



**A Report to the Energy Users Association
of Australia**

Review of Electricity Connection Agreements in the NEM

August 2008

TABLE OF CONTENTS

1	INTRODUCTION	1
1.1	Energy Users Association of Australia	1
1.2	Scope of the Review	1
1.3	Methodology	1
2	ANALYSIS	2
2.1	General Observations	2
2.2	Comparison of Key Elements and Common Clauses	3
3	CONCLUSIONS & RECOMMENDATIONS	6
3.1	Comparison of the Key Elements of Each of the Agreements	6
3.2	Selection of 'Best Practice' Elements or Clauses	6
3.3	Catering for Different Service Level Requirements	6
3.4	Commentary on MCE Recommendations for the Development of a National Framework for Distribution Network Connection	7
3.5	Recommendations	7

Appendices

Appendix 1 Guaranteed Service Level Clause from CitiPower's Standard Connection Agreement

1 INTRODUCTION

1.1 Energy Users Association of Australia

The Energy Users Association of Australia (EUAA) is an association of major electricity users across the National Electricity Market and was formed to represent the collective interests of its members in addressing common issues and areas of interest. The EUAA is a non-profit organisation funded by membership fees, internally generated revenue and external funds. It is focused entirely on energy issues. Members determine EUAA policy and direction. The Association's members are business users of energy with activities across all states and many sectors of the economy. It has in excess of 100 members, including many of Australia's largest energy users.

The EUAA covers national and State issues dealing with electricity and gas, as well as greenhouse and energy efficiency. The organisation seeks to represent its member's views and concerns in relation to all of these aspects of energy supply and usage and it has been active in ensuring that members' interests are protected and profiled in relation to electricity supply across the National Electricity Market.

This report has been produced in response to an enquiry from EUAA about connection agreements, standards used in typical agreements and how agreements could be modified to better suit the interests of its members. This follows issues raised by EUAA members in relation to such agreements over a number of years and also an initial report from Evans & Peck to the EUAA that examined network connection issues in Queensland in some detail¹.

1.2 Scope of the Review

As an extension to its report on the "Review of Network Connection Arrangements for Large Electricity Users in Queensland", Evans & Peck (E&P) has been engaged by the EUAA to review Standard Connection Agreements currently being used across the National Electricity Market (NEM) and carry out the following analysis.

- Desktop review of the connection agreements that have been deemed to be in operation, or are otherwise used, in each of the NEM states;
- Comparison of the key elements of each of the agreements, indicating whether particular clauses are user-unfriendly, relative to other contracts being used;
- Indication of the variable elements of each of the agreements, and a assessment of the way that any lack of variability or customization could be addressed to meet the needs of individual users;
- Selection of 'best practice' elements or clauses from the contracts that were studied;
- Recommendation about the way that contracts could be reformatted into a more user-friendly format;
- Detailing the process through which each of the standard agreements could be amended or revised;
- Commentary on additional / optional clauses that could be included to cater for differentiated service level provision
- The way that 'no liability' performance reporting could be built into the relationship.

1.3 Methodology

Evans & Peck have put together an analysis of Connection agreements from the following Distribution Companies:

- Energex
- Ergon
- Integral Energy

¹ Reference paper entitled "Queensland Connection Agreement Review (Jan 07)" at the EUAA Web Site <http://www.euaa.com.au/publications/papers/index.htm>

- Energy Australia
- Country Energy
- Powercor
- CitiPower

The analysis set out in this report follows from the review of each clause of those contracts and assists in identification of differences and areas where improvements could be made.

2 ANALYSIS

2.1 General Observations

2.1.1 Access to Standard Connection Agreements

The first issue for E&P was the difficulty in identifying the relevant contracts with each of the Distribution Companies and then getting a copy of each contract. E&P went through the same series of contacts that a new customer would have to go through and more often than not those contacts were not able to quickly identify if they had a Standard Connection Contract available to respond to an enquiry or specifically what document was being sought even though the "standard connection agreement" was being asked for by name. E&P were even sometimes sent the wrong agreements which on more than one occasion turned out to be a standard "Retail Agreement".

This is an issue that needs to be addressed by the Distribution Companies through Standard Connection Agreements being clearly labelled and made available on the Distributor's web site. At the present time it appears that, until a potential connection customer is assigned a customer officer they can expect little assistance in managing a new connection.

