



ELECTRICITY INDUSTRY

GUIDELINE No. 5

CONNECTION AND USE OF SYSTEM AGREEMENTS

(Issued pursuant to section 12 of the Office of the Regulator-General Act 1994)

Office of the Regulator-General

ELECTRICITY INDUSTRY GUIDELINE No. 5

Enquiries concerning the currency of these Guidelines should be addressed to -

The Office of the Regulator-General
Level 1, 35 Spring Street
Melbourne. 3000
Telephone (03) 9651 0222, facsimile (03) 9651 3688

AMENDMENT RECORD

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GUIDELINE No. 5
CONNECTION AND USE OF SYSTEM AGREEMENTS
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GLOSSARY

Customer means a *customer* who is eligible to choose the retailer from whom it buys its electricity.

Distribution system means the system used to distribute electricity from the high-voltage *transmission grid* to a customer.

Distribution business means one of the following five businesses: CitiPower, Eastern Energy, Powercor, Solaris Power or United Energy. Each business has two components - a *wires business* (which operates under a distribution licence) and a retail arm (which operates under a retail licence).

Host distribution business means the *distribution business* conducting the *wires business* to which a customer is connected.

Host retailer means the retail arm of a customer's *host distribution business*.

Host wires business means the *wires business* of a customer's *host distribution business*.

Network tariffs are maximum charges regulated by the *Tariff Order* for the use of the *transmission grid* and *distribution systems*.

Retailer means a company which is licensed by the Office to sell electricity. A retailer may be a *host retailer* or a *third party retailer*.

Supply means the delivery of electricity and such related services as must, if provided, be provided within the Network Tariff as defined in the *Tariff Order*.

Supply point means a point where a supply of electricity last leaves a facility owned or operated by a *wires business* before being supplied to a customer. In most cases, the supply point is located near the meter. Other supply points include -

- a single set of the *wires business*' low voltage terminals;
- a single sub-station of the *wires business* (consisting of one or more transformers); or
- in the case of a high voltage supply, a single high voltage switchroom or other enclosure containing *wires business*' terminals.

However -

- there may be non-*wires business*' assets between the supply point and the place at which the customer takes supply (eg - a rising main in a high rise building);
- several customers may share a single supply point (eg - tenants in a high-rise building); and
- several meters for one customer may be associated with a supply point.

Tariff Order means the Order in Council, dated 20 June 1995, (as amended) regulating certain tariffs, charges and fees in the electricity supply industry, including distribution use of system charges or a distribution business' charges for providing, maintaining and operating its distribution system. A copy of the Tariff Order forms an appendix to the Office's *Electricity Industry Regulatory Statement*.

Third party retailer means a *retailer* other than a *host retailer*.

Transmission grid means the high-voltage grid used to transmit electricity from the generators to a *distribution system*. The grid is owned and maintained by PowerNet Victoria and operated by Victorian Power Exchange.

VicPool means the Victorian wholesale electricity market managed by Victorian Power Exchange, which trades as VPX.

Wires business means the component of a *distribution business* which distributes electricity from the *transmission grid* to customers across a *distribution system*. A wires business is operated under a distribution licence issued by the Office.

