



Government of Western Australia  
Department of Finance  
Public Utilities Office

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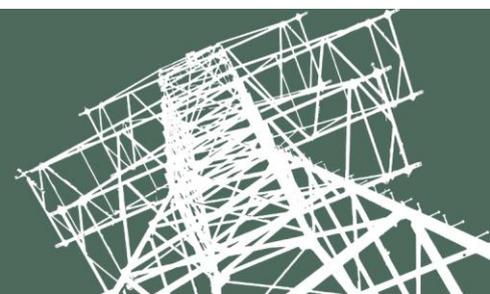
# Position Paper on Changing the Contractual Relationship between the Electricity Distributor, Customers and Retailers

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## Electricity Market Review

Department of Finance | Public Utilities Office

15 June 2016



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## Glossary

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Term	Definition
Connection point	A registered connection point on Western Power's network.
Customer Code	<i>Code of Conduct for the Supply of Electricity to Small Use Customers 2014</i>
Customer Contract Regulations	<i>Electricity Industry (Customer Contracts) Regulations 2005</i>
Deemed class-specific contract	A deemed standard ongoing supply contract that governs the ongoing supply of network services to a specified class of large customers.
Deemed standard contract	A deemed standard ongoing supply contract that governs the ongoing supply of network services to customers not supplied under a deemed class-specific or negotiated contract.
Electricity Industry Act	<i>Electricity Industry Act 2004</i>
Negotiated contract	A type of ongoing supply contract.
Ongoing supply contract	A contract between a distributor and customer that governs the ongoing provision of network services. Supply services require the use of shared network assets, rather than exclusively dedicated assets.
Public Utilities Office	Department of Finance Public Utilities Office
Retailer of last resort	A retail electricity supplier that, usually by prior arrangement, will assume responsibility to supply the customers of a failed retailer.
Small customer	A residential customer or a business customer who consumes energy at business premises below an upper consumption threshold specified in jurisdictional legislation under the National Energy Customer Framework.
Small use customer	A customer who consumes not more than 160 megawatt hours of electricity per annum, as defined in the Electricity Industry Act.

## Executive Summary

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Subject to passage of necessary legislation through Parliament during 2016, Western Australia will adopt the national electricity regulatory framework under the National Electricity Law for regulating Western Power's transmission and distribution network in the South West Interconnected System.

The new arrangements under National Electricity Law are designed for a contracting framework different from the existing system of regulated access arrangements. However, a replacement framework, under which access seekers can obtain contracts for network services, is not prescribed. This gap would leave the regulatory framework incomplete, but is readily addressed through changes to the electricity contracting framework between the distributor (Western Power), retailers and customers in the South West Interconnected System. These changes are the subject of this Position Paper.

The changes proposed in this Position Paper are to take effect on 1 July 2018, but implemented substantially in advance of this time to allow the industry sufficient time to prepare. The reforms will avoid changes to existing customer protection settings, except to the extent necessary to make the arrangements workable, and will be implemented in such a way as to minimise inconvenience for customers. The reforms will require amendments to legislation, new subordinate legislation and, potentially, modifications to existing regulations and codes. The reforms will be compatible with full retail contestability, although will be required even in the absence of a fully contestable retail electricity market (Chapter 1).

The triangular model of contracting involves the distributor supplying network services directly to customers under contracts that are typically deemed into existence through regulation. Under this model, retailers do not buy network services, but do bill for them, on behalf of the distributor. Retailers and distributors are required to work together to coordinate service delivery and associated transactions and certain risks between them are explicitly allocated and/or defined. The adoption of the National Electricity Rules has proceeded on the presumption that the local contracting framework will be amended to establish a triangular arrangement, since this is the basis on which the National Electricity Rules have been designed to operate. This model is preferred over alternative approaches for sound policy reasons (Chapter 2).

The Position Paper contemplates changing the existing regulatory framework, only to the extent necessary to implement the triangular model. The National Energy Customer Framework was used to provide a general, though non-binding, design template. New instruments will be required to govern the relationship between distributors and customers and between distributors and retailers and minor changes may also be required to existing regulations governing the relationship between retailers and customers. Implications for existing network access contracts are discussed in this paper, although a separate process is contemplated to deal with the sensitive topic of contract intervention. The scope of these changes is limited to the South West Interconnected System and does not extend to the gas sector (Chapter 3).

Under the proposed changes, the distributor will be required to provide or offer ongoing supply services to all customers connected to the distribution system under an ongoing supply contract (subject to some limitations). The framework will establish how contracts are specified and formed and what functions and powers are exercised by a local regulator in

relation to the development, approval and enforcement of ongoing supply contracts and related processes. It will also provide for suitable customer protections, to the extent these are not already covered by the existing customer protection framework (Chapter 4).

To a large extent, the existing regulatory framework is sufficient to reflect the retailer-customer relationship under the triangular model. However, some amendments to regulatory instruments are required to reflect that retailers will no longer be the intermediaries for the provision of network services to customers (Chapter 5).

The establishment of the new direct contractual relationship between distributors and customers for the provision of network services will displace the current contractual arrangements governing network service transactions. This paper proposed to address these gaps through regulation, consistent with the approach taken under the National Energy Customer Framework. Network charges will, in most instances, continue to be recouped via the retailer. Western Power and each retailer will owe responsibilities to each other to facilitate the provision of network services by Western Power to their shared customers. This will mean regulatory provisions to address, among other things, coordination, information sharing, billing arrangements and allocation of risk between retailers and Western Power (Chapter 6).

The new contracting framework will create new supervisory and approval functions. It is proposed that these would be created within the existing licensing framework and the associated roles and responsibilities conferred on the Economic Regulation Authority (Chapter 7).

The Public Utilities Office is seeking submissions from stakeholders on the proposed reforms to implement the triangular model set out in this paper. Further consultation on several complex elements of the reform is also anticipated at a later stage.

## 1. Introduction

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### 1.1 Purpose of paper

This paper proposes reforms to the Western Australian electricity regulatory framework to change the contracting relationship between electricity distributors, retailers and customers in the South West Interconnected System. The purpose of the reforms is to ensure that the Western Australian regulatory framework will work with the national regulatory framework being introduced into Western Australia by adoption of the National Electricity Law.

The paper will inform the development of drafting instructions for subordinate legislation and is accordingly detailed.

Submissions from stakeholders are invited on the proposed reforms.

### 1.2 Background

Subject to passage of necessary legislation through Parliament during 2016, Western Australia will adopt the national electricity regulatory framework under the National Electricity Law for regulating Western Power's transmission and distribution network in the South West Interconnected System. The new network regulation arrangements will take operational effect on 1 July 2018.<sup>1</sup>

The implementation of the National Electricity Rules<sup>2</sup> will install a new framework of network access regulation, displacing the existing system of regulated access arrangements provided by the Electricity Networks Access Code 2004. The change to network regulation necessitates changes to the contracting framework between customers, distributors and retailers. Yet the National Electricity Rules do not set out a replacement contracting framework for the provision of services to retail customers.

The contracting frameworks that exist in National Electricity Market jurisdictions are set out in instruments separate to the National Electricity Law and Rules. Instead of facilitating access contracts, negotiated by reference to an approved access arrangement, these frameworks facilitate the creation of largely uniform contracts to house the terms of service set by revenue determinations made under the National Electricity Rules. These separate regulatory frameworks minimise the role of either individual negotiation or local regulatory intervention and ensure that the resulting contracts mesh with the comparatively directive economic regulation provided under the National Electricity Rules.

The national network regulatory regime operates with the National Energy Customer Framework to bring the whole energy supply chain under national regulation in participating jurisdictions. The National Energy Customer Framework establishes the contracting framework referred to in the preceding paragraphs and primarily consists of the:

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<sup>1</sup> The National Electricity Law and selected chapters of the National Electricity Rules will be adopted by the end of 2016, such that the Australian Energy Regulator is empowered by the start of 2017 to carry out its first revenue determination for Western Power for a regulatory period commencing 1 July 2018. However, Western Power's network will not operate under the national framework until the start of that regulatory period (1 July 2018).

<sup>2</sup> Available at <http://www.aemc.gov.au/Energy-Rules/National-electricity-rules/Current-Rules>

- National Energy Retail Law<sup>3</sup>;
- the National Energy Retail Rules<sup>4</sup>;
- the National Energy Retail Regulations<sup>5</sup>; and
- Chapters 5A and 6B of the National Electricity Rules.

The National Energy Customer Framework contains the regulatory requirements for retailers and distributors for the sale and supply of electricity and gas to customers. In those jurisdictions where the National Energy Customer Framework applies, it works in conjunction with the National Electricity Rules to establish a triangular set of relationships between retailers, distributors and customers.

In Western Australia, the government has not made a decision to implement the National Energy Customer Framework.<sup>6</sup> However, in the absence of the National Energy Customer Framework, changes to local regulation are needed to modify the contracting framework between the distributor, retailers and customers to ensure that the services regulated under the National Electricity Law and Rules can be supplied under valid and suitable contracts.

Throughout this paper, reference is made to ‘the distributor’. Where this reference relates to the local arrangements, it can be read as a reference to Western Power. As will be explained later in the Paper, it is not the intention of this proposed reform to change the regulatory arrangements applicable outside the South West Interconnected System.

### 1.3 Objectives and principles

The proposed reforms to change the contracting model set out in this Position Paper have been developed with a view to the following reform objectives, principles and assumptions.

#### Objectives

- The modified contracting model will be adopted in the electricity sector and will take effect on 1 July 2018.
- The modified contracting model will be implemented substantially in advance of 1 July 2018 to allow retailers and distributors preparation time.

#### Principles

Legislation and regulation to implement the modified model will be designed in such a way as to:

- support electricity network regulation reforms;
- avoid changing the level of customer protection currently provided, unless necessary;
- have minimal effect on customers; and

<sup>3</sup> See the Schedule to the National Energy Retail Law (South Australia) Act 2011, available at [https://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ENERGY%20RETAIL%20LAW%20\(SOUTH%20AUSTRALIA\)%20ACT%202011.aspx](https://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ENERGY%20RETAIL%20LAW%20(SOUTH%20AUSTRALIA)%20ACT%202011.aspx)

<sup>4</sup> Available at <http://www.aemc.gov.au/Energy-Rules/Retail-energy-rules/Current-rules>

<sup>5</sup> For example, South Australia's regulations are available at <https://www.legislation.sa.gov.au/LZ/C/R/National%20Energy%20Retail%20Regulations.aspx>

<sup>6</sup> Chapter 5A of the National Electricity Rules is being adopted as part of the reforms to network regulation.

- not limit future adoption of full retail contestability.

## Assumptions

- Chapter 5A of the National Electricity Rules will be adopted substantially as it applies in other National Electricity Market jurisdictions.
- Local regulations consistent with the reforms will be retained.
- Western Power is the only distributor operating within this framework. As Horizon Power and other integrated licensees will not be subject to the National Electricity Law, the amendments for the triangular model will not apply to them.
- The distinction between contestable and non-contestable customers will be retained until separate retail contestability reforms are implemented.
- The Australian Consumer Law will apply to customer contracts covered by these regulatory reforms.

## 1.4 Timing and interaction with wider retail sector reforms

### 1.4.1 These reforms

The changes in law contemplated in this Position Paper do not pre-empt a Government decision to implement full retail contestability in electricity, although they will support such a reform. The primary purpose of reforms outlined in this paper is to complete the implementation of the government decision on the network regulation reforms.<sup>7</sup> Should the Government determine to proceed with the implementation of full retail contestability, this may require additional legislative amendments at a later date.

The introduction of the new contractual relationships must occur by 1 July 2018 to align with the commencement of the national network regulation framework. To meet this timeframe, legislative changes to the *Electricity Industry Act 2004* (the Electricity Industry Act) are expected to be considered by Parliament in the second half of 2016 and passed by November 2016.

The regulations and codes with which this Position Paper is concerned will contain the detail of the new relationships. These instruments will be made subsequent to the passage of the legislation through Parliament and are expected to be gazetted in the second or third quarter of 2017. This schedule will allow industry participants time to prepare for the new arrangements to commence on 1 July 2018.

### 1.4.2 Later reforms

The Government has announced that it intends to introduce further competition into the retail electricity market. The implementation of full retail contestability will include reforms to the current statutory prohibition of the supply to customers below 50 megawatt hours (MWh) per year, modifications to the customer protection framework and ensuring concessions are available to eligible customers regardless of the retailer.

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<sup>7</sup> The scope of these reforms is described in a Network Regulation Workstream information paper, available online at: [https://www.finance.wa.gov.au/cms/uploadedFiles/Public\\_Uilities\\_Office/Electricity\\_Market\\_Review/Information-Paper-Network-Regualtion-Workstream.pdf](https://www.finance.wa.gov.au/cms/uploadedFiles/Public_Uilities_Office/Electricity_Market_Review/Information-Paper-Network-Regualtion-Workstream.pdf)

Details of those reforms will be announced in due course and stakeholders will have the opportunity to comment on the proposals.