2.1.2 Legal Risk Allocation

An initial assessment of each of the contracts demonstrates that the agreements have all been prepared by the Distributor's lawyers as they are written to protect and place the Distributor in the best position in terms of risk allocation and commercial protection. Whilst this is not unreasonable for a starting position for the Distributors, it makes it difficult to get to a balanced agreement.

Some examples of such clauses are:

- The contractual management of Maximum Connection Capacity (which is treated similarly in most agreements) where the customer takes on total risk of exceeding the Max Capacity and the onus is on them to make application for an increase in Max Capacity prior to any such event occurring or suffer disconnection. All upgrade costs are at the customer's cost. Although the need to manage the issue is recognised, a more balanced legal wording is considered appropriate where the Customer could perhaps take on a progressively more onerous obligation to advise of an increase.
- In relation to Distributor Liability, typical clauses require that distributors are only liable insofar as the TPA makes them liable and then they exclude or limit their liability to the maximum extent possible. They all specifically exclude indirect or consequential losses of the customer often even if they are negligent or breach the agreement. Normally, in contrast to this limitation, they expect the customer to indemnify them for the customer's negligence and/or breach of contract and include exposure to indirect and consequential losses of the Distributor.

It would be appropriate for EUAA on behalf of their members look at engaging a lawyer to prepare a contract draft that provides a balanced position and helps the customers either put an alternative on the table or have an alternative to discuss/negotiate with the distributor.

2.1.3 Focus on State issues

One of the other confusing issues is the different focus of the various jurisdictional agreements. For example, the NSW Standard Connection agreements provide a significant focus on the contestability for construction of connection assets and the consequential clauses that need to deal with standards of construction to ensure that quality of supply to other customers and health & safety are not compromised. By contrast the Queensland distributors all tend to follow the

Queensland Government guideline on the form of the agreement which does not explicitly address the possibility of connection asset construction by another party.

On a separate issue, the only standard connection agreement that appeared to explicitly recognise the possibility of an alternative "Negotiated Customer Connection Contract" was the agreement from Country Energy.

2.2 Comparison of Key Elements and Common Clauses

2.2.1 Contract Scope

There are a number of introductory clauses in each of the contracts reviewed that cover what is and what is not covered by the contracts. The common features are the inclusion of Customer Connection Services and the exclusion of Retail Services. Clauses also typically define requirements for the parties to comply with relevant legislation or codes, the Connection Point and Conditions for Connection.

The only real issues identified with these provisions are:

- The obligations imposed under a number of the arrangements for the management of Maximum Connection Capacity as discussed in 2.1.2 above. Specifically, there is a requirement that the customer:
 - must make a request for an upgrade to the connection if they anticipate that they may go over the Maximum Connection Capacity; and
 - if they do go over the maximum they may be disconnected and must, under these circumstances, indemnify the Distributor for any costs resulting from exceeding this maximum including indirect and consequential losses.

This obligation does not reflect a practical or balanced mechanism for managing such an issue.

E&P recommend taking a risk based approach to this issue and where the risk to the Distribution system is low, the requirement might be that the Distributor and Customer have a joint obligation to identify the exceedance (even if it is after the event) and agree on the process for rectifying the issue. A riskier situation might justify a requirement to request an upgrade to the connection if the customer anticipates that they may go over the Maximum Connection Capacity.

- The confusion created by the different inclusions and exclusions due to the different jurisdictional requirements or approaches.

2.2.2 Distributor Liability

The next major section of each of the contracts covers limitations on the Distributor's liability and addresses issues such as:

- A recognition of the requirement for the Distributor to comply with the Trade Practices legislation but the exclusion of any further liability or the limitation of any liability to the maximum extent possible;
- Typical clauses reflect that unless required by law or specifically set out in the contract, the Distributor gives no undertaking or warranty in respect of the quality of service or that the connection is fit for purpose;
- Typical clauses also limit the Distributors ultimate liability (after the exclusions made above) to providing replacement services or paying the cost of replacement services provided under the contract; and
- In all cases clauses exclude the Distributor's liability for any consequential or indirect losses that the customer might incur.