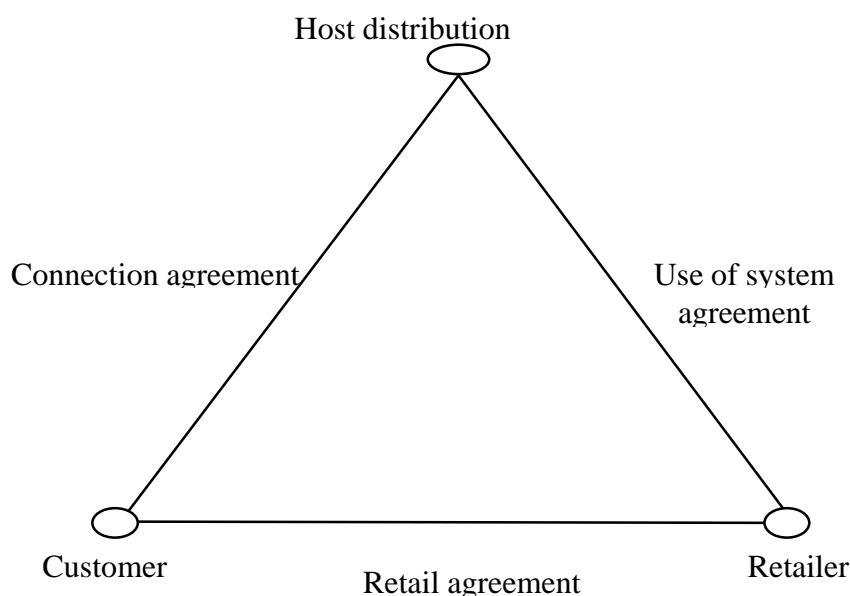
PART 1: EXECUTIVE SUMMARY

1.1. These guidelines outline principles, consistent with the regulatory regime and good electricity industry practice, against which the Office may decide whether connection or use of system agreements are fair and reasonable.

1.2. In the main, this guideline sets out principles only - distributors, retailers and customers are free to negotiate innovative variations based on these principles.

1.3. Connection and use of system agreements are an essential ingredient of a successful competitive electricity market.

1.4. The agreements together with the retail agreement form a contractual triangle between a host distribution business, on the one hand, and a retailer and a customer on the other.



1.5. This triangle exists, at least notionally, whether the customer buys energy from a host retailer or from an a third party retailer. The triangular nature of the contractual arrangements is not mandated - parties are free to negotiate the arrangement that best suits their needs. Customers who choose to contract only with their retailer are free to do so.

1.6. Where a customer buys through VicPool, the tripartite arrangement will be replaced by a bilateral arrangement between the customer and the host distribution business or, if the customer is directly connected to the high voltage transmission grid, a bilateral arrangement between the customer and PowerNet Victoria

1.7. While they involve separate concepts, connection and use of system agreements may appear in the same document.

PART 2: THE NATURE OF THE GUIDELINES

2.1. Authority

2.1.1. These guidelines are published by the Office pursuant to section 12 of the *Office of the Regulator-General Act 1994*.

2.2. Purpose

2.2.1. These guidelines are designed to assist distribution businesses, retailers and customers understand the principles upon which the Office will decide whether the terms and conditions of connection and use of system agreements are fair and reasonable.

2.2.2. These guidelines build on the work of the distribution businesses' Joint Use of System Committee. The Committee represented four of the five distribution businesses and consulted all licensed retailers in the process of developing the agreements. The objective of the Committee was to produce standard form connection and use of system agreements.

2.2.3. As the Office wishes to encourage innovation in the form of the agreements developed by the distribution businesses and retailers, it has not moved to endorse the Committee's standard agreements. Nevertheless, these guidelines and the clauses in the Committee's standard agreements provide a useful starting point and, in the Office's opinion, represent minimum criteria for negotiating individual connection and use of system agreements.

2.3. Consultation

2.3.1. These guidelines have been developed in consultation with the licensees and other interested parties having regard to, and for the purposes of achieving, the Office's objectives in section 7 of the *Office of the Regulator-General Act 1994* and section 157 of the *Electricity Industry Act 1993*.

2.4. The Office's objectives

2.4.1. The objectives of the Office under section 7 of the *Office of the Regulator-General Act 1994* are -

- *to promote competitive market conduct;*
- *to prevent misuse of monopoly or market power;*
- *to facilitate entry into the relevant market;*
- *to facilitate efficiency in regulated industries;*
- *to ensure that users and consumers benefit from competition and efficiency.*

2.4.2. The objectives of the Office under section 157 of the *Electricity Industry Act 1993* are -

- *to promote competition in the generation, supply and sale of electricity;*
- *to ensure the maintenance of an efficient and economic system for the generation, transmission, distribution, supply and sale of electricity;*
- *to protect the interests of consumers with respect to electricity prices and the safety, reliability and quality of electricity supply;*
- *to facilitate the maintenance of a financially viable electricity supply industry.*

2.5. Caveat

2.5.1. The Office must consider any issue on its merits when it arises having regard to the information then available to it.

2.5.2. Also, these guidelines necessarily summarise the relevant legislation and other documents which constitute the regulatory framework. As summaries only focus on some issues, industry participants should not rely solely on the summaries but should refer to the relevant legislation and other documents if they wish to gain a complete understanding of the issues to which the summaries refer.