## 1.5 Consultation processes

### 1.5.1 Invitation for submissions

Respondents are invited to comment on the proposed reforms to implement the modified contracting model as outlined in this Position Paper. Submissions need not be limited to those items identified for comment throughout the paper.

Submissions are due by Wednesday 13 July 2016 and can be emailed to [electricitymarketreview@finance.wa.gov.au](mailto:electricitymarketreview@finance.wa.gov.au). Please include in the subject line the title of the Position Paper and your name or the name of your organisation.

### 1.5.2 Publication of submissions

Submissions will be available for public review at [www.finance.wa.gov.au/publicutilitiesoffice](http://www.finance.wa.gov.au/publicutilitiesoffice), unless you request otherwise.

Please indicate clearly on the front of your submission if you wish all or part of it to be treated as confidential. Contact information, other than your name and organisation (where applicable) will not be published.

Requests may be made under the *Freedom of Information Act 1992 (WA)* for any submissions marked confidential to be made available. Requests made in this manner will be determined in accordance with the provisions under that Act.

### 1.5.3 Further consultation

This paper will propose, and seek comment on, most of the detail required to implement the triangular model (besides Chapter 5A of the National Electricity Rules). However, this paper does not present a complete proposal for the implementation of the triangular model. Several matters of special complexity or sensitivity will be held over for separate consultation and consideration. Specifically:

- The question of whether further regulatory intervention is required to clarify the effect of the reforms on existing access contracts with retailers will be the subject of a separate Electricity Market Review consultation.
- The method(s) to be used to calculate retailer credit support requirements and the requirement for and design of a detailed retailer of last resort scheme will be separately consulted on.
- Transitional arrangements, to the extent these are likely to have material consequences for customers or market participants, will be separately consulted on.

Information on the timing and processes to apply to consultation on these matters will be provided in due course. In light of the importance of timely implementation, a long delay in addressing these topics is not anticipated.

## 2. The Proposed Contracting Model

### 2.1 Background

Electricity services can be supplied to end use customers under different contracting models. In Western Australia, a linear model is currently used whereby the distributor supplies network services to retailers and then retailers pass on the cost to retail customers when charging for the electricity service. In contrast, in most jurisdictions in the National Electricity Market, a triangular model is used, whereby distributors supply network services directly to customers although still rely on retailers to bill for those services.

Prior to commencing work on the adoption of the National Electricity Rules, the Public Utilities Office considered several alternative contracting models. As a result of this assessment, the triangular model was confirmed as the most suitable basis for supplying network services to customers when the new regulatory arrangements for networks are introduced.

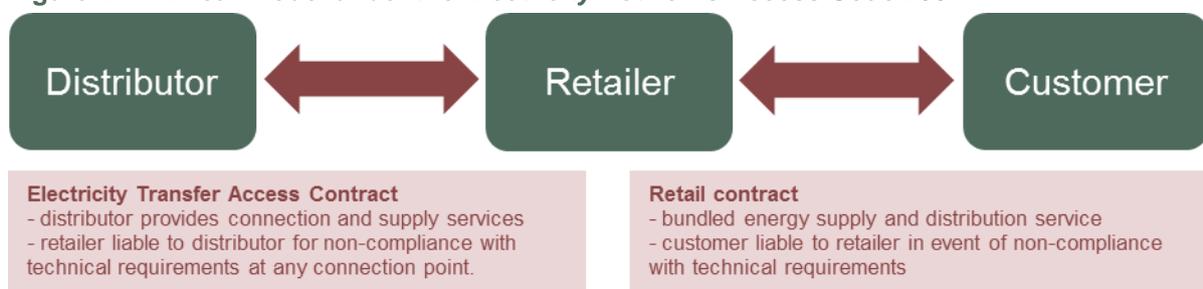
The adoption of the National Electricity Rules for regulation of Western Power’s network is now well advanced, with draft instruments expected to be finalised in June 2016. This work has proceeded on the presumption that the local contracting framework will be amended to establish a triangular arrangement, since this is the basis on which the National Electricity Rules have been designed to operate. Without a triangular contracting model in place, the National Electricity Rules would need to be substantially modified and some of the benefits of a nationally consistent network regulatory framework would be undermined.

The following sections of this Chapter summarise the current and future contracting frameworks and provide reasons for the decision to adopt the triangular model. However, this background is provided for information only as the Paper does not seek views on the choice of contracting model.

### 2.2 Status quo – a linear model

In Western Australia, network services are provided to most customers through what is known as the linear model (Figure 2.1). Under this model, customers have a contract with their retailer, but not with their distribution service provider. This retail contract covers both the supply and payment of network services.

Figure 2.1: Linear model under the *Electricity Networks Access Code 2004*



The linear model cannot continue in its current form because the scheme for the regulatory oversight of access contracts between the distributor and retailer is being replaced by the National Electricity Law and the National Electricity Rules. Moreover, the connections framework that will be established under the National Electricity Rules is predicated on a

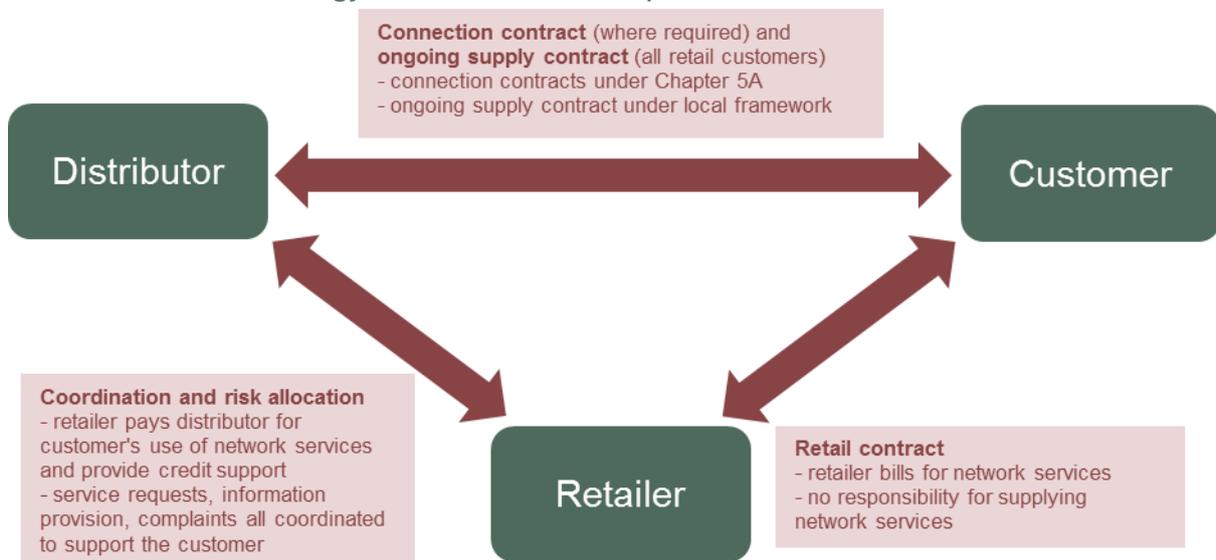
direct relationship between the distributor and customer. This would be incompatible with the current arrangements, whereby connections services are supplied to customers via their retailer.

## 2.3 The triangular contracting model

### 2.3.1 Description

The triangular contracting model is a feature of the National Electricity Law and the National Energy Customer Framework. Under a triangular model, customers have a contract with both their retailer and their distributor (Figure 2.2). Under this model, the distributor provides network services directly to the customer. However, for practical reasons, network charges are to be recouped via the retailer (with limited exceptions). A regulated relationship exists between the distributor and retailer, through which information sharing and coordination is facilitated and network charges are recouped.

Figure 2.2: Triangular model as proposed to be adopted in Western Australia (based on the National Energy Customer Framework)



Some of the matters considered in adopting the triangular model for delivering a contracting framework capable of interoperating with the National Electricity Law and the National Electricity Rules are described below.

### 2.3.2 Implications of adopting triangular model

#### *Low level of implementation risk*

Implementing the triangular contracting model will require extensive regulatory changes, but will involve a relatively low level of implementation risk because a clearly defined template already exists. The National Energy Customer Framework establishes a contracting framework that interoperates effectively with the National Electricity Law and the National Electricity Rules. By using the National Energy Customer Framework as a guide, some of the risks of unintended consequences associated with a complex regulatory architecture should be reduced.

*Limited change in customer experience*

While the triangular model represents a change in the conceptual framework for delivering network services, it will change little of the day-to-day experience of retail electricity customers. The contract between a retailer and customer will remain largely unchanged. Other than for new connections, an ongoing supply contract will be deemed into existence by regulation, so the customer's explicit consent will not be required. The retailer will continue to be the main point of contact, and will continue to manage most of the service requests on the customer's behalf, including billing. The customer may work directly with the distributor for a new or modified connection, but in most situations will continue to work through the retailer.<sup>8</sup>

*Greater consistency with most Australian jurisdictions*

The National Energy Customer Framework is used in most Australian jurisdictions. Therefore, by applying the triangular contracting model as implemented under the National Energy Customer Framework, the changes are expected to reduce the costs of market entry for interstate retailers.

*Improved allocation of technical risk*

Currently, new connections and modified connections, including the connection of specified types of equipment at an existing connection, often require customers to deal with distributors but a retailers' consent is required.<sup>9</sup> The need for the retailer's consent is appropriate, since the retailer will assume liabilities associated with the connection.

By establishing a direct contractual relationship between distributors and customers, customers become directly responsible to distributors for their use of the network, including maintaining compliance with technical requirements. The retailer will cease to be a party to the contract for the provision of network services and will no longer bear the risk of the customer's connection to the network and the retailer's consent to the installation need no longer be required. This will remove a potential conflict of interest arising from the retailer's effective right to veto applications to connect new embedded generation equipment, the installation of which might be counter to the retailer's commercial interests.<sup>10</sup>

## 2.4 Alternative contracting models

As noted, the Public Utilities Office considered alternative contracting models, prior to determining to proceed on the basis of the triangular model. A review of two alternative contracting models is summarised in Appendix A. This review shows that there were specific complexities and costs associated with each model. Moreover, the benefits offered by these alternative models were insufficient to justify the risks inherent in changing important aspects of the National Electricity Rules.

<sup>8</sup> Under the National Electricity Rules, connection applications can be made to either the distributor or the retailer (r. 5A.D.3(a-b)). Further, s. 102 of the National Energy Retail Rules provides that retailers have an obligation to pass through to the distributor customer inquiries relating to the functions of a distributor.

<sup>9</sup> For example, the installation of solar photovoltaic systems.

<sup>10</sup> However, where the installation of such equipment changes a customer's profile and unit cost to supply, it is to be expected that retailers will adjust their offers to such customers accordingly.

## 3. Implementation Approach for the Triangular Model

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### 3.1 Consistency with the model for network regulation

The Government is progressing legislation to adopt the national regulatory frameworks for electricity networks. The National Electricity Law establishes a central governance framework with national regulatory bodies that oversee and apply the National Electricity Rules, which provide a single set of rules for the regulation of the electricity network, system and market in participating jurisdictions.

The adoption of the national electricity regulatory framework necessitates modifications to the contracting relationship between customers, Western Power and retailers, as the National Electricity Rules presumes the existence of the triangular model. These modifications will be made to the local regulatory framework.

### 3.2 Local framework changes and the National Energy Customer Framework

The regulatory instruments required to implement the triangular model will be designed to:

- modify existing customer protection arrangements to the extent they are inconsistent with the triangular contracting model or need to be modified to support that model (minimum change principle); and
- use the National Energy Customer Framework as a template, with suitable modifications for the local market where necessary (national consistency principle).

Additional changes to the customer protection framework may be required to assure particular policy objectives as part of introducing full retail competition in Western Australia.

In line with the national consistency principle, comparisons and references are made in the sections below to provisions under relevant national instruments. Consistency with the National Energy Customer Framework is desirable because:

- it is an established and functioning framework that has demonstrated its workability across most Australian jurisdictions; and
- it reduces barriers to entry for retailers who already operate under the framework in other jurisdictions.

The intention to use the National Energy Customer Framework as a template for new or modified aspects of the triangular relationship will need to be balanced with the minimum change principle, since the National Energy Customer Framework provides a more prescriptive customer protection framework than applies in Western Australia. It is not the intention to fully replicate this framework, rather to take those parts judged necessary to implement the triangular model effectively.

### 3.3 How will the amendments be implemented?

The implementation of the new model is to occur primarily through regulations (and other instruments such as codes) made under new heads of power within the Electricity Industry Act.