Whilst it is considered that this might be a common legal starting point in a negotiation where the parties have an equal capability to negotiate, in the situation where the Distributor (as a monopoly service provider) has most of the negotiating leverage, it does not reflect a balanced risk position. There are no similar limitations expressed in relation to customers' liabilities and, in fact, in most documents customers are required to accept the Distributor's right to recover consequential or indirect losses from the customer for a failure to comply with contract requirements.

2.2.3 Customer's Obligations

Typical contract requirements in this area are for the customer to:

- Provide the Distributor with access to the Customer's premises;
- Inform the Distributor if there are any changes materially affecting the connection or the customer's load;
- Maintain their electrical equipment such that it does not materially affect quality of supply to other connection customers; and
- Comply with (and do what is necessary for the Distributor to comply with) applicable legislation.

Other than the fact that the consequences of a breach of these provisions can lead to extensive exposure to losses and severe punitive penalties, these obligations are generally considered reasonable.

There does not appear to be any balanced requirement of the Distributor to communicate with or keep the customer informed of changes to the distribution system that might affect them such as the connection of new customers. Additionally, there are no stated obligations imposed the Distributor in relation to accessing the customer's premises. These are both typical of the imbalanced nature of the contract conditions.

2.2.4 Interruption to Supply

All contracts generally cover the right of the Distributor to interrupt supply under the following circumstances:

- In accordance with electricity legislation;
- In accordance with the agreed conditions of an applicable connection tariff;
- In order to avoid danger to life or property; and
- For planned maintenance of the distribution system.

Individual contracts also provide for interruptions as a result of:

- Unplanned maintenance resulting from unexpected failure of equipment (and particularly where this poses a threat to safety);
- In the case where load shedding is required (this is also covered under applicable electricity market rules); and
- To restore supply to the customer/ other customers.

A number of contracts specifically seek acknowledgement from the customer that quality and reliability of supply are subject to a variety of factors, some of which are outside the control of the Distributor and that under these circumstances interruption is permissible.

Most contracts make provision for the customer to register the premises if there are life support facilities at the premises.

E&P would see that all of these conditions of contract are reasonable but, from the point of view of a balanced agreement, would seek to have the contract cover subsequent issues such as:

- Compulsory notice periods of a reasonable length for planned interruptions with undertakings as to duration and notice of restoration;
- Obligations to keep interruptions due to planned maintenance under an agreed threshold;
- Obligations for the Distributor to notify the customer as early as is reasonably possible of the interruption to supply resulting from any of the other circumstances with an ongoing obligation to inform the customer of return to service expectations;
- Obligations to analyse interruptions (with feedback to the customer) with the aim of identifying any unacceptably frequent interruptions and an obligation to address any interruption mechanisms that exceed an agreed threshold.

A number of the agreements already include some form of provisions similar these that require the Distributor to provide the customer with relevant information in a timely way. However, even these need to be expanded to provide more of a balance. For example, the Standard Energen agreement requires that they will provide the customer with 2 days notice of a planned interruption while the Citipower agreement provides for 4 days notice of the planned interruption, including an estimate

of the return to service time and a “best endeavours” undertaking to complete the work in a timely way.

2.2.5 Charges, Billing, Security Deposit, Notices and Dispute Resolution

The next major section analysed for each of the contracts covers charging, billing, provision of a security deposit, notices and dispute resolution mechanisms.

Charges and Billing covers the application of any connection charges, whether they are paid direct by the customer or are charged through the retailer, the methodology for determining the charges, charge variation processes/mechanisms, billing and payment arrangements and charge/billing dispute processes.

Security Deposits are a feature of each of the contracts and separate clauses set out the requirements for security deposits, the mechanism for determining the amount of any security deposit, the form of the security deposit, increases, interest and use of the security deposit.

Complaints handling and other disputes are generally managed in accordance with Australian Standards or similar in-house processes.

Without commenting on the reasonableness of charges, E&P is of the view that all of these clauses represent standard provisions of any such contracts and very few changes would be required to provide balance to the documents.

2.2.6 Guaranteed Service Levels

A number of the contracts specifically refer to Guaranteed Service Levels or Standards of Service, however most of these clauses tended to either:

- refer to minor commitment failures like being late for a scheduled appointment; or
- keep performance commitments to simple undertakings like a requirement to use reasonable endeavours to resolve issues.

These levels of commitments are relatively ineffective when it comes to larger electricity customers and don't provide incentives to the Distributor that reflect the impact on the customer.