2.5.3. Licensees and other interested parties may discuss with the Office the issues addressed in these guidelines as they may affect them.

2.6. Further information

2.6.1. Further information about the regulatory framework and the Office's approach to its administration of that framework may be obtained by reference to the Office's *Electricity Industry Regulatory Statement*.

2.7. A living document

2.7.1. These guidelines are a *living document* which will change to reflect the Office's experience of their application, changes in the regulatory framework (including developments at the national level as outlined in the *Electricity Industry Regulatory Statement*) and to accommodate their users' needs.

2.8. Related guidelines

2.8.1. These guidelines should be read in conjunction with the Office's *Electricity Industry Guideline No. 1: Access to, and use of, distribution systems, statements of approved charges and charges for other services* and, in particular, Part 3 of that guideline which canvasses the requirements imposed on a host distribution business to offer connection to, and use of, its distribution system.

2.9. Amendments

2.9.1. Suggestions for improvement to these Guidelines are welcome. Such suggestions should be addressed to -

The Office of the Regulator-General
Level 1
Spring Street
Melbourne. 3000
Facsimile (03) 9651 3688

PART 3: THE NATURE OF THE AGREEMENTS

3.1. Contractual triangle

3.1.1. Connection and use of system agreements reflect the physical path that electricity takes from a power station through a transmission grid, into a distribution system and, ultimately, to a supply point at the customer's electricity installation. The resulting commercial transactions may be summarised as follows.

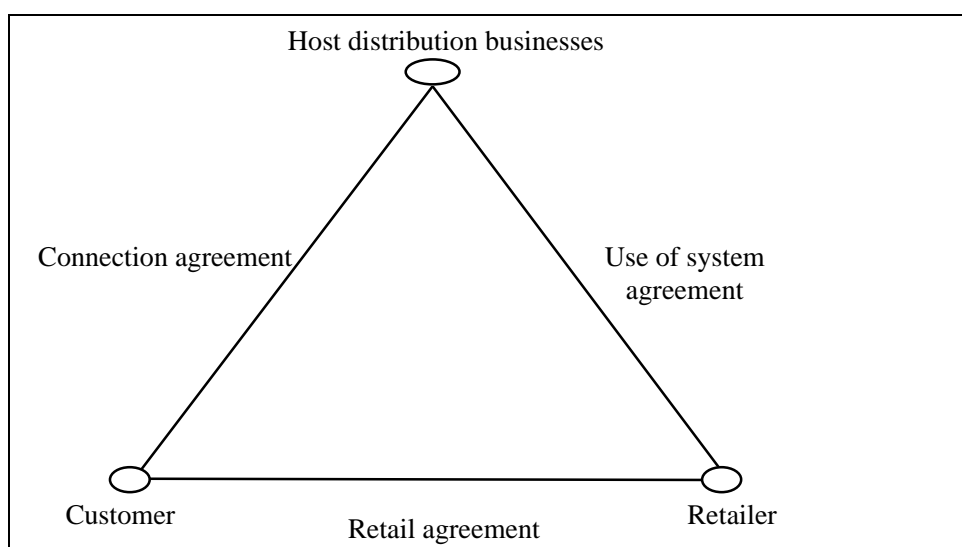
3.1.2. First, each person who wants to use a supply system to send or receive electricity must connect their system to the supply system they use for that purpose. As the various licences recognise, they may only do this if they have entered into an agreement with the owner of that supply system, for example, by way of a connection agreement between a host distribution business and customers connected to its distribution system.

3.1.3. Secondly, a retailer or a customer will make arrangements to buy electricity which will be supplied or delivered using the distributor's distribution system. Thus, there will be a use of system agreement between the retailer or the customer and the host distribution business for delivering the electricity across the host distribution business' system to the customer's premises.

3.1.4. A customer may choose to contract only with a retailer without having to negotiate a separate connection agreement with the distributor. In this case, the retailer will arrange the connection agreement with the distributor.

3.1.5. Finally, unless a customer is buying through VicPool, there will be a retail agreement between the customer and a retailer.

3.1.6. Ideally, connection and use of system agreements should be based on a fundamental principle that the legal agreements must be led by, and reflect, the physical and commercial world, not the other way around.