The Public Utilities Office is progressing amendments to existing legislation to create the new heads of power to create the triangular relationship. Subject to the passage through Parliament of these legislative amendments, subordinate legislation will be developed to implement the relationships which will take effect from 1 July 2018.

It is recognised that market participants will require sufficient certainty regarding the new arrangements to make necessary investments (such as compliant information technology systems) and undertake preparation (such as in renegotiating contracts that have been affected by the change of law) prior to the 1 July 2018 start date. Those preparations are anticipated to take at least 12 months. It is expected all subordinate legislation will be made by the middle of 2017, giving participants sufficient time for implementation.

The changes required to implement the triangular model are expected to include a combination of new instruments and modifications to existing instruments.

### **3.3.1 New instruments to govern distributor-customer relationship**

Amendments to the Electricity Industry Act will establish a direct contractual relationship between the distributor and customers covering the ongoing supply of network services, where no such relationship currently exists. These amendments will be accommodated in a new “Distributor Customer Part” to the Act. The Distributor Customer Part will include a head of power to enable regulations (or other instruments) for the purposes of establishing a framework for this new contractual relationship between the distributor and customers. These new contracts (termed ongoing supply contracts) will be either deemed into existence by regulation or will be negotiated.

The regulations will address the model or minimum terms and conditions for ongoing supply contracts, establish a framework for the negotiation of contracts between the customer and distributor and specify the information the distributor will be required to publish on its website. Further, the regulations will specify the functions and powers of the regulator in relation to the approval of deemed ongoing supply contracts, monitoring and ensuring compliance with regulatory obligations. Further detail on the regulation of the relationship between the distributor and customers is provided in Chapter 4.

### **3.3.2 Existing instruments to govern retailer-customer relationship**

The regulation of the relationship between retailers and customers is largely unaltered by the triangular model, as the provisions contained in existing regulations and codes are largely consistent with the requirements under this model. Modifications to the Electricity Industry Act will be made to reserve a limited power for the Government to intervene to ensure retail contracts are not inconsistent with the distributor-customer contracts and the regulatory arrangements for distributor-retailer relationship.<sup>11</sup> Relatively minor modifications to existing regulations and codes may be required, but will be undertaken under existing legislative heads of power. Further detail on the regulation of the relationship between the retailers and customers is provided in Chapter 5.

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<sup>11</sup> The preferred approach to retail contract amendment is that it should be left to retailers to resolve. The exercise of the proposed power to amend retail contracts would be considered only if a strong case for using it was demonstrated 3.5.

### 3.3.3 New instruments to govern distributor-retailer relationship

Amendments to the Electricity Industry Act will allow for the establishment of a regulated relationship between the distributor and retailers, in place of the contractual relationship that currently exists. These amendments will be accommodated in a new “Distributor Retailer Part” to the Act. The Distributor Retailer Part will include a head of power to enable regulations for the purposes of prescribing the rights and obligations owed by retailers to the distributor and *vice versa*. The regulations will address matters currently specified through contractual arrangements, such as how network charges are recouped and how the risk of a retailer default is mitigated. In addition, obligations will be placed on both retailers and the distributor to share information, refer requests and complaints, cooperate and generally assist to serve shared customers. Further detail on the regulation of the relationship between the distributor and retailers is provided in Chapter 6.

### 3.3.4 Transitional amendments

To ensure these three parts operate together and consistently with other regulatory obligations, some existing provisions may be modified or deleted and included in new instruments. For example, some of the distributor obligations in the Code of Conduct for the Supply of Electricity to Small Use Customer (the Customer Code) may be better placed in new instruments under the Distributor Customer Part. In assessing the drafting options, consideration will be given to how any possible changes might affect instruments that apply outside the South West Interconnected System or only in relation to small use customers.

### 3.3.5 Process for dealing with change of law to existing contracts

Existing contracts between retailers and their customers, and between Western Power and retailers, will necessarily be affected by these changes in law. In some cases, it may be useful for regulations to clarify what this change of law means for existing contracts, to support counterparties in managing uncertainties arising from the change in law.

#### *Existing contracts between retailers and their customers*

It is anticipated that existing change of law clauses mean that these contracts will be updated without a separate and direct intervention by Government. To the extent that such an intervention is actually required, the intention is to manage the design and consultation on this intervention as part of the implementation of the triangular model. Further detail on these matters is provided in Section 5.2.3.

#### *Existing contracts between Western Power and retailers*

From the perspective of retailers, the founding premise of existing access contracts (Electricity Transfer Access Contracts and Network Access Agreements)<sup>12</sup> is the provision of network services by Western Power to retailers. With the creation of a direct contractual relationship between Western Power and end consumers of electricity, this foundation falls away. Even in the absence of explicit legislative intervention, existing contractual arrangements for the provision of network services to retailers would have ceased to apply for future purposes from the date at which new contracts between distributors and customers

<sup>12</sup> Electricity Transfer Access Contract is the name given to access contracts struck between Western Power and its users since the establishment of the Electricity Networks Access Code 2004. Network Access Agreement is the name given to access contracts struck with Western Power Corporation prior to the availability of Electricity Transfer Access Contracts.

were deemed to commence. However, amendments are expected to the Electricity Industry Act, which will make this effect explicit.

Access contracts held by companies engaged in electricity retailing may continue to have effect to the extent that the contracts relate to the provision of network services for purposes other than retailing. For example, some retailer access contracts also deal with the provision of network services to market generators. While the retailing-related aspects of these contracts will fall away, there may be some advantages in additional intervention by regulation that further clarifies the implications of the changes to the contracting framework for existing access contracts.

The adoption of the National Electricity Law and the National Electricity Rules will also have implications for the existing access rights of market customers and market generators. To provide an integrated approach to modifying and updating existing access contracts, the question of how retailer access contracts might be transitioned to the new regulatory arrangements will be addressed outside this paper. Other consultation processes are discussed in Section 1.5.3.

### **3.4 Application outside the South West Interconnected System**

The State Government's commitment to adopt the national electricity network regulation framework applies only to Western Power's network, at present. Implementing the new contractual arrangements outside the South West Interconnected System without the network regulation framework in place would be needlessly complex. Therefore, the new contractual arrangements described in this paper are only proposed to be implemented within the South West Interconnected System at this time.

Licensees and customers outside the South West Interconnected System will continue to operate under the existing arrangements.

Although this will result in there being two regulatory regimes in place in the State, customers across the State will continue to be protected by similar customer protection arrangements whether a customer of an integrated regional licensee such as Horizon Power or a customer of a retailer within the South West Interconnected System. Consistent with the minimum change principle, these reforms will only modify existing customer protection arrangements to the extent that they are inconsistent with the new contracting model. This means the substantive customer protection provisions will remain the same and customers will continue to be protected in a manner similar to the existing arrangements.

### **3.5 Application to gas customer contracts in Western Australia**

The Government decided in 2015 that economic regulation of gas networks in Western Australia would become the responsibility of the Australian Economic Regulator, which has required amendments to the National Gas Law and Rules as they apply in this State. However, there is no Government policy to undertake further regulatory reform in the gas sector. Accordingly, the new contractual arrangements described in this paper are proposed to apply to the supply of electricity network services, but not the supply of gas network services. The contracting arrangements for gas will remain linear.

It is hoped that the future introduction of full retail contestability in electricity will bring greater convergence in the retailing of gas and electricity, with the same companies active in both markets. This outcome offers the possibility of incremental improvements in efficiency,

service and risk management. It would represent a serious policy concern if the introduction of a triangular contracting model for electricity was found to impede the ability of retailers to simultaneously participate in both markets.

Experience in the Eastern States suggests that the existence of different contracting models in electricity and gas markets will not preclude simultaneous participation in both markets. For instance, up until the introduction of the National Energy Customer Framework in NSW in mid-2013, electricity network services were supplied under a triangular contracting arrangement, while in gas the services were contracted linearly. The Australian Energy Market Commission carried out its “Review of Competition in the Retail Electricity and Natural Gas Markets in New South Wales” in the first half of 2013, reporting that:

“Between late 2010 and 2012 there were at least 102 unique electricity, 22 dual fuel and nine gas offers available across NSW, many with different discounts and benefits in the form of points, subscriptions and rebates from which customers can choose.”<sup>13</sup>

At the time, NSW maintained separate, but closely aligned regulations governing retailer conduct and retail contracts in respect of both electricity and gas. Consistency between these rules may be more important to the task of structuring a dual fuel retail offer than are the similarities and differences in the network contracting models of each sector. The approach being taken in the reform of contracting arrangements in Western Australia is to minimise any changes to the retail obligations established under the Customer Code. This will preserve the close alignment between that instrument and the combined Gas Marketing Code of Conduct and Compendium of Gas Customer Licence Obligations.

It seems reasonable to conclude on this basis that the proposal to shift to a triangular model for electricity in Western Australia, while retaining the existing linear model for gas, would not preclude or impinge simultaneous participation by retailers in both markets.

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<sup>13</sup> Australian Energy Market Commission, 2013, *Review of Competition in the Retail Electricity and Natural Gas Markets in New South Wales*, <http://www.resourcesandenergy.nsw.gov.au/energy-supply-industry/consumer-assistance/necf>, page p. ii, accessed 13 April 2016.

## 4. Distributor-Customer Relationship

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### 4.1 Introduction

The biggest change to the existing arrangements under the triangular model will be the creation of a direct contractual relationship between the distributor and retail customers in the South West Interconnected System to govern the ongoing supply of network services<sup>14</sup> (an ongoing supply contract). The ongoing supply contracts will apply for both small and large retail customers<sup>15</sup> and will be deemed by regulation to exist between the distributor and customer, except in select instances where individually negotiated contracts will be permitted.

At a high level, the required framework must impose obligations on the distributor to provide suitable ongoing supply services under a contract, as well as setting out the arrangements for contract development (such as types, processes and minimum terms and conditions). The framework must also specify the oversight functions of a regulator, including any approval, compliance and monitoring powers. Finally, to the extent that existing customer protection settings are unsuitable with the triangular model, these settings must be amended.

The creation of this new distributor-customer relationship will require both a new instrument and modifications to existing instruments, as discussed further in Section 4.2 below.

#### 4.1.1 Relationship between Chapter 5A connection contracts and ongoing supply contracts

In discussing the formation of a distributor-customer relationship it is important to distinguish between ongoing supply contracts (the subject of this Chapter) and connection contracts established under Chapter 5A of the National Electricity Rules.<sup>16</sup>

Connection contracts provide for the establishment of new connections and connection alterations. Common examples include organising network connection for newly built homes, upgrading supply capacity for existing premises and the connection of micro-generation. Obligations under connection contracts tend to be discharged once the customer has been connected. In contrast, ongoing supply contracts concern the provision of an electricity supply to the premises, and will persist for so long as the customer receives electricity supply.<sup>17</sup>

The Public Utilities Office expects to release an information paper, *Transitioning to the National Electricity Regulatory Framework*, shortly. This paper provides information regarding network regulation reforms and sets out the proposed approach to adopting Chapter 5A in Western Australia.

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<sup>14</sup> Ongoing supply services are expected to cover all supply elements of services currently referred to as reference and non-reference services.

<sup>15</sup> Generators and customers connected directly to the transmission network and those who consume or provide energy under market contracts, will have their ongoing supply arrangements provided for under a negotiated agreement with Western Power governed by the Chapter 5 framework.

<sup>16</sup> Distributors operating under the National Electricity Rules are required to have approved model basic offers to facilitate customer connection, with regulatory oversight of model offers undertaken by the Australian Energy Regulator.

<sup>17</sup> Note that a person can be considered to have an electricity supply, irrespective of actual energy import or export.

The design of Chapter 5A is beyond the scope of this Position Paper. Nonetheless, Chapter 5A must be considered in the formation of ongoing supply contracts due to the relationship between connection and ongoing supply. In particular, it is intended that there be no regulatory gaps or overlap between connection contracts regulated by the Australian Energy Regulator and ongoing supply contracts regulated by the local regulator. Due to these interdependencies, Chapter 5A connection contracts are referred to in the design parameters of ongoing supply contracts in this Chapter.

## 4.2 Changes required to implement the distributor-customer relationship

The following elements of the relationship between distributors and customers will need to be introduced or modified to implement the triangular relationship. These elements will be prescribed through regulations and/or codes.

- Contract type, development and termination
- Information requirements and additional customer protection
- Billing arrangements
- Liability

Each of these elements is discussed further below.

### 4.2.1 Contract type, development and termination

The development of contracts between customers and distributors is the centrepiece of the changes to support the development of a distributor-customer relationship. As discussed above, the distributor-customer framework will be modelled on the arrangements under the National Energy Customer Framework. Below is a high level summary of the changes required to support the development of suitable contracts and supporting obligations, along with further discussion on each contract type. References to relevant parts of instruments under the national framework are included to provide further detail on the proposed changes.