In one or two of the contracts analysed, there were a number of more specific undertakings/guarantees in relation to failure to supply the connection services at the specified time, supply restoration payments for failure to restore supply within a specified time or low reliability payments if there are more than a certain number of interruptions. Each of these specific undertakings appears to include appropriate protections for the Distributor where the fault or interruption is outside the Distributor's control. However, the greatest protection is the relatively small payments (\$50 - \$80 per occurrence) that are tied to each of these guarantees. The best example of these types of guarantees was found in the CitiPower contract and the particular clauses have been included in Attachment 1 to this report.

3 CONCLUSIONS & RECOMMENDATIONS

Following the desktop review of the available Standard Connection Agreements used by various Distribution companies across the NEM, Evans & Peck have developed the following conclusions and recommendations in response to the specific questions raised by the Energy Users Association of Australia.

3.1 Comparison of the Key Elements of Each of the Agreements

From a broad perspective, each of the agreements analysed included clauses that covered similar issues. This is not surprising since each has obviously been developed with reference to legal advice that should ensure coverage of all essential issues.

There are a number of major differences in approach but these are essentially linked to different jurisdictional approaches such as the obvious NSW requirement that the construction of connection assets be contestable.

All contracts have obviously been prepared based on legal advice sought by the Distribution companies and all reflect the issues from the Distributor's point of view and only tend to address their risks. The contracts reflect a typical legalistic style (ie not "plain English") but are probably suitable for the more legally sophisticated large electricity consumers.

Evans & Peck conclude that it would be relatively easy to develop a single National Standard Connection Agreement that would cover all the key issues set out in current agreements used by individual Distributors. It is proposed that under such a National standard, specific jurisdictional issues, technical requirements or regulated requirements could be addressed in separate appendices to the overarching document. These appendices could be called up as necessary.

3.2 Selection of 'Best Practice' Elements or Clauses

Whilst this review is not specifically attempting to undertake the identification or selection of 'Best Practice' elements (from the point of view of a large connection customer), the review did identify that there were a significant number of clauses from various agreements that could be used as the basis of a single National standardised agreement.

However, it is specifically concluded that in order to produce a standard connection agreement that provides a balanced position on each of the issues, there are a number of additional clauses that would need to be developed for the purpose of allocating risks more appropriately

3.3 Catering for Different Service Level Requirements

In order to cater for differentiated service level provision for particular Connection Customers, it would be desirable to develop a series of optional "service level" and "performance guarantee" clauses that address different performance requirements, different "failure to perform" consequences and different performance level cost implications for the Connection assets. Evans & Peck envisage that with such clauses being available, the parties would be able to choose from a range of clauses to tailor an agreement to meet the particular requirements of the customer and the consequential needs of the Distributor.

In a previous report of our review of connection arrangements in Queensland, Evans & Peck identified the possibility of adopting a 'no liability' performance reporting arrangement as an initial step towards the development of service level undertakings. In recommending such an arrangement, Evans & Peck were recognising that it is not strictly necessary to expose Distributors to the consequences of a failure to supply or reinstate a connection in order to provide them with an incentive to perform. A simple reporting mechanism that allows both parties to identify and analyse the impact of these events on each other can be an important first step until the risks can be accurately quantified. This 'no liability' performance reporting arrangement could be introduced as an initial step in the identification of the range of clauses proposed as part of this Service Level performance proposal.

3.4 Commentary on MCE Recommendations for the Development of a National Framework for Distribution Network Connection

As part of this review, the report prepared for the Ministerial Council on Energy (MCE) by the Allen Consulting Group and NERA Economic Consulting was reviewed along with some of the responses received about this report.

The conclusion of the report (in respect of connection applications and agreements) was a recommendation to adopt a simpler process that provided an opportunity for a Connection Applicant to either accept a Standard Contract or head down a Negotiated Contract path.

The main objections raised by Distribution entities to this proposal seemed to focus on:

- The need to cater for differing technical (and commercial) requirements in each jurisdiction;
- The complexity and suitability of the proposed Negotiation Process to provide acceptable outcomes; and
- The need for the Distributors to meet the resourcing demands of such a process.