3.1.7. The connection and use of system agreements together with a retail agreement form a contractual triangle between a host distribution business, on the one hand, and a retailer and a customer on the other.

3.2. Charges, tariffs and prices

3.2.1. The charges that a distribution business may impose under a connection agreement are approved by the Office on a *fair and reasonable* basis. Matters the Office may take into account in determining whether such charges are fair and reasonable are canvassed in Part 4 of these guidelines. The charges are maximum charges only and a distribution business may charge less than the charges the Office approves as fair and reasonable.

3.2.2. The tariffs payable by a retailer or a customer under a use of system agreement are determined in accordance with the Tariff Order. They are maximum tariffs only and a distribution business may charge less than the maximum - see Part 4.5 of these guidelines.

3.2.3. The price paid by a customer for electricity under a retail agreement is open to competition - there are no regulatory constraints placed upon the price of energy to a contestable customer.

3.3. Connection agreements

3.3.1. A connection agreement may be entered into between a host distribution business and a customer to allow the supply of electricity between the host distribution business' distribution system and the customer's electrical installation. Where a host distribution business connects a customer's electrical installation to its distribution system, the following matters need to be addressed -

- a host distribution business may need to install plant and equipment at a customer's premises and will need to maintain that equipment (though nothing in these guidelines precludes provision of meters or metering services by a person other than the host distribution business);
- the host distribution business should be entitled to recover *fair and reasonable* charges for installing and maintaining the plant and equipment;
- the host distribution business is entitled to access to the plant and equipment and entitled to require the customer not to interfere, and to prevent interference, with the plant and equipment; and
- the host distribution business is entitled to require that the customer's own equipment does not interfere with the distributor's own system or other customers' equipment and, for those purposes, require that the customer observe relevant industry codes;
- an agreement between the distributor and the customer should establish their respective rights and obligations in those regards; and

- the relationship between the host distribution business and the customer must be tied in with the industry-wide arrangements which ensure the delivery of electricity from a power station through to the customer.

3.3.2. Where a host distribution business provides connection and connection maintenance services, the above matters need to be addressed. However, for the reasons outlined below, it may not be reasonable nor practical for a customer to sign a separate connection agreement with the host distribution business.

3.3.3. Based on the experience in the UK, customers may change retailers frequently (in the UK retail contracts are commonly written on an annual basis). The physical connection between the host distribution business and a customer is, on the other hand, a long term arrangement and, for all practical purposes, permanent. Thus, in the UK the permanent nature of connection has been distinguished from the transient nature of a customer's relationship with a retailer by separate connection agreements between the host distribution business and the customer.

3.3.4. While there are sound practical reasons for a contractual relationship between a host distribution business and a customer, from the perspective of a customer contemplating buying electricity from a third party retailer, requiring the customer to physically sign a connection agreement with the host distribution business is but an additional burden. Indeed, it may be such a burden as to inhibit competition. That is, a customer faced with having to sign a connection agreement with the host distribution business and a retail agreement with a third party retailer, may take the path of least resistance by dealing with the retail arm of the host distribution business. This gives the host retailer a significant incumbent advantage that may deny equality of opportunity to third party retailers in their negotiations with potential customers.

3.3.5. The issue of how best to provide the contractual relationship sought by the host distribution businesses while at the same time promoting competition by avoiding unnecessary burdens on a customer has been addressed in the UK. There, a third party retailer acts as an agent for the host distribution businesses to procure the customer's consent to the connection agreement. Thus, the use of system agreement between a third party retailer and a host distribution business contains clauses to the following effect -

- *“Host Distribution Business Pty Ltd appoints Third Party Retailer Pty Ltd as its agent for the sole purpose of making a connection agreement in respect of each supply point at the customer's premises on the terms set out below (and no other terms). Third Party Retailer Pty Ltd does not have authority to create any obligations on behalf of Host Distribution Business Pty Ltd other than expressly provided for in this clause.*
- *Third Party Retailer Pty Ltd shall ensure that each agreement it has with a customer includes a clause in terms of Appendix A and that the clause is drawn to the attention of the customer.*
- *Notification of a supply point to Host Distribution Business shall constitute a warranty by the Third Party Retailer that it has complied with clause 2.”*

3.3.6. Appendix A referred to in the above clauses is in the following terms -

“Your agreement to take supply of electricity from Third Party Retailer Pty Ltd includes an agreement with Host Distribution Business Pty Ltd (for whom Third Party Retailer is for this purpose acting as agent) that the electricity is supplied to you on the standard terms and conditions of connection from time to time published by Host Distribution Business Pty Ltd. These are the same terms and conditions as apply to Host Distribution Business’ own supply to its customers.