#### *General obligations on distributors*

As the development of the distributor-customer limb of the triangular relationship does not have an existing legal framework, there are some general obligations that will require specification in the Distributor Customer Part. These are that:

- An obligation be imposed on the distributor to provide customers with ongoing supply services under a deemed or negotiated ongoing supply contract.  
This corresponds to the obligations imposed under ss. 66 – 67 of the National Energy Retail Law.
- The distributor will be required to comply with the deemed ongoing supply contracts.  
This corresponds to the obligation imposed by s. 71(1) of the National Energy Retail Law.
- The distributor will be required to provide customer connection services as soon as practical after receiving the application from the retailer.  
This corresponds to the obligation imposed by r. 79 (4) of the National Energy Retail Rules.

- The details of contract formation for deemed contracts will be specified to avoid doubt as to the time of commencement.

This corresponds to the mechanism established under s. 70 of the National Energy Retail Law.

- Provision will be made for the duration (i.e. replacement or termination) of deemed contracts to be specified.

This corresponds to the mechanism established under s. 74 of the National Energy Retail Law.

- Any rights and obligations already accrued under a deemed contract will not be affected by contract termination.

This corresponds to the provision made by r. 81(3) of the National Energy Retail Rules.

- A prohibition will be placed on the distributor to prevent directly billing a customer for ongoing supply services.

This corresponds to the provision made by s. 71(2) of the National Energy Retail Law.

The obligation to provide customers with ongoing supply services will be facilitated by providing for three types of ongoing supply contracts between customers and the distributor. These contracts are deemed standard ongoing supply contracts (deemed standard contract), deemed class-specific ongoing supply contracts (deemed class-specific contract), and negotiated ongoing supply contracts (negotiated contract). Further detail is provided in the sections below.

### *Deemed standard contracts*

An obligation will be imposed on the distributor to have a deemed standard contract that meets the requirements specified in regulations. This corresponds to the obligations imposed under s. 69 of the National Energy Retail Law.

The deemed standard contract is the default that will apply to all customers that are not subject to another contract type. The intention is for this contract to be deemed and to take effect at the time the customer enters into a retail supply contract, or commences using electricity at the premises (whichever is earlier).

A position on the means of contract development is yet to be reached. The options include prescribing the contract, or requiring the distributor to develop the contract for approval by the regulator.

Prescribing the deemed standard contract would require a model for this contract to be set out either in regulations or in an order made by a prescribed entity. Then the distributor would convert this model into its actual deemed standard contract by filling in relevant details and publishing it on its website. Under this option, the Minister could be responsible for prescribing the first contract, or could choose to delegate this responsibility to the local regulator. The local regulator would be responsible for subsequent review and amendment in accordance with procedures and minimum terms and conditions specified in the regulations.

The prescription approach is used under the national framework.<sup>18</sup> However, local differences in market structure weaken the arguments for adopting the prescribed approach in the South West Interconnected System. For example, there are many distributors operating under the national framework, making the distributor development of contracts administratively cumbersome for the regulator, who would need to approve multiple distribution contracts that would, in practice, vary little in their scope. Further, consistency between contracts in distribution areas is also desirable from a customer protection perspective. An important difference between the national framework and the South West Interconnected System is the existence of only one distributor, Western Power, meaning that both the efficiency and consistency arguments for the prescription approach do not hold locally.

The alternative to prescribing the deemed standard contract is to require that the distributor develop and publish the contract, subject to local regulator's approval. As with the prescription approach, the distributor-developed deemed standard contract must conform to minimum conditions set out in regulation (the difference being that the contract is not prescribed). This is the Victorian approach.

Allowing distributor development would provide Western Power with more control over the form and content of the agreement, which would allow for greater consistency with its connection agreements and deemed class-specific contracts (see below). Further, allowing the distributor to develop the contracts may improve flexibility, and improve the timeframes associated with contract amendments<sup>19</sup> while continuing to ensure adequate customer protection through the local regulator's approval process.

Question: Should standard contracts be prescribed pursuant to regulation, or developed by the distributor for approval by the local regulator?

### *Deemed class-specific contracts*

Where a class of large customers requires network services for which the deemed standard contract is not appropriate or desirable, it is proposed that the distributor will have discretion to establish a deemed class-specific contract for that class of customers, subject to the regulator's approval. This partly corresponds to the mechanism established under ss. 75 – 77 of the National Energy Retail Law.

In approving the class-specific contract, the intention is for the regulator to assess the contract against prescribed principles, such as whether it contains minimum terms and conditions prescribed by the regulations. Once approved in accordance with the procedures prescribed in regulations, the contract will be deemed to exist between the distributor and members of that customer class, irrespective of whether a customer commenced supply before or after the approval of the contract. The exception to this rule will be when a customer has a negotiated contract.

<sup>18</sup> Schedule 2 of the National Electricity Retail Rules.

<sup>19</sup> The alternative, making the changes to contract through changes to regulation, would likely result in longer delays in updating contracts.

The scope to create a class-specific contract would be limited to large customers. Small customers would either be contracted under the deemed standard contract, or a negotiated contract.

Question: Should the distributor be limited to large customers in the development of deemed class-specific contracts?

### *Negotiated contracts*

Allowance will be made for an ongoing supply contract to be negotiated in accordance with a negotiation framework. The negotiated contract will displace the relevant deemed contract. This partly corresponds to the obligations imposed under s. 78 of the National Energy Retail Law.

While negotiated contracts for ongoing supply are permitted both under the National Energy Customer Framework and the Victorian model, in practice there is little scope for network services to be negotiated, since these are tightly controlled by the regulatory framework under Chapter 6 of the National Electricity Rules. Negotiation of ongoing supply services is likely to arise only to facilitate a network solution that will enable connection. As such, negotiation of the equivalent of an ongoing supply contract under the National Energy Customer Framework is limited to customers who have also negotiated a connection contract under Chapter 5A of the National Electricity Rules.

Where a customer and the distributor have sufficiently unique circumstances as to warrant a negotiated contract, the negotiation is guided by a regulated framework specified in Part C, Section 5A.C.1 of Chapter 5A of the National Electricity Rules.

Under the national arrangements, the negotiation framework is common for connection and ongoing supply services. That is, the National Energy Retail Law refers to Chapter 5A for its negotiation framework. As discussed previously, the National Energy Customer Framework will not be adopted in the South West Interconnected System, and therefore the negotiation framework under Chapter 5A will not automatically apply for ongoing supply services (although it will apply for connection services). A strong case exists for applying the Chapter 5A negotiation framework to ongoing supply contracts by referring to it within local arrangements, as this will:

- allow for a common negotiation framework between connection and ongoing supply services;
- ensure that amendments to the Chapter 5A negotiation framework automatically apply for ongoing supply services (thereby removing the need to make local amendments in the event that the framework under Chapter 5A changes); and
- support the alignment of administrative processes relating to the development of connection offers and corresponding ongoing supply offers.

While the provisions of negotiated contracts will be agreed between the distributor and customer, the national framework imposes some contractual provisions as outlined in r. 82 of the National Energy Retail Rules. Given that small use customers will be able to negotiate

ongoing supply contracts, the intention is to provide for similar contractual provisions for negotiated contracts under the local regulatory framework.

There may be instances where a customer seeks a negotiated Chapter 5A contract that the distributor would only be willing to offer if the customer consented to ongoing supply terms that complement the particular connection arrangements being offered. Thus, in some cases the optimal connection offer might be inconsistent with a deemed standard contract or a class-specific contract. For this reason, the regulations may need to specify a narrow set of circumstances under which a deemed contract would not apply and require instead that the ongoing supply contract be negotiated.<sup>20</sup> Certain protections may be required, such as information requirements that allow the customer to be aware of the variations required to ongoing supply contracts prior to entering into a negotiated connection agreement.

Question: Is the negotiation framework under Chapter 5A suitable for negotiating ongoing supply contracts in the South West Interconnected System? If not, what amendments should be made?

Question: Is there any reason why the high-level contractual provisions under r. 82 of the National Energy Retail Rules should not be adopted in the South West Interconnected System?

#### 4.2.2 Information requirements and additional customer protection

While the distributor-customer limb of the triangular relationship in the South West Interconnected System is new, the majority of pre-existing information and customer protection requirements are suitable to support the triangular relationship. It is the intention to make changes to existing customer protection and information provisions only where they are required to support the development of the triangular relationship. Minor changes proposed are provided below.

##### *Additional information requirements*

The National Energy Retail Rules obligates the distributor to provide certain information on its website, and have certain pre-contractual duties to provide information. Under local arrangements, distributors also have obligations to provide information to customers. Notwithstanding, there is some misalignment between local arrangements and the national framework. Those items considered material to support the triangular relationship include:

- Information to be provided on the distributor's website. This corresponds to the obligations imposed under r. 80 of the National Energy Retail Rules:
  - details of the distributor's deemed ongoing supply contracts and connection offers, and information on the customer's rights to negotiate different contract terms;
  - details of the distributor's connection charges, de-energisation and re-energisation timeframes;

<sup>20</sup> The mechanism by which a customer is obliged to negotiate a contract is yet to be determined. However, it is likely that the customer's right to a deemed ongoing supply contract will need to be qualified and will only be applicable where there are no special connection arrangements that would warrant the inclusion of special terms in the ongoing supply contract.

- a description of service standards and service standard payments; and
  - information relating to small use customer rights and entitlements such as complaint and dispute resolution processes.
- The provision of information direct to the customer in relation to their default retailer (upon customer contact). This corresponds to the obligations imposed under r. 17 of the National Energy Retail Rules

It should be noted that while the distributor is not currently obligated to include some of the above information on its website, in many cases it does so voluntarily.

Question: Should the additional information provisions above be included within local customer protection arrangements?

### *Ombudsman Services*

The scope of Part 7 of the Electricity Industry Act may need to be clarified to ensure that the Electricity Ombudsman Scheme applies to contracts formed between distributors and small use customers for ongoing supply and connection services. This is in addition to the Ombudsman's existing role in respect of retail contracts defined under s.47 of the Act.

Small use customers can currently access the services of the Ombudsman for disputes regarding ongoing supply services, which form part of the customer's contract with their retailer. Under the new contracting framework, these same services will be provided through a contract between the customer and the distributor. Therefore, while the Ombudsman's role in respect of these services may need to be rephrased, it is not expected that the changes will materially extend the Ombudsman's existing role.

### *Implementation of any required changes*

Additional information requirements applicable for small customers will be either retained and expanded under the Customer Code or placed into a new instrument. If the provisions are retained in the Customer Code, it may be necessary to expand the objectives of this instrument to encompass defining standards of conduct for a distributor in providing ongoing supply services to small use customers.

As the Customer Code applies only to customers using up to 160 MWh per annum, it is not an appropriate instrument for any protections required for large customers. Where alternative local instruments are unsuitable, new instruments will be required.

Any additional special protections will be accommodated by the framework established under the Distributor Customer Part of the Electricity Industry Act. The ongoing supply contracts established under that part will be required to be consistent with the specific protections afforded to small use customers under the Customer Code and other relevant instruments. To the extent that the Code specifies obligations that will be incompatible with the intended structure or content of the new ongoing supply contracts, the Code will be amended.

### 4.2.3 Billing arrangements

The development of a distributor-customer contract under the proposed triangular model is not expected to result in any significant changes in the experiences of customers. Customers will continue to be billed for their ongoing supply services through their retailer, with distributors being prohibited from billing small use customers directly for ongoing supply charges. This is consistent with the mechanism established under s. 71(2) of the National Energy Retail Law.

Retailers will be prevented from charging the distributor for the provision of billing, payment and debt recovery services (see Section 6.2.8).

### 4.2.4 Liability under the distributor-customer contract

Even in the absence of a direct contract between them, the distributor and customers in the South West Interconnected System today have liabilities arising from their provision and operation of the network and use of the network, respectively. The changes to implement the triangular model need not address all of these liabilities, but will need to determine what specific liabilities the parties should face due to default of core contractual obligations and to what extent it should be allowable for either party to limit these liabilities.

Existing contractual liabilities between distributors and retailers and retailers and customers should be considered, but different regulatory settings might be appropriate. Retail customers are very different types of counterparties to electricity retailers, in terms of their sophistication in managing financial risks, such as through specific insurance policies, and in terms of their average ability to absorb financial losses. Further, retail customers and Western Power have very different abilities to evaluate technical risks and to determine the most appropriate approach to managing them.

#### *Obligations of Western Power*

Western Power's main contractual obligations under the contract will be to supply network services of the quality and reliability required under the contract. The distributor will also have various obligations to support customers in maintaining compliance with their contractual obligations, such as through the provision of information. Thus the liabilities to be considered here should be those arising from Western Power's failure to supply to the required standard of reliability or its failure to maintain service quality.

