rules.

The response paper appears to contemplate private enforcement actions between distributor, retailers and large users based on conduct provisions modelled on those under the National Gas Law as a historical carryover from the National Gas Pipelines Access Law. This concept does not appear to take into account the duplication this would introduce as the contractual model adopted by SCO contemplates a series of enforceable private contractual rights (assuming that such rights can be justified in the SCO framework).

Jemena recommends that a general scope for private enforcement should not apply.

### **2.3.4 S 8.2.6. Use of lower courts**

Jemena does not support proposals to increase the role of lower courts in enforcement actions. The proposals would multiply the potential range of court-based interpretations of key enforcement provisions, and may foster significant changes in the general enforcement framework applying to the national energy market.

In particular, the changes risk making the pursuit of unmeritorious and trivial actions for strategic purposes more common, and by changing the costs and incentives around enforcement action risks moving the energy access regimes into a far more litigious framework. Jemena recommends that the current courts-based enforcement arrangements should continue to apply.

## **2.4 Implementation and transition**

The policy paper has identified the need for a 'smooth' transition from existing regulatory arrangements to the new 'customer framework' in the following terms (p 110):

The SCO will actively manage the implementation of the new national customer framework so that it can operate consistently with existing regulatory determinations and arrangements. Where there are changes that are necessary for the new national customer framework that may have an impact on existing regulatory determinations or access arrangements, these matters will be identified and appropriately addressed on a case by case basis if necessary at the time when the new Framework is being implemented.

While this comment is reassuring, it is not yet clear how SCO can manage this process. Jemena submits that matters for consideration include:

- How the national regulator will be instructed to address the 'new' customer framework when it has not yet been fully implemented in national legislation. This will be a major issue in the short term when access arrangement revisions and regulatory determinations are in progress;
- The timing of the new 'customer provisions' coming into effect. End-user matters may be subject to ongoing retailer-distributor contractual arrangements which may not fit SCO's standardisation requirements;



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**Re: Jemena Response to MCE/SCO National Energy Customer Framework  
July 2008**

Jemena (formerly Alinta) appreciates this significant opportunity to make a submission to MCE/SCO on the policy response paper for a national framework to regulate energy distribution and retail services.

If required, I can be contacted on (02) 9270 4512 or [sandra.gamble@jemena.com.au](mailto:sandra.gamble@jemena.com.au)

Yours sincerely,

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