A copy of such terms and conditions may be obtained free of charge from Host Distribution Business Pty Ltd by telephoning”

3.4. Use of system agreements

3.4.1. A use of system agreement may be entered into between a retailer and the host distribution business or, where a customer buys through VicPool, the customer may enter into a use of system agreement with the host distribution business.

3.4.2. A use of system agreement will cover all the commercial arrangements related to the delivery of electricity and the provision of related services provided under a network tariff determined in accordance with the Tariff Order - those network tariffs being maximum tariffs. Each retail licence requires the licensee to include as a separate item in its customers’ accounts the amount charged by a distribution business under the use of system agreement.

3.4.3. In addition to the network tariff, a typical use of system agreement will deal with the following matters -

- billing and the payment cycle (generally monthly but may be varied upon agreement between the customer and the retailer/distributor);
- force majeure events or events or circumstances beyond the reasonable control of the distributor (outlined in paragraph 4.4 of these guidelines);
- indemnities provided by the retailer/customer to the distribution business and vice versa;
- the distribution businesses’ obligation to operate its system in a manner which enables it to support the customer’s load, maintain and develop the capability of the system so that it can support the load and control the voltage of the system;
- the circumstances in which a distribution business may disconnect, interrupt or reduce the delivery of electricity to a customer, eg - to carry out planned maintenance to its distribution system (in which case it must give at least 4 business days’ written notice); and
- how disputes between a distribution business and a retailer are to be resolved.

3.5. Standard form agreements

3.5.1. Distributors and retailers will tend to provide standard form agreements to their customers.

3.5.2. The actual terms of such standard form agreements being offered by retailers should be carefully considered by a customer when choosing a retailer, eg - a price advantage contained in a particular offer may need to be balanced against a higher risk allocation to the customer.

3.5.3. Customers should consider their preferred risk allocation before accepting a retailer's standard form contract. In a competitive situation, such as where a customer has invited tenders, the customer may be able to negotiate an improvement to the standard form contracts in order to meet its preferred risk allocation.

3.6. Limitation of Liability

3.6.1. A party to a contract may incur liability to another party in respect of loss or damage suffered by the other party because of -

- a breach of its contractual obligations to that party;
- a breach of its obligations to that party arising under the general law, such as the law relating to negligence; or
- a breach of its obligations to that party arising under a statute, such as the *Trade Practices Act 1974*.

3.6.2. Typically, parties to a contract will seek to limit their exposure to such liability. In considering whether a clause limiting the liability of a distribution business or a retailer is fair and reasonable, the Office will have regard to matters of a kind referred to in Part 4 of these guidelines. A similar approach would also be adopted by the Office in considering whether clauses enabling a distribution business or a retailer to claim compensation in respect of losses or damage suffered because of another party's breach of a relevant obligation or to clauses that seek an indemnity from another party.

3.6.3. Section 27 of the *Electricity Industry Act 1993* provides that a distributor is not liable -

- to any penalty or damages for not supplying electricity under any contract if the failure arises through accident, drought or unavoidable cause; or
- in damages to any person for any partial or total failure to supply electricity arising through any cause that is not due to the fault of the company.

The effect of these provisions may be varied or excluded by agreement between the distributor and the customer.

3.6.4. The *Trade Practices Act 1974* implies certain conditions and warranties into all contracts for the supply of goods and services which are of a kind ordinarily acquired for personal, domestic or household use or consumption or which cost \$40,000 or less. It is arguable that under the *Trade Practices Act 1974*, electricity may be characterised as a good which is of a kind ordinarily acquired for personal, domestic or household use or consumption. If electricity

were characterised as a good which is of a kind ordinarily acquired for personal, domestic or household use or consumption, then -

- the implied conditions and warranties would be relevant to connection and use of system agreements by which electricity was supplied; and
- these conditions and warranties could not be excluded or limited and any attempt to limit the liability would constitute a breach of the *Trade Practices Act 1974*.