#### *Western Power's liability to customers*

Currently, Western Power's contractual liabilities relating to the supply of network services arise under access contracts with large users, including retailers. That is, Western Power does not currently owe any contractual liabilities to retail customers. Under Western Power's template Electricity Transfer Access Contract, Western Power's liability for negligence or default under the contract to a retailer is limited to \$5 million. A cap of this kind may or may not be suitable in the context of a direct contract with customers. The fact that most customers could not be expected to account for such a cap as part of a considered strategy for the insurance of their risks might suggest that the cap would be inappropriate.

Section 120(1) of the National Electricity Law will be adopted in Western Australia, which will give Western Power a statutory immunity from liability for partial or total failure to supply. This general immunity will not extend to circumstances where Western Power has acted in bad faith or negligence. However, Western Power's liabilities could be limited still further by

contract – for instance, to apply caps to its liability for damage from partial or total failure to supply due to bad faith or negligence or to exclude liability for such things entirely.

A judgement is required as to what scope Western Power should be afforded to limit its liability beyond the general immunity conferred by Section 120(1). In those jurisdictions that have adopted the National Energy Customer Framework, a paragraph (2A) has been inserted into Section 120, which specifically precludes distributors from contracting to further limit their liabilities, though only in respect of small customers.<sup>21</sup> Since Western Australia will not be adopting the National Energy Customer Framework at this time, paragraph (2A) will be excluded from the National Electricity Law as it applies in this State, but its substance could be given effect through local provisions within the Distributor Customer Part.

Whether there should be scope for Western Power's liabilities to be further varied by contract might depend on whether the contract in question is deemed or negotiated. It is likely that there will be instances where a customer's connection solution can be more efficiently facilitated by the customer accepting some reallocation of liabilities under the ongoing supply contract. Thus, constraining the parties' ability to agree to further limit Western Power's liability might have undesirable consequences. On the other hand, the potentially unequal negotiating positions of Western Power and the customer might suggest that such constraints would be valid, particularly in the case of small use customers.

Question: Should Western Power's liability to customers under the ongoing supply contract be limited? If so, why and in what ways?

Question: Should negotiated ongoing supply contracts grant full scope for the parties to agree to contract away from the default liability settings established under Section 120(1) of the National Electricity Law? Should the answer be different in the case of small use customers?

### *Obligations of customers*

The customer's main contractual obligations under the contract will be to pay for the network services it receives and maintain compliance with the technical requirements imposed under the contract. The customer will also have supporting obligations to provide information and disclose changes, obligations intended, in part, to allow Western Power to confirm and assure the customer's conformity with technical requirements.

The customer's failure to pay for network services would constitute a particular type of default with which this liabilities discussion is not concerned, since this is a matter to be dealt with under the retail contract.<sup>22</sup> The technical requirements with which the customer must maintain compliance will take various forms and may include obligations to only connect certain types of equipment to the network, obligations to comply with instructions, obligations to maintain equipment and obligations as to the operation of equipment. Where contracts

<sup>21</sup> Read as "small use customers" for Western Australian purposes.

<sup>22</sup> The customer will continue to be obligated under the retail contract to pay the retailer for any network charges incurred by the customer. Consequently, the rights of a retailer to recover customer debts arising from the use of network services will continue to be subject to the law of contract, subject to relevant customer protections.

are negotiated, customers may be made subject to special technical requirements, different from, or in addition to, those specified in deemed contracts.

### *Customer's liabilities to Western Power*

Under the local framework at present, a customer may be liable to its retailer for damage arising from the customer's failure to meet its contractual obligations to maintain its equipment in good working order. Further, the customer may be liable if it fails to use this equipment in ways that avoid interference with the network.<sup>23</sup> The liability of the customer is made explicit, at least in some retail contracts, by means of the customer indemnifying the retailer against damage resulting from the customer's breach.<sup>24</sup> To the extent that they will be adequately dealt with under the new distributor-customer contracts, these matters should be removed from the retailer-customer contract.

The default deemed contract established by the National Energy Customer Framework appears to impose liabilities on a customer that are broadly similar to those presently imposed on customers under retail contracts in the South West Interconnected System. The model terms and conditions for deemed standard connection contracts<sup>25</sup> prohibits the use of any energy equipment in a manner that unreasonably interferes with supply to other customers or causes damage to any third party and requires that the customer comply with energy laws and the distributor's reasonable requirements. The model terms and conditions explicitly outline consequences of wrongful or illegal use, which include liabilities for rectification. Indemnities are not mentioned in the contract.

Neither the existing retail contract nor the deemed standard connection contract under the National Energy Customer Framework limit a customer's liability for damage to matters caused by the customer's failure to comply with technical requirements. Yet Western Power is arguably better placed than customers to determine how best to minimise the risk of adverse events. Its technical requirements are highly prescriptive and electrical work can only be carried out by technical experts such as licensed electricians.<sup>26</sup> Customers might reasonably expect to be safe from legal claim provided they "followed the rules". It may be appropriate to limit or exclude liability where the customer has complied with the technical requirements, especially in the case of small use customers.

Question: Should customer contractual liabilities to Western Power be limited? If so, why and in what ways?

Questions: Should limits on customer contractual liabilities be defined differently for small-use and large customers?

It is good regulatory practice to check whether the changes to the contracting framework proposed in this paper might render existing regulatory requirements unnecessary. The obligations that will be owed by customers to distributors under ongoing supply contracts

<sup>23</sup> See for instance, Synergy's Standard Electricity Agreement, Terms and Conditions, clause 8 ("Electricity supply equipment and your equipment").

<sup>24</sup> See for instance, Synergy's Standard Electricity Agreement, Terms and Conditions, clause 14.3 ("Indemnity").

<sup>25</sup> National Energy Retail Rules, Schedule 2.

<sup>26</sup> This regulatory context includes the requirements relating to energy safety, imposed under the Electricity Act 1945 as well as security, quality and reliability requirements imposed under the Electricity Industry Act 2004.

may be adequate to justify removing or amending certain statutory obligations that are presently imposed with similar effect.

One example that has been identified is regulation 244 of the *Electricity Regulations 1947*, which provides that a customer may be liable for damage caused through overloading the network.<sup>27</sup> Following the creation of new contractual liabilities owed by the customer to the distributor in respect of compliance with technical requirements, the need for regulation 244 of the *Electricity Regulations* might be questioned. The *Electricity Act 1946* sits in a separate Ministerial portfolio and the Public Utilities Office will investigate with the Department of Commerce what scope, if any, there may be to modify this provision to allow the contracting framework to manage the liabilities for damage of the kind contemplated in regulation 244.

Question: Are there other liabilities created by statute that should be considered for amendment as part of these reforms?

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<sup>27</sup> This liability is not restricted to cases of negligence or bad faith, nor does it require that the customer has failed to maintain compliance with its technical obligations. The liability is limited to situations where the network operator has not had previous notification of the overloading.

## 5. Retailer-Customer Relationship

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### 5.1 Introduction

The retailer-customer relationship is regulated under the Electricity Industry Act. To a large extent, the existing regime is sufficient to reflect the retailer-customer relationship under the triangular model. However, some amendments to the Electricity Industry Act and subordinate instruments under the Act are required to reflect the shift to the triangular contracting model.

### 5.2 Changes required to modify retailer-customer relationship

#### 5.2.1 Customer Contracts Regulations

Modifications to the *Electricity Industry (Customer Contracts) Regulations 2005* (the Customer Contracts Regulations) are proposed to ensure individual elements that enforce the triangular relationship are located in suitable instruments.

The Customer Contracts Regulations will relate to only the retailer-customer relationship, but will look similar to the existing regulations. Most of the provisions in the existing regulations will be retained, with the exception of provisions that relate only to the distributor. For example, regulation 36 ‘determination of a default supplier’ is an obligation on the distributor and it is proposed that this would be removed from the Customer Contracts Regulations and placed into an instrument developed under the Distributor Customer Part.

It is anticipated that the provisions relating to the distributor-customer relationship and administrative elements, such as contact details, will be contained in separate regulations, made under the Distributor Customer Part, discussed in detail in Chapter 4.

#### 5.2.2 Customer Code

The Customer Code contains most of the substantive retailer-customer protection measures and these will not change under the triangular model. Any future changes to the substantive provisions of the Customer Code will be progressed by the local regulator as part of the Code change process specified under Part 6 of the Electricity Industry Act.

#### 5.2.3 Updating contracts

The imposition of the triangular model creates a fundamental change to the nature of relationships between retailers, distributors and customers. It is anticipated that existing change of law clauses in retail contracts will mean that many of these contracts will be updated without a specific intervention by Government.

For customers on standard form contracts and non-standard contracts<sup>28</sup> established under section 48 of the Electricity Industry Act, retailers will be able to update their contracts to reflect the change of law, since change of law clauses are required to be included in such

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<sup>28</sup> Section 48 of the Electricity Industry Act relates only to customers who consume not more than 160 Megawatt hours per annum.

contracts.<sup>29</sup> The updated contract will then apply to customers in accordance with the contract amendment provisions each contract is required to contain.

For customers on negotiated contracts, the proposed changes in law may be inconsistent with some contractual provisions and will, to the extent of that inconsistency, over-ride those provisions. Further, some changes to law may hinder the interpretation of existing contracts, for instance by removing specific external instruments that may be incorporated by reference, such as the Technical Rules. It is expected that change of law clauses will have been routinely included in most, if not all, of these contracts. To the extent that this expectation is borne out, retailers should be able to update the contracts without a specific intervention by Government.

It is recognised that there could be circumstances where Government intervention is needed where parties have not made adequate provision in negotiated contracts for changes in law. However, in light of the importance of respecting contracts, strong arguments in favour of Government intervention would be required.

Question: Are there any circumstances under which specific intervention is needed to ensure contracts are updated to reflect the change in contracting arrangements?

Question: Are there any other reasons why intervention in contracts is necessary?

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<sup>29</sup> Section 16 of the *Electricity Industry (Customer Contract) Regulations 2005* requires standard retail contracts to include the power to amend the contract without the customer's consent and requires that the contract describe the process for its own amendment.

## 6. Distributor-Retailer Relationship

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### 6.1 Introduction

The shift to a triangular contractual relationship fundamentally changes the nature of the relationship between retailers and distributors. At present, retailers are treated as a class of network user and their relationship to Western Power is ultimately a contractual one, in the form of an Electricity Transfer Access Contract or Network Access Agreement. These contracts establish the terms on which Western Power provides network services to retailers. Under the triangular contracting model, a contractual relationship between distributors and customers is established for the direct provision of network services. As such, the basis of the existing contractual relationship between distributors and retailers falls away.

For practical reasons, network charges will continue to be recouped via the retailer (unless the distributor and customer agree otherwise). Western Power and each retailer will owe responsibilities to each other to facilitate the provision of network services by Western Power to each customer it shares with that retailer (“shared customers”). Consequently, new regulatory arrangements must address, among other things, coordination, information sharing, billing arrangements and allocation of risk between retailers and Western Power. These regulatory arrangements will be enforceable by the local regulator through the existing licensing scheme.

In addition, Chapter 6 of the National Electricity Rules deals with the distributor-retailer relationship to some extent as part of its distribution billing arrangements between a distributor and other market participants. The billing arrangements under Chapter 6 of the National Electricity Rules presume that the customer will either be billed directly or through the retailer. Unless a large customer enters into a direct billing arrangement with a distributor, the retailer will be billed for all network charges for its customers. The framework set out below is intended to operate in conjunction with Chapter 6 of the National Electricity Rules.

The reciprocal coordination obligations and risk allocation will be provided for through regulations under new heads of power to be inserted into the Electricity Industry Act.

### 6.2 Changes required to implement the distributor-retailer relationship

The following elements of the relationship between Western Power and retailers will need to be introduced or modified to implement the triangular relationship. These elements will be prescribed through regulations, rather than be the subject of contractual negotiation.<sup>30</sup>

- Assistance and cooperation
- Information sharing regarding:
  - Applicable tariffs

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<sup>30</sup> As the distributor is no longer providing network services to the retailer under contract, the basis for contractual negotiation about associated matters (such as information provision) falls away.

- Connection related information
- Contact information
- Notification of planned and unplanned interruptions
- Coordination of classification and reclassification of customers
- Referral of complaints and enquiries
- Coordination of service standard payments
- Coordination of de-energisations and re-energisations
- Mutual indemnification
- Billing arrangements for payment and recovery of network charges
- Provision of credit support from a retailer to the distributor
- Resolution of disputes concerning billing and credit support

Each of these elements is discussed further below.