Following this review, Evans & peck suggest that there could be an effective third alternative to establish new connection arrangements that would be facilitated by the development of a Single National Standard Connection Arrangement that:

- Utilises the 'best practice' elements from the existing Standard Connection Agreements developed by individual Distributors;
- Incorporates specific jurisdictional requirements in separate Appendices that can be called up from the main document if required;
- Provides additional clauses that result in a more balanced agreement in terms of effective risk allocation and treatment; and
- Provides a selection of additional alternative clauses from which the parties to the agreement can make a choice to provide for a tailoring of a suitable agreement for specific customers.

Such an agreement could address the customer's requirement for a more simplified and fair approach, the distributor's requirements to provide for differing jurisdictional approaches and the joint requirement to keep negotiations relatively simple by providing for some "guided tailoring" of the particular agreement between the parties.

3.5 Recommendations

The following recommendations are made in support of the conclusions set out above.

- EUAA should establish a facilitated working group of members that includes a legal advisor charged with the development of a Single Connection Agreement that;
 - reflects the 'best practice' clauses from existing agreements;
 - provides additional/redrafted clauses that result in the agreement having a balanced position on the allocation of risks; and
 - provides a range of clauses that identifies performance requirements for a broad selection of large electricity use customers (perhaps adopting a stepped approach by utilising a 'no liability' performance reporting requirement as the initial step).
- The working group should then be extended to include representatives from the Distribution organisations who can provide input into any subsequent asymmetry of risk allocation, specific requirements for jurisdictional requirements, and quantify the impact of the proposed service level clauses.
- EUAA should approach MCE in relation to this middle road concept in order to ascertain support for such an approach and to lobby for the adoption of such a Single National Connection Agreement.

Appendix 1 Guaranteed Service Level Clause from CitiPower's Standard Connection Agreement



7 GUARANTEED SERVICE LEVELS

7.1 Appointments

Where the *distributor* makes an appointment with the *customer*, if the *distributor* is more than 15 minutes late for the appointment, the *distributor* must pay the *customer* \$20.

7.2 Failure to supply

Where the *distributor* does not *supply* electricity to the *customer's supply address* on the day agreed with the *customer*, the *distributor* must pay to the *customer* \$50 for each day that it is late, up to a maximum of \$250.

7.3 Supply restoration and low reliability payments

7.3.1 The *distributor* must make a *supply restoration payment* of \$80 to the *customer* for each *interruption* in the *supply* of electricity to the *customer's supply address* which is not restored within 12 hours of the *interruption* first starting.

7.3.2 The *distributor* must make a low reliability payment of \$80 to:

- (a) the *customer* if it is *supplied* electricity through a *short rural feeder* or a *long rural feeder* and experiences more than 15 *interruptions*; and
- (b) if the *customer* is not *supplied* electricity through a *short rural feeder* or a *long rural feeder* and experiences more than 9 *interruptions*,

in the *supply* of electricity to the *customer's supply address* in any calendar year.

7.3.3 Despite clauses 7.3.1 and 7.3.2:

- (a) a *supply restoration payment* is not required to be made by the *distributor*:
 - (i) for a planned *interruption* effected with the prior agreement of the *customer*; or

- (ii) for an unplanned *interruption* which is not restored within the time specified in clause 6.3.1 at the request of the *customer*.

- (b) a planned *interruption* requested by the *customer* is not to be counted in determining whether a *low reliability payment* must be made by the *distributor*;

- (c) *momentary interruptions* are not to be counted in determining whether a *supply restoration payment* or a *low reliability payment* must be made by the *distributor*; and

- (d) in the 2001 calendar year *supply restoration payments* and *low reliability payments* are only required to be made to *customers* using less than 40MWh per annum and in subsequent calendar years only to *customers* using less than 160MWh per annum.

7.3.4 Also despite clauses 7.3.1 and 7.3.2, on application from the *distributor* the *Commission* will excuse the *distributor* from making a *supply restoration payment* or a *low reliability payment* if the *Commission* is satisfied that the obligation to make the payment arises from an *interruption* which relates to:

- (a) *load* shedding due to a shortfall in generation;

- (b) a failure of the shared transmission network;

- (c) a failure of a *transmission connection*, but only to the extent that the *interruption* is not due to inadequate planning of *transmission connections*; and

- (d) widespread *supply interruptions* due to rare events which are not reasonably able to be foreseen, but only to the extent that the *distributor* is not reasonably able to mitigate the impact of such *interruptions* on *customers*.