PART 4: FAIR AND REASONABLE

[For ease of reference paragraphs 4.1.1 to 4.2.5 repeat paragraphs in the Office's *Electricity Industry Guideline No. 1*].

4.1. Fairness and reasonableness of certain terms

4.1.1. Where a clause in a connection or use of system agreement is not covered by -

- the Tariff Order;
- these guidelines; or
- an Approved Statement of Charges,

the Office may decide whether the term is fair and reasonable on the basis of the Office's opinion of its fairness and reasonableness.

4.1.2. The Office's power in that regard is designed to be exercised prior to the parties binding themselves to a term of an offer.

4.1.3. Except in circumstances where -

- events which were not reasonably foreseeable occur subsequent to the parties binding themselves to a term;
- a distribution business or retailer has made misleading, deceptive or false representations (in particular representations about the Office's position on a particular issue);
- the relative bargaining position of the two parties is clearly in favour of a distribution business or retailer; or
- a distribution business has abused the market power given to it by its licence,

the Office would be reluctant to decide questions of the fairness and reasonableness of a term once the parties have bound themselves to that term.

4.1.4. The words *fair and reasonable* will be applied according to their ordinary meaning.

4.1.5. The Macquarie Dictionary defines *fair* as, amongst other things -

"1. Free from bias, dishonesty, or injustice: a fair decision or judge. 2. That is legitimately sought, pursued, done, given, etc, proper under the rules: fair game, stroke, hit etc."

4.1.6. The Macquarie Dictionary also defines the word *reasonable* as, amongst other things -

"1. Endowed with reason. 2. Agreeable to reason or sound judgement: a reasonable choice. 3. Not exceeding the limit prescribed by reason: not excessive: reasonable terms. 4. Moderate, or moderate in price: the coat was reasonable but not cheap."

4.1.7. While the words *fair* and *reasonable* do not have identical meanings and the fairness and reasonableness of an offer may be assessed separately, if an offer is determined to be not *fair* or not *reasonable*, it cannot be said to be *fair and reasonable*.

4.1.8. General matters to which the Office may have regard in determining whether a term of an offer is *fair and reasonable* include the objects of the Office under the *Office of the Regulator-General Act 1994* and the *Electricity Industry Act 1993* as quoted in Part 2 of these guidelines.

4.1.9. Other general matters to which the Office may have regard in determining whether a term of an offer is *fair and reasonable* include -

- the relative bargaining strength of the parties;
- whether the term would be likely to have been negotiated by parties dealing at arms length;
- whether the term goes beyond what is required to protect the legitimate interests of the licensee; and
- terms offered by other licensees and retailers in similar circumstances.

4.1.10. Particular matters that may be taken into account by the Office in determining the fairness and reasonableness of a term of an offer relating to a matter not covered by the Tariff Order, these guidelines or an Approved Statement of Charges include -

- the period for which connection services or use of system services is sought;
- the incremental impact of the applicant's load on the distribution business' local capacity, including the nature of augmentation work needed to guarantee the level of service requested by the customer;
- the likelihood of a customer ceasing to take supply (delivery) from the distribution business;
- whether the term is consistent with the terms offered by a host distribution business to its retail arm in similar circumstances;
- whether the term offered to a non-contestable customer is different from a term offered to a contestable customer;
- in respect of an agreement with a new generator, whether the term gives proper recognition to any enhancement of the distribution system by virtue of the generator's location within the system.

4.1.11. The above examples are not exhaustive of matters that the Office may take into account in deciding whether a term of an offer not covered by the Tariff Order, these guidelines or an Approved Statement of Charges is fair and reasonable. Each matter will be decided on its merits having regard to the information available to the Office. The Office will move to make its decision as soon as reasonably practicable having regard to the nature of the issue.

4.1.12. The Office is not however resourced to arbitrate each and every dispute that may arise between a distributor, a retailer and its customers in relation to the fairness and reasonableness of terms and conditions in connection and use of system agreements.

4.1.13. Accordingly, the Office will in the course of considering the issue communicate with the parties and, where possible, provide guidance to them in order that they may negotiate an outcome and thus avoid the necessity of the Office having to make a decision.