### **6.2.1 Assistance and cooperation**

To ensure the triangular model works smoothly, retailers and Western Power will need to provide each other assistance and cooperation in relation to shared customers. It is proposed that regulations will oblige these parties to:

- give all reasonable assistance to each other, and cooperate with each other, in relation to the performance of their respective obligations and the enforcement of their respective rights in respect of the sale and supply of electricity to shared customers;
- use their best endeavours to provide or make available to the other (at no cost and in a timely manner) information or documentation that the other reasonably requires to carry out its obligations;
- notify each as soon as reasonably practicable on becoming aware of any material change in any of the information; and
- take all reasonable steps to ensure that information that a party provides or makes available to the other (irrespective of whether the information is generated by a third person) as part of the distributor-retailer relationship is accurate and complete.

The obligations proposed above correspond to obligations placed on distributors and retailers under the National Energy Customer Framework (r. 94 of the National Energy Retail Rules).

Question: Is there any reason why local regulations regarding assistance and cooperation between retailers and distributors should be substantively different to the National Energy Customer Framework model set out in r. 94 of the National Energy Retail Rules?

## 6.2.2 Information sharing

To ensure that retailers and Western Power each have the appropriate information regarding shared customers, it is proposed that regulations will oblige retailers and distributors to share the following information (consistent with and subject to the Privacy Act).

- Information relating to a shared customer (including information about applicable tariffs and connection related information) that the retailer or distributor is required to provide to the other under a customer retail contract or ongoing supply contract.
- Contact details including a contact telephone number for customer inquiries. In the case of the distributor, it must provide to the retailer a contact telephone number for:
  - Customer inquiries, including inquiries to obtain information about unplanned interruptions;
  - Fault reporting by customers; and
  - Emergency reporting by customers.
- The distributor must notify the retailer of planned interruptions and give the retailer the information that the distributor is required to give to a customer regarding planned interruptions, and must do so within the same time period as the distributor is required to notify the customer.
  - The information must include details of the area in which the planned interruption is to occur.
  - At the request of the retailer, and if the information is readily available, the information must include information regarding specific premises affected.
  - If a customer contacts the retailer about a planned interruption requested or proposed by the distributor, the retailer must refer the customer to the distributor or, if the customer does not wish to contact the distributor, give the customer the information provided by the distributor to the retailer.
- The distributor must make available to the retailer the information regarding unplanned interruptions due to faults or emergencies that the distributor is required to make available to a customer regarding unplanned interruptions, and must do so within the same time period as the information is required to be made available by the distributor to the customer.
  - The information is not required to distinguish between faults or emergencies affecting customers of the retailer and faults or emergencies affecting customers of other retailers.
  - If a customer contacts a retailer by telephone about a fault or emergency, the retailer must refer the customer to the distributor's fault enquiries or emergency telephone number.

Retailers and distributors will be obliged to notify each other of the information referred to in the above dot points and ensure that the details are at all times current.

It is not intended that the above obligations will require distributors to provide retailers with detailed information about interruption on a premises-by-premises basis. Rather, information provided to the retailer regarding interruptions can be aggregated.

The obligations proposed above correspond to obligations placed on distributors and retailers under the National Energy Customer Framework (rr.95-100 of the National Energy Retail Rules).

Question: Is there any reason why local regulations regarding provision of information between retailers and distributors should be substantively different to the National Energy Customer Framework model set out in rr.95-100 of the National Energy Retail Rules?

### 6.2.3 Coordination of classification and reclassification of customers

Under the triangular model, both the retailer and the distributor will have a direct relationship with a customer. This sharing of responsibility for the customer means there needs to be communication and common understanding between the retailer and distributor regarding a customer's characteristics and associated classification.

It is proposed that regulations will oblige customers, retailers and distributors to do the following.

- A customer requesting a contract with a retailer must, on request by the retailer, provide sufficient information to the retailer for the retailer to classify, on the basis of that information, the customer as a residential customer or a business customer in relation to the premises.
  - On receiving the information, the retailer must classify the customer accordingly.
  - The retailer must, as soon as practicable, notify the distributor of the classification of the customer.
  - The distributor must keep a record of the classification of the customer.
- The current retailer<sup>31</sup> for the premises of a customer may, at its own initiative or on application by the customer or the distributor, reclassify the customer as a residential customer or a business customer in relation to the premises.
  - The retailer may decline to accept a reclassification application if the retailer has classified or reclassified the customer in relation to the premises within the previous 12 month period, whether of its own initiative or on application.
  - The retailer must, as soon as practicable, notify the customer and the distributor of the reclassification of the customer or of the retailer's decision to refuse the reclassification application (if any) by the customer or distributor.
  - The distributor must keep a record of the reclassification of the customer.

<sup>31</sup> The current retailer is the retail licensee supplying electricity at the premises. For small use customers, the current retailer is equivalent to the default supplier under the Electricity Industry (Customer Contract) Regulations 2005.

- The reclassification takes effect on the date of notification of both the customer and the distributor or on a later date specified in the notification.
- If a customer is not currently classified (or reclassified) by the distributor in relation to the premises, then the distributor must classify the customer as a large customer or a small use customer.
  - The distributor must, as soon as practicable, notify the retailer for the premises of the classification of the customer.
  - The distributor must keep a record of the classification of the customer.
- The distributor for the premises of a customer may, of its own initiative or on application by the customer or the current retailer for the premises, reclassify the customer as a large customer or a small use customer in relation to the premises after the initial classification of the customer by the distributor.
  - The distributor may decline to accept a reclassification application if the distributor has classified or reclassified the customer in relation to the premises within the previous 12 month period, whether of its own initiative or on application.
  - The distributor must, as soon as practicable, notify the customer and the current retailer of the reclassification of the customer under this rule or of the distributor's decision to refuse the reclassification application (if any) by the customer or retailer.
  - The distributor must keep a record of the reclassification of the customer.
  - The reclassification takes effect on the date of notification of both the customer and the current retailer or on a later date specified in the notification.

The obligations proposed above correspond to obligations placed on distributors and retailers under the National Energy Customer Framework (rr.7-10 of the National Energy Retail Rules).

Question: Is there any reason why local regulations regarding classification and reclassification of customers should be substantively different to the National Energy Customer Framework model set out in rr.7-10 of the National Energy Retail Rules? Is the administrative burden associated with the classification and reclassification of customers reasonable?

#### 6.2.4 Referral of complaints and enquiries

To ensure that customer complaints and enquiries can be addressed promptly and by the appropriate entity, it is proposed that retailers and distributors will be subject to the following obligations.

- If a shared customer makes an enquiry or complaint to the distributor about a matter relating to the sale of energy, the distributor must:
  - refer the customer to the retailer's enquiry or complaint telephone number where practicable if the enquiry or complaint is made by telephone, or

- provide the retailer with the details of the enquiry of the complaint, including contact details of both the customer making the enquiry or complaint and the person who received the enquiry or complaint, as soon as practicable but no later than the next business day after receiving the enquiry or complaint,.
- The retailer must respond to an enquiry promptly and resolve a complaint promptly and in accordance with its standard complaints and dispute resolution procedures.
- The distributor must provide to the retailer on request copies of any documents or written records (including in electronic format) relating to an enquiry or complaint and provide any other assistance reasonably requested by the retailer for the purpose of responding to an enquiry or resolving a complaint.
- If a person makes an enquiry or complaint to a retailer about a problem relating to a distribution system or customer connection services (other than a fault, an emergency, a planned interruption or an unplanned interruption), the retailer must:
  - if the enquiry or complaint is made by telephone, refer the person to the relevant distributor’s enquiry or complaints telephone number where practicable, or
  - otherwise, as soon as practicable but no later than the next business day after receiving the enquiry or complaint, provide the relevant distributor with the details of the enquiry or the complaint, including contact details of both the person making the enquiry or complaint and the person who received the enquiry or complaint.
- If a retailer requests a distributor to provide information about a shared customer’s energy consumption, the distributor must use its best endeavours to provide the information to the retailer at no cost and in a timely manner to allow the retailer to carry out its obligations to provide information to its customer.
- The distributor must respond to an enquiry promptly and resolve a complaint promptly and in accordance with its standard complaints and dispute resolution procedures.
- The retailer must provide to the distributor on request copies of any documents or written records (including in electronic format) relating to an enquiry or complaint and provide any other assistance reasonably requested by the distributor for the purpose of responding to an enquiry or resolving a complaint.

The obligations proposed above correspond to obligations placed on distributors and retailers under the National Energy Customer Framework (rr.101-102 of the National Energy Retail Rules).

To a small extent, the proposed obligations above overlap (but are not inconsistent with) with requirements on retailers and distributors in relation to small use customers under Part 12 of the Customer Code.<sup>32</sup> However, the Customer Code and the proposed provisions differ in their scope of application. The Customer Code applies in relation to all small use customers, whereas the proposed provisions would apply to all shared customers (regardless of size).

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<sup>32</sup> Part 12 sets out maximum timeframes for retailers and distributors to respond to complaints. In addition, clause 12.4 states that when a retailer, distributor or electricity marketing agent receives a complaint that does not relate to its functions, it must advise the customer of the entity that the retailer, distributor or electricity marketing agent reasonably considers to be the appropriate entity to deal with the complaint (if known).

The Customer Code provision regarding the referral of complaints is not as prescriptive as the proposed requirement above, but its application is broader. It applies to electricity marketing agents as well as retailers and distributors, and requires that, if one of these entities receives a complaint that does not relate to its functions, it is to advise the customer of the appropriate entity to deal with the complaint (if known). It is considered that this provision can coexist with the proposed obligation for a retailer or distributor to refer a complaint to each other when that complaint relates to specific matters. If it is considered that the overlap between provisions will result in unnecessary complexity, the Customer Code provision could be amended to specifically exclude its application to complaints that must be referred under the new regulations.

The Customer Code provision regarding the timeframe for responding to complaints provides that customer complaints are responded to within a maximum time of 20 business days. It is appropriate that an obligation to respond to complaints from large customers be introduced as part of the implementation of the triangular model, as there will be a shared responsibility for resolving problems for customers under the new contracting model. However, it is not considered necessary to specify maximum timeframes for responding to complaints from large customers.

There is no intention to change the existing maximum timeframes for retailers and distributors to respond to complaints from small use customers under the Customer Code. It is considered that the existing Customer Code provisions can operate alongside the general requirement to respond to customer complaints 'promptly'. Alternatively, the new provision could be limited to large customers only.

Although some requirements regarding referral of complaints will be extended to large customers, there is no intent for the scope of the energy ombudsman scheme to be extended to complaints made by large customers.

Question: Is there any reason why local regulations regarding referral of enquiries and complaints should be substantively different to the National Energy Customer Framework model set out in rr. 101-102 of the National Energy Retail Rules? Is the overlap between the Customer Code and the proposed provisions adequately resolved?

### 6.2.5 Coordination of service standard payments

Part 14 of the Customer Code sets out service standard payments applicable to small use customers. Further, Part 3 of the Network Quality and Reliability Code sets out additional service standard payments applicable in relation to eligible customers.<sup>33</sup>

It is proposed that retailers and distributors be obliged to each use their best endeavours to provide each other, at no cost and in a timely manner, information or documentation that the other reasonably requires to carry out their obligations to allow a service standard payment to be made to the customer. This corresponds to the obligation placed on distributors and

<sup>33</sup> An 'eligible customer' in the context of Western Power's network is equivalent to a non-contestable retail customer.

retailers under the National Energy Customer Framework (r.84 of the National Energy Retail Rules).

Both the Customer Code (cl.14.7) and the Network Quality and Reliability Code (s.22) permit a distributor to make a service standard payment to a customer via the customer's retailer. This is not inconsistent with the mechanism under the National Energy Customer Framework, which requires that (where applicable) credits for service standard payments<sup>34</sup> are to be included in the statement of charges provided by a distributor to a retailer.

Question: Is there any reason why local regulations regarding coordination of service standard payments should be substantively different to the National Energy Customer Framework model set out in r.84 of the National Energy Retail Rules?

### 6.2.6 Coordination of de-energisations and re-energisations

Part 7 of the Customer Code sets out circumstances in which small use customers can be disconnected (or de-energised) and limitations to disconnection. Part 8 of that Code sets out circumstances in which small use customers must be reconnected (or re-energised).

To provide for communication and coordination between retailers and the distributor in relation to de-energisations and re-energisations of shared customers, it is proposed that retailers and distributors will be subject to the following obligations.

- If the distributor is entitled under applicable energy laws to refuse a retailer's request to de-energise a customer's premises, the distributor must promptly notify the retailer of its reasons for doing so.
- If the distributor is entitled under applicable energy laws to de-energise a customer's premises at the customer's request, the distributor must notify the retailer of the request as soon as practicable.
- If the distributor de-energises a customer's premises in accordance with applicable energy laws, the distributor must notify the retailer of the de-energisation and the reason for it, as soon as practicable, except where the de-energisation is as a result of the retailer's request.
- If a distributor is required to de-energise a customer's premises within the timeframes for de-energisation in accordance with a distributor service standard, and the distributor fails to do so, the distributor must (unless the failure is due to an act or omission of the customer or retailer):
  - waive any network charges applicable to the premises after the timeframes expire; and

<sup>34</sup> Under the National Energy Customer Framework, service standard payments are referred to as Guaranteed Service Level payments (GSL payments)

- pay charges for energy consumed at the premises after the timeframes expire, if the retailer has used all reasonable endeavours to recover the charges from the customer and has been unable to do so.
- If the retailer subsequently recovers from the customer all or any part of any amount that the distributor has waived or paid, the retailer must pay that recovered amount to the distributor.
- If, in accordance with applicable energy laws, the retailer is required to arrange for the re-energisation of a customer's premises, the retailer and the distributor must deal with the request in accordance with those energy laws.

The obligations proposed above correspond to obligations placed on distributors and retailers under the National Energy Customer Framework (rr.103-106 of the National Energy Retail Rules).

The potential adoption of the new national metering framework under Chapter 7 of the National Electricity Rules is still subject to a future decision of Government. If the framework for metering competition (including the ability for retailers to initiate remote de-energisations) is adopted, local regulations may need to incorporate further interactions and requirements regarding re-energisations and de-energisations arising from metering competition. These changes to local regulations would be expected to correspond to the changes to be implemented by the National Energy Retail Amendment (Expanding competition in metering and related services) Rule 2015 No. 1<sup>35</sup>, subject to any derogations to reflect local circumstances.

Question: Is there any reason why local regulations regarding coordination of de-energisations and re-energisations should be substantively different to the National Energy Customer Framework model set out in rr.103-106 of the National Energy Retail Rules?

### 6.2.7 Mutual indemnification

To support the appropriate allocation of risk between retailers and distributors, it is proposed that retailers and distributors will be obliged to mutually indemnify each other in certain circumstances:

- Subject to any applicable laws, if a shared customer seeks to recover any loss or damage by action against a retailer in a court of competent jurisdiction, the distributor:
  - indemnifies the retailer to the extent that the damage suffered by the customer arises from the act or omission of the distributor; but
  - does so only to the extent that the act or omission arises from the negligence or breach of statutory duty of the distributor, its servants or agents or involves bad faith on the part of the distributor or its servants or agents.

<sup>35</sup> Available from the Australian Energy Market Commission website, <http://aemc.gov.au/getattachment/b5afe9e5-e0b6-4baf-abf1-7e87b9639586/Final-Rule---NERR.aspx>

- Subject to any applicable laws, if a shared customer seeks to recover any loss or damage by action against a distributor in a court of competent jurisdiction, the retailer:
  - indemnifies the distributor to the extent that the damage suffered by the customer arises from the act or omission of the retailer; but
  - does so only to the extent that the act or omission arises from the negligence or breach of statutory duty of the retailer, its servants or agents or involves bad faith on the part of the retailer or its servants or agents.

The obligations proposed above correspond to obligations placed on distributors and retailers under the National Energy Customer Framework (s.317 of the National Energy Retail Law).

Question: Is there any reason why local regulations regarding mutual indemnification should be substantively different to the National Energy Customer Framework model set out in s.317 of the National Energy Retail Law?

### 6.2.8 Billing arrangements

At the same time as the contractual relationship between the distributor and retailer for the provision of network services falls away and the contractual relationship between the distributor and customers is put in place, new provisions will need to be established for the passing through of network charges via the retailer.

It is proposed that these provisions will be modelled on Part A of Chapter 6B of the National Electricity Rules and include the following elements:

- an obligation for retailers to pay network charges in respect of shared customers to the distributor;
- the ability for a distributor and certain shared customers to agree that the customer will be responsible for paying network charges directly to the distributor, and removing the liability for a retailer to pay network charges for shared customers under this arrangement;
- an obligation for a distributor to provide a statement of network charges to a retailer, and prescribe matters that must be included in a statement of charges;
- the due date for a retailer to pay network charges to a distributor and the manner in which payment is to be made;
- arrangements for adjustments of network charges in a subsequent statement of charges;
- arrangements to review and communicate which network tariff is applicable to a shared customer;
- arrangements to manage disputed statements of charge;
- provisions for distributors to charge retailers interest on amounts unpaid after the due date; and

- communication obligations regarding changes to network charges.

As discussed further in Appendix A, it would be inefficient for distributors to duplicate the billing systems that retailers already maintain. Instead, it will be more practical for the costs of network services to continue to be recovered by retailers on behalf of distributors. In early stakeholder consultations, it has been argued that retailers should be able to charge distributors for this service. However, it is proposed that retailers would not be able to charge distributors for the costs associated with billing customers for network services, but would instead continue to recover this and other costs from customers.

The design and operation of efficient billing systems should be a core competency of retailers and billing forms an important retail operating cost that retailers should be competing to minimise. Customers will ultimately be liable for billing costs regardless and it is important that they bear the billing costs of their specific retailer (rather than the average billing costs of all retailers), otherwise there can be no competition between retailers to reduce these costs.

This rationale also applies to retailers providing information, assistance and cooperation to distributors at no charge.

Question: Is there any reason why local regulations regarding billing arrangements should be substantively different to the National Energy Customer Framework model set out in Part A of Chapter 6B of the National Electricity Rules?

### 6.2.9 Credit support

Under the triangular model, retailers will be responsible for recouping network access charges from customers, much as they are today. This means that there needs to be a suitable framework to allocate and manage the risks of a retailer default on payment of network charges.

In the event of a retailer default, a distributor's revenue falls as network charges are not being recovered via that retailer. This may cause an immediate cash flow problem, if the retailer defaulting is sufficiently large, and it results in reduced revenue for the distributor until the retailer default is resolved. Ultimately, if distributors are able to pass on any unrecovered costs through network tariffs, then the risk of a retailer default is borne by customers.

A credit support regime is intended to ensure distributors can recover their costs, even where a retailer is failing to pay its bills. Credit support provided to the distributor typically takes the form of a bank guarantee, cash or parent company guarantee for which the retailer will pay a fee. The cost of the guarantee will depend on the level of credit support required. In both Western Australia (under Electricity Transfer Access Contracts and Network Access Agreements) and National Electricity Market jurisdictions (under Chapter 6B of the National Electricity Rules) there are provisions for distributors to seek credit support from retailers for network charges incurred by the retailers' end-use customers.

It is expected that retailers will build the costs of obtaining and providing credit support into their pricing. To advance the interests of consumers, the costs of a credit support regime need to be balanced against the risks associated with a retailer default on network charges.

### *Potential changes to the mechanisms for managing retailer default in the National Electricity Market*

Concerns have been raised in the National Electricity Market regarding the mechanisms to manage the risks of a retailer default, resulting in the National Electricity Amendment (Distributor-retailer Credit Support Requirements) Rule 2015.<sup>36</sup>

The Australian Energy Market Commission is currently considering options regarding mechanisms to manage the risks faced by distributors and their customers associated with retailer default. These options include strengthening the existing credit support arrangements and the retailer insolvency cost pass-through provisions in the National Electricity Rules. Other options are also being considered which, if adopted, could replace the credit support regime. These include the establishment of a retailer default fund or the introduction of a liquidity support scheme for the distributor.

The Australian Energy Market Commission is due to release a draft determination and (if applicable) a draft rule by 28 July 2016. This means that the Western Australian regulations governing the distributor-retailer relationship are being progressed while there is uncertainty regarding the credit support regime in the National Energy Customer Framework.

### *Proposed regulations for the WA distributor-retailer relationship*

It is proposed that regulations will set out a credit support regime to manage the risk of a retailer default. It is proposed that the administrative framework for imposing that credit support regime will be modelled on Rule 6B.B2.1, Divisions 1, 4 and 5 of Part B, Chapter 6B and Schedule 6B.2 of the National Electricity Rules.

At a high level, the proposed administrative framework will include the following:

- the ability for a distributor to require a retailer to provide credit support in accordance with the regulations, up to the required credit support amount;
- an obligation for retailers to provide credit support in accordance with these regulations, on request by a distributor;
- acceptable forms of credit support;
- arrangements for the provision of credit support in the event of a dispute;
- requirements for topping up, reducing, applying and returning credit support; and
- the prescription of a form of unconditional undertaking for credit support.

Recognising the uncertainty regarding potential changes to the Chapter 6B credit support regime, a separate policy development and consultation process will be undertaken regarding suitable mechanisms for managing the risk of retailer default in a Western Australian context, including the amount of credit support to require from retailers. It will take

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<sup>36</sup> Available at <http://www.aemc.gov.au/Rule-Changes/Distributor-retailer-Credit-Support-Requirements>

into account developments in the Australian Energy Market Commission rule change process, but may need to be undertaken before the Australian Energy Market Commission's final determination on the National Electricity Amendment (Distributor-retailer Credit Support Requirements) Rule 2015.

Matters for later policy development and consultation will include:

- formulae for calculating a retailer's required credit support amount (with or without a guarantor);
- rules for determining a retailer's applicable credit rating; and
- circumstances under which no credit allowance will be granted to a retailer.

These matters for later policy development and consultation correspond to the remaining sections of Part B of Chapter 6B and Schedule 6B.1 of the National Electricity Rules.

Question: Is there any reason why local regulations regarding the administrative framework for credit support should be substantively different to the National Energy Customer Framework model set out in Rule 6B.B2.1, Divisions 1, 4 and 5 of Part B of Chapter 6B and Schedule 6B.2 of the National Electricity Rules?

### *Managing a retailer failure*

A distributor must have the ability to recover the cost of providing network services to customers. Under the triangular model, those costs will be predominantly – and in the case of small customers, exclusively – recovered via the customer's retailer. Thus, the failure of a retailer would result in the removal of the mechanism for cost recovery from customers.

It is clearly not a satisfactory outcome for a distributor to stop providing network services to customers whose retailer has failed. Therefore, a mechanism is needed to provide the financial machinery by which a distributor is able to recover the costs of providing network services in the event of a retailer failure. Such a mechanism is needed to complete the contractual framework by providing for continuity of cost recovery.

In the National Electricity Market, the retailer of last resort scheme provides this mechanism. A retailer of last resort scheme provides for the transfer of the failed retailer's customers to one or more other retailers (designated retailers of last resort). It also manages the establishment of associated contractual and regulatory relationships and places obligations on relevant parties to facilitate the operation of the retailer of last resort scheme.

Western Australia already has the legislative heads of power for a retailer of last resort regime<sup>37</sup> to be prescribed, and Synergy is designated as the retailer of last resort for the South West Interconnected System in the absence of any other retailer of last resort designation. However, the local retailer of last resort scheme is incomplete as there are no regulations under the legislative heads of power that provide for retailer of last resort arrangements, and there is not an approved last resort supply plan for Synergy to follow in

<sup>37</sup> The Electricity Industry Act uses the term 'Supplier of Last Resort' rather than 'Retailer of Last Resort', but the broad purpose of the regime is the same.

the event of a retailer failure. As a result, it would likely take materially longer to work through a retailer failure in Western Australia than in the National Electricity Market.

This in turn, means a retailer failure may result in an increased exposure for the distributor, as the situation of default on network charges may last for months longer than would be case if there were a well-functioning retailer of last resort scheme and customers were promptly transferred to one or more alternative retailers. As such, Western Power could have a proportionally higher exposure in the event of a retailer failure than a distributor facing an equivalent situation in the National Electricity Market.

A functioning retailer of last resort regime will also become more important when the electricity retail market becomes fully contestable. As retailers other than Synergy enter the small use electricity market, households and small businesses will become exposed to the risk of a potential retailer failure. In the absence of a well-functioning retailer of last resort regime, the problems associated with a retailer failure will be exacerbated by the greater numbers of small use customers and the lower average level of customer knowledge of the electricity sector within that customer segment. Further, a higher degree of competition in the market will likely result in a higher level of risk exposure associated with retailer default for Western Power, as a higher proportion of network charges are recovered via retailers other than Synergy.

Consultation on potential strengthening of the local retailer of last resort arrangements will be undertaken later in 2016.

#### **6.2.10 Resolution of disputes concerning billing or credit support**

Chapter 8 of the National Electricity Rules sets out a dispute resolution framework for the National Electricity Rules. Under the National Energy Customer Framework, disputes initiated by retailers regarding:

- amounts set out in a statement of charges from a distributor to a retailer; or
- the distributor's entitlement to the credit support provided by the retailer, in whole or in part,

may be resolved under the Chapter 8 dispute resolution framework.

Since the distributor-retailer billing and credit support provisions will be contained in local legislation, it will not be possible to use the Chapter 8 dispute resolution process for disputes relating to these matters.

An alternative to the Chapter 8 dispute resolution process that can be applied to local provisions is prescribing that disputes be conducted in accordance with the processes and procedures of the *Commercial Arbitration Act 2012*.<sup>38</sup>

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<sup>38</sup> As part of the broader suite of Electricity Market Review reforms, disputes that are currently referred to the Energy Disputes Arbitrator will in the future be conducted in accordance with the processes and procedures of the *Commercial Arbitration Act 2012*.