4.1.14. Where the Office determines a term is not fair and reasonable, it may require the parties to negotiate a term that is fair and reasonable having regard to the Office's opinion of what is fair and reasonable. Provided that the Office is satisfied that the licensee is genuinely negotiating towards a fair and reasonable term in a timely manner, the Office would refrain from exercising its punitive powers.

4.2. Fairness and reasonableness of charges

4.2.1. While the Office would expect to see differences in charges between different customers or classes of customers attributable to the different -

- capacity required to provide a service;
- volume or quantity in which goods or services are supplied;
- places to or from which the services are to be supplied; or
- performance characteristics at which the services are to be supplied,

it will examine any cross-subsidisation between a distribution business' -

- regulated and non-regulated activity;
- non-contestable and contestable customers; or
- geographic areas,

to ascertain whether it is anti-competitive or otherwise not in the interests of customers.

4.2.2. In deciding whether such a cross subsidisation is anti-competitive or otherwise not in the interests of customers, the Office will apply principles developed under the *Trade Practices Act 1974*. An understanding of how those principles might apply may be seen by reference to the Office's *Electricity Industry Regulatory Statement*.

4.2.3. Applying those principles, a mark up on charges to non contestable customers over those to contestable customers that is not cost based or otherwise attributable to a difference of a kind outlined above would not be approved by the Office.

4.2.4. Particular matters that may be taken into account by the Office in deciding whether to approve a charge include -

- whether the charge involve any element of *double dipping*, ie - a requirement that a customer contribute to the costs of a distribution business' wire business which are included in the Tariff Order's weighted average revenue yields (or controls on total revenue). The Tariff Order weighted average revenue yields include allowances for depreciation, return on assets, operation and maintenance and new capital expenditure based on forecast load growth;
- whether any customer contribution to augmentation properly sought is consistent with arrangements existing prior to the restructuring and re-regulation of Victoria's electricity industry;
- whether the licensee is attempting to move costs from an area of its operations that is subject to price regulation by virtue of the Tariff Order to another area of its operations that is not subject to price regulation;
- whether the licensee is attempting to shift a cost from an area of its operation that is subject to a maximum uniform tariff price cap under the Tariff Order to an area which is subject to a weighted average revenue yield under the Tariff Order;
- the scope of the service to be provided, including whether it is a routine service generally provided by the licensee or one which will be peculiar to particular customers;
- whether the charge is cost based and accurately reflects the costs of carrying out the work or providing the service including the cost of labour, assets employed and overheads;
- whether the service is to be provided during or outside usual business hours;
- where a service is provided at a standard charge, whether the charge is -
 - an accurate averaging of the costs involved in providing the service across the distribution business' customer base; or
 - discriminates in favour of one class of customer over another; or
 - involves a cross subsidisation between customer classes; and
- whether provision of a service to one customer may benefit other future customers and if so, whether the charge makes any, and if so what, provision for the initial customer to receive any rebate in relation to future customers contributing to the cost of providing the service.

4.2.5. The above examples of matters that the Office may take into account in deciding whether to approve a charge submitted to it are not exhaustive. Each matter will be considered on its merits having regard to the information available to the Office.

4.3. Separate connection agreements v agency arrangements

4.3.1. Having regard to the matter canvassed in Part 3 of these guidelines, the Office recognises that there is a need for a contractual relationship between a host distribution business and a customer. That is not to say, however, that the Office recognises the need for a separate physical agreement signed by the customer to achieve that contractual relationship. For reasons stated in Part 3 of these guidelines, requiring a customer to sign a separate connection agreement with the host distribution business may inhibit competition.

4.3.2. Accordingly, the Office would **not** regard it as fair and reasonable for a host distribution business to require that each customer connected to its distribution system should have to sign a connection agreement with it - the contractual arrangement that a distribution business may require with customers connected to its distribution system may be achieved by way of clauses of the kind that have been adopted in the UK, as outlined in Part 3 of these guidelines.

4.3.3. Whether or not there be a separate connection agreement should be a matter of customer choice. A customer with special needs may consider it prudent to have those special needs recognised in a separate connection agreement negotiated directly with the host distribution business. Also, as a connection agreement imposes obligations upon a customer, customers may consider it prudent to have a separate connection agreement negotiated directly with the host distribution business. For example, a customer may want to negotiate particular conditions on the variables in the agreement, such as the liability cap. Separate connection agreements are not, however, mandatory - the Office considers it is fair and reasonable to leave the choice whether a customer has a separate connection agreement to the customer.

4.3.4. In circumstances where a third party retailer does act as a customer's agent in relation to a connection agreement, it will bind the customer as a principal to the agreement. Accordingly there is an onus upon the third party retailer to ensure that the customer -

- understands that there is a contractual relationship between the host distribution business and the customer; and
- is aware of the obligations imposed on the customer, particularly any warranties and indemnities that the agreement may require the customer to give to the host distribution business.

4.4. Force majeure

4.4.1. A force majeure clause operates to relieve a party to a contract of the requirement to comply with an obligation if the party is unable to comply because of the occurrence of an event identified in the clause. Such an event is sometimes referred to as an "excusable delay". To the extent that a party is not able to comply with the contract due to an event identified as force majeure, the party will not be in breach of the contract.

4.4.2. Force majeure events identified in a contract are usually events which can be described as "being outside the reasonable control" of the affected party. Examples of force majeure events include -

- "acts of God" (eg - floods, lightning, storms, fire and natural disasters);

- civil disorder, malicious damage, wars;
- the order of any court or government or governmental authority with jurisdiction over the affected party; and
- inability or delay in obtaining governmental or regulatory approvals, consents, permits, licences or authorities.

4.4.3. The Office would not consider it fair and reasonable for an industrial dispute or disturbance within the reasonable control of a distributor to be treated as a force majeure event.

4.5. General principles for evaluating agreements

Discrimination

4.5.1. There is no prohibition against a distribution business offering different prices or terms and conditions to different retailers or customers. Indeed, retailers and customers negotiating different terms and conditions epitomises competition.

4.5.2. Where, however, a host distribution business offers a customer or a retailer prices or terms and conditions different from those that it charges or offers to customers of its retail arm, the Office may examine the prices and terms and conditions to ascertain whether they are anti-competitive or otherwise not in the interests of customers. In deciding whether such prices or terms and conditions are anti-competitive or otherwise not in the interests of customers, the Office will -

- apply principles developed under the *Trade Practices Act 1974*. (An understanding of how those principles might apply may be seen by reference to Part 17 of the Office's *Electricity Industry Regulatory Statement*.); and
- have regard to clause 5.2.5 of the Tariff Order which provides that a distribution business must -
 - take into account the customer's load and connection characteristics; and
 - treat customers in similar situations in a similar manner.

4.5.3. Thus, for example, the onus will be on a distribution business to justify why a discount off the network tariff determined in accordance with the Tariff Order it is offering to customers of its retail arm is not available to third party retailers or other customers.

4.5.4. The Office would expect a distribution business to be able to justify such a discount on commercial grounds, for example -

- by reference to the difference in the quantities in which the services are supplied;
- the differences in the network capacity needed to supply the services;
- the different places to or from which the services are supplied;
- the different periods (time of day, week, etc.) for which the services are supplied; and
- the different performance characteristics at which the services are supplied.

Balance of responsibilities

4.5.5. Where a contract requires parties to a contract to do some act or carry out some obligation, the standard to which they are to do that act or carry out that obligation should be qualitatively the same for both parties. For example, where parties are required to give consent to something (such as assignment or novation of the contract) one party should not be allowed to unreasonably withhold consent if the other party's right to give consent is unfettered. Where it is agreed that it is reasonable or appropriate for there to be an imbalance in the standards of obligations in an agreement, specific reasons for this imbalance may need to be provided.

Comprehensiveness

4.5.6. An agreement must be sufficiently comprehensive to enable a contracting party to understand the terms and conditions expected of and by, the party. Where possible *plain English* should be used.

Risk allocation

4.5.7. In general, risk should be allocated to the party who is best placed to manage it, or insure against it, on the principle that the cost of managing risk, so allocated, may be lower.

Dispute resolution

4.5.8. A suitable dispute and appeal procedures should be established. This is likely to involve various escalating steps starting with commercial arbitration and ending in regulatory involvement as outlined above. The costs of taking action should be representative of the cost of the problem.