Question: Do you consider that the Commercial Arbitration Act is a suitable framework for managing disputes regarding billing and credit support?

## 7. Role of Local Regulator

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It is intended that the Economic Regulation Authority would perform the new and existing functions of the local regulator and would regulate the relationships within the triangular model through the licensing regime. It appears that, provided the new parts to the Electricity Industry Act are suitably linked to the licensing regime, granting the Authority the power to perform these new functions and recover the associated cost can be achieved through regulation on the basis of section 25 of the *Economic Regulation Authority Act 2003*.

It is proposed that the Authority will perform the following functions:

- monitor and enforce compliance with the requirements on the distributor and retailers arising from the implementation of the triangular model through the licensing regime;
- recover the costs of these new functions under the licensing regime. It is intended that these costs will be recovered in the same manner as existing licence fees; and
- be conferred the power to approve distributor deemed ongoing supply contracts.

It is intended that the Authority will have the same remedies available to it for enforcing compliance as it does for other aspects of the licensing regime.<sup>39</sup> These include:

- Issuing a notice requiring the licensee to rectify the contravention within a specified period.
- If the licensee fails to comply with such a notice, the Authority may:
  - serve a letter of reprimand;
  - order the licensee to pay a monetary penalty not exceeding \$100,000; and/or
  - cause the contravention to be rectified to the satisfaction of the Authority.

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<sup>39</sup> See Part 2, Division 6 of the *Electricity Industry Act 2004*.

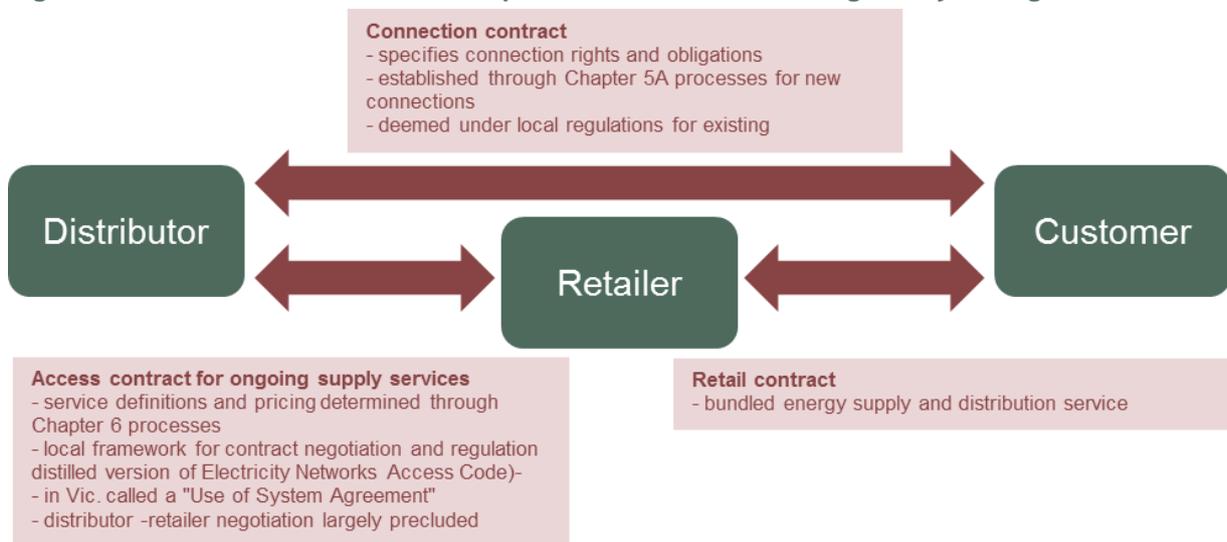
## Appendix A : Alternative contracting models

### A.1 A modified linear model

It would be possible to retain a linear contracting model in the South West Interconnected System, by modifying the regulatory scheme to allow the contracting framework to operate in conjunction with the national network regulation arrangements. This model would be similar to the arrangements that will apply in Victoria.

As illustrated in Figure A.1 for distribution services, this modified linear model would involve shifting any ongoing rights and obligations relating to connections (though not ongoing supply services) into a separate contract between the distributor and customer. Ongoing supply services would be defined and priced under Chapter 6 of the National Electricity Rules. However, these ongoing supply services (as distinct from the connection services) would be supplied under access contracts between retailers and the distributor and then on-supplied to customers under retail contracts.

Figure A.1: Linear model modified to operate with new network regulatory arrangements



The name 'modified triangular' model might be equally accurate in describing this form of contracting arrangement. The provision of connection services follows a triangular configuration with the distributor servicing the customer directly (with some degree of retailer coordination), while the provision of ongoing supply services is linear.

#### A.1.1 Regulatory risk and consistency

The modified linear approach would involve similar levels of regulatory cost and complexity to the triangular model, in that it would involve material regulatory changes and a need for a customised framework. Just as implementing the triangular model would benefit from the National Energy Customer Framework as a guide to the components required, the modified linear approach could use the Victorian example as guide. However, in both instances, considerable work would be required to ensure a workable integration with retained local regulatory and newly adopted national arrangements.

Consistency with the Victorian framework would provide some benefit, if a modified linear model was adopted, since a large number of electricity retailers compete in that market.

Conversely the modified linear approach would lead to somewhat higher barriers for new entrant retailers from National Energy Customer Framework jurisdictions.

### **A.1.2 Regulatory overlap**

The regulation of the contract between the distributor and retailer requires that a distinction be drawn between those matters relevant to economic regulation (which would fall under the revenue determination processes) and other matters (which could be regulated by the local regulator). Since practically all terms of the contract could be argued to have some consequence for the cost of running the business, the possibility exists that the distinction must be drawn arbitrarily.

It is likely that Western Power would regard the terms of its contract for ongoing supply services to be fundamental to its revenue requirement and proposal. This would make the revenue determination process dependent on settling the terms of that contract. In turn this would constrain the ability of the local regulator to modify this contract, on account of its implications for revenue, which would be set by the Australian Energy Regulator for five year periods.

### **A.1.3 Flexibility**

It has been suggested that a modified linear approach could provide greater flexibility in negotiating network services. However, this does not appear to be the case, on account of the constraints on negotiation imposed by the national network regulation arrangements.

Under Chapter 6 of the National Electricity Rules, distribution network services are classified prior to determining the revenue controls that are to apply. Distribution services can be classified as negotiated services or as direct control services (which includes standard control services and alternate control services). Almost all of the services that market participants recognise as typical network services are classified as standard control services and once thus classified, these services are placed beyond negotiation.

This inability to negotiate network services raises an obvious question – what would remain to be negotiated within the locally regulated contract between the distributor and retailers? Most material commercial terms can be expected to have implications for the distributor's revenue requirement. Thus, to preserve the integrity of the Australian Energy Regulator's economic regulation of the distributor, the local scheme of regulation for ongoing supply contracts would need to largely preclude negotiation of contract terms. As a result, the theoretical benefit of retailers negotiating on behalf of customers would not be realised in practice.

Evidence for the proposition that there is little flexibility in the specification of the distributor-retailer contract under this modified linear model can be found in the fact that the default use of system agreements across all Victorian distributors are almost identical.<sup>40</sup> Moreover, it is reported to the Public Utilities Office that there is generally no scope for the negotiation of the use-of-system agreements offered by distributors in that State.

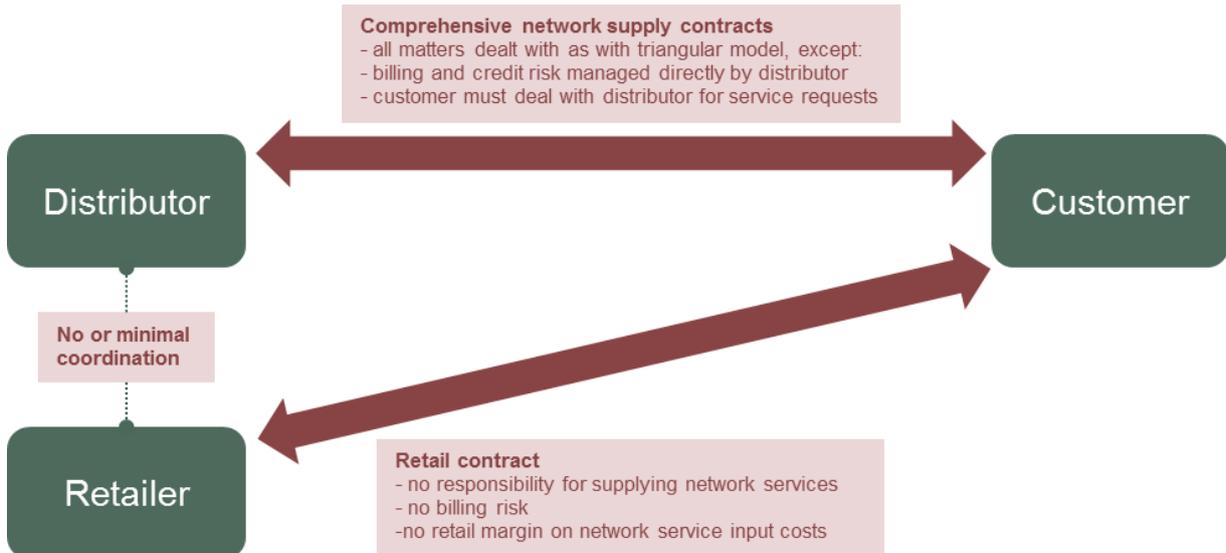
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<sup>40</sup> Published on the Essential Services Commission website, see <http://www.esc.vic.gov.au/energy/distribution/publications>.

## A.2 A dual linear model

The Public Utilities Office also considered a dual linear model that would entirely unbundle the distribution service from the retail product. As with the triangular model, customers would have a contract with their retailer for the supply of electricity and a separate contract with their distributor for ongoing supply services (Figure A.2). However, unlike the triangular model, the distributor would need to directly bill and liaise with customers on all network related service requests. As a result, the need for a coordinated relationship between the distributor and the retailer would largely disappear.

Figure A.2: Complete separation of retail and distributor relationships with customers



### A.2.1 Increased distributor – customer contact

Under this model, the distributor would develop a more direct relationship with customers, of which the direct billing would be the clearest example. This could give rise to new opportunities to engage with customers in relation to managing their load and compliance with technical obligations. Moreover, the capacity for more active customer engagement could lead to opportunities in the delivery of competitive services – for instance battery-related products or even services unconnected with electricity supply. To the extent that distributors were permitted to engage in such commercial interactions with customers, those activities may need to be ring-fenced from its network service provision activities.

### A.2.2 Duplication

#### *Billing systems*

Implementing this model would require the distributor to invest in customer-facing systems and capabilities, such as billing systems. This involves a costly and inefficient duplication of systems and capabilities that already exist within retailers and the associated costs would ultimately be recovered from customers. The development of these customer-facing systems would likely have some off-setting benefits in terms of the distributor's ability to manage its relationships with customers and improve customer service and experience.

#### *Credit risk and hardship customer management*

If the distributor was made directly responsible for billing, it would take all commercial risks associated with the provision of network services. Under this model the distributor would no

longer require credit support from retailers, since it would assume customer credit risk in respect of network changes. Distributors would need to develop the capability to assess and manage those risks. There would also be associated obligations, such as the need to develop a hardship policy and work with customers experiencing difficulties in paying network charges (e.g. to agree payment plans).

The capabilities to assess and manage credit risks and to identify and support hardship customers already exist within retailers. As with the duplication of billing systems, the duplication of these capabilities within distributors would be costly and potentially inefficient. Further, distributors would require a regulated return to account for this risk, just as retailers expect to be compensated within their margin on sales for the risk of delayed payments or bad debts.

### **A.2.3 Retailer no longer charges for network services**

Retailers would no longer be using their billing systems, extending their credit and taking risks on that credit for purposes of the network services component of electricity supply. As the distributor took on these responsibilities, the cost base would expand as a result of system duplication, but the revenue base would not, since consumers could not be expected to pay twice for billing and credit costs relating to network services. Retailers, consequently, would no longer be able to earn a margin on this component of the electricity cost stack.

### **A.2.4 Increase in complexity for customers**

Under this dual linear model, customers would have entirely separate relationships between retailers and distributors, including separate bills from each. This results in an additional administrative burden for electricity customers, as well as an increase in complexity and confusion. When customers experience difficulties in paying a bill, they may make a decision about whether they prioritise paying their retail bill over their network charges, or vice versa. The consequences of choosing to prioritise one over the other may not be clear to the consumer, particularly if the distributor and retailer have different hardship policies, a different willingness to negotiate a payment plan, or a different approach and timeframes for taking further action against the customer for non-payment (such as de-energisation).

## Disclaimer

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