



**Western Power**

# **REASONS FOR MODIFYING THE MODEL ACCESS CONTRACT**

**Western Power Corporation**

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# 1 INTRODUCTION

The purpose of this appendix is to describe the suite of contracts that Western Power proposes for its access arrangement, including the major changes from the model access contract (MAC) that Western Power proposes for its standard access contract (SAC).

In preparing the SAC, Western Power was mindful that the contract must be reasonable and sufficiently detailed and complete to form the basis of a commercially workable contract. Western Power was also mindful of the need for the SAC to be consistent with the Code objective of promoting economically efficient investment in, and operation and use of, the network and network services. The SAC must also work within the wholesale electricity market (WEM) framework and generally complement the rest of the access arrangement and other relevant parts of the Act.

Three key matters underpinned Western Power's thinking in developing the SAC and in considering the implications of alternative approaches that may be adopted in addressing particular matters within a standard access contract, namely:

- The access contract should deal with the reference services defined in the access arrangement, being exit and entry services.
- The party receiving connection services (a non-reference service) may not be the contracted recipient of exit or entry services.
- The original contracting party to the construction of connection assets for which a contribution was required may not be a party to a contract for reference services.

Western Power is of the firm belief that providing contractual clarity around these matters promotes competition in upstream and downstream markets (such as generation and retail) not only by facilitating economically efficient investment by Western Power but also by providing certainty to participants and potential entrants to upstream and downstream markets.

Consequently, Western Power includes the following three standard agreements in its access arrangement:

- An electricity transfer contract (the SAC) for entry and exit reference services, incorporating technical compliance requirements.
- A separate connection contract for connection services where the party to that contract (usually a controller) is not party to an electricity transfer contract.
- An Interconnection Works Agreement (IWA) concerning the construction of and payment for works required to provide the services.

The separate electricity transfer and connection contracts are an expansion of the approach of clauses A3.8 to A3.11 of the MAC.

It should also be noted that whilst the SAC is applicable to all users, Western Power is exploring the possibility of developing a "lite" form of the contract that might be more appropriate for small independent generators. This would be done in conjunction with a similar addition to the Technical Rules.

Finally, to further promote efficient economic investment in and operation of the network and services, Western Power has sought to clarify the allocation of risks and their financial consequences, by following the "user pays" principle, with appropriate caps and safeguards.

These matters, which are further explained below, provide the necessary detail for a commercially workable agreement and consequently Western Power believes that the proposed SAC is consistent with the MAC.

## 2 STANDARD ACCESS CONTRACT

### 2.1 Style and Terminology

The following minor changes have been made to the MAC.

- The “capacity contract” has been replaced with “electricity transfer contract” and the “technical compliance contract” is now the “connection contract” to avoid confusion regarding the term capacity, and to mirror the actual covered services dealt with by the two contracts.
- The use of italics to identify defined terms has been replaced with the use of capitals, as this is more suitable for use with defined styles within a Microsoft Word document.
- “UserCo” has been replaced with “the User” for readability.
- Service Provider has been changed to Western Power.
- A new contents page has been added.
- The term Connection Point has been replaced with Contracted Point wherever possible, to avoid confusion between a point at which title of electricity changes (ie the meter point) and where title of the network assets changes (to be known under the Obligation to Connect Regulations as the Attachment Point).
- The term Transfer, with respect to transferring access rights under a contract, has been changed wherever possible to Assignment, to avoid confusion with transferring electricity.
- The term Emergency has been used throughout the contract to replace phrases such as “any accident, emergency, potential danger or other extraordinary circumstance”.
- The term Capital Contribution has been replaced with Contribution, in line with the capital contributions policy.
- Several minor drafting changes have been made, for example, as regards the use of “under” and “in accordance with”.
- The clauses of the MAC have been shuffled somewhat in the SAC on the basis that if a clause is not relevant to the connection contract, then it is located in the electricity transfer provisions of the SAC.

### 2.2 The electricity transfer provisions

The electricity transfer provisions of the SAC deal with the provision and use of, and changes to the contracted services, including changes to contracted capacity and addition and deletions of contracted points, and set out the rights and obligations of the Parties in each situation.

These provisions confer on Western Power the right to decrease the contracted capacity at a Contracted Point subject to suitable safeguards for the user, including a reasonableness test, notice period and exception arising from Force Majeure events. Whilst safeguarding existing users, this provision enables Western Power to optimise its investment in and operation of the network for the benefit of all current and prospective users, which in turn promotes competition and meets the Code objective.

The user has been given the option under the SAC to change the service selected for a contracted point from time to time. For example, a customer of a retailer might increase demand such that they become eligible to move to a CMD tariff, under Western Power’s Price Application Policy.

The SAC requires that any capacity increase be dealt with under the contract, the Applications and Queuing Policy and the Customer Transfer Code, as applicable. This enables Western Power to properly consider

the potential impacts of an application on other users and thereby enables Western Power to optimise its investment in and operation of the Network in accordance with the Code objective.

The notion of a capacity increase notice has been removed from the SAC to avoid duplication and thereby mitigate compliance risk with the application process. This matter has been explained in Appendix 8 in the explanatory information provided on the application and queuing policy.

The SAC specifies the start date of new services as either the date of practical completion of any works required to provide the services or, if there are no works, the date of signing the relevant access offer. This is to ensure that payment by the user for services commences at the same time as the provision of services commences.

Another new clause requires that a contribution be secured before Western Power commences work. Whilst this is somewhat redundant, as it is a requirement of the Code (section 2.9) and the capital contributions policy, it has been added here to reinforce the fact that Western Power might be waiting for a controller who is not the user to pay the contribution.

The SAC allows for a user to decrease contracted capacity (whether due to relocation or otherwise) and obliges Western Power to accept such application, subject to appropriate notification and in any event only once in any twelve month period. The purpose of the 12-month period restriction is to facilitate an orderly market for access, to minimise the administrative costs to Western Power and to prevent users seeking to pass their seasonal revenue variations onto Western Power, when those variations are not reflective of the costs of maintaining the fixed network assets.

Overall, this clause enables users to access underused capacity whilst mitigating the risk of stranded assets. It was foreshadowed in a note in the MAC under the definitions of CMD and DSOC, suggesting that a service with a varying demand would be a non-reference service. (This note has been deleted, as Western Power has defined several reference services that have, by their nature, varying demands, such as a Time of Use service.)

The SAC obliges Western Power to accept a request to delete a contracted point subject to the following conditions.

- For permanent disconnection, the user must provide appropriate notice to allow Western Power time to prepare modifications to its network equipment, and then to effect and test those changes.
- For deletion of a contracted point that is not to be permanently disconnected, that point must have been transferred to another electricity transfer contract (such as via a customer transfer request), so that at no point can electricity be transferred without being captured under an electricity transfer contract.
- The user must pay any outstanding amounts.

The outstanding amounts might be in the form of outstanding charges or an additional contribution, regardless of whether the user or the controller paid the original contribution. This “user pays” principle avoids costs being unfairly passed on to users in general and promotes competition in accordance with the Code objective. It is recognised that users, particularly retailers, will consider the implications of this and therefore may seek in turn to allocate this risk to their end customers.

An addition has been made to the requirement to mark up the appropriate schedule on any of the above changes to gain acknowledgement that Western Power will hold the information regarding contracted points in an electronic database. Provisions related to this information are dealt with in the Customer Transfer Code and the Metering Code, and their subsidiary rules and policies. This is a practical matter to avoid administrative duplication.

It is to be noted that the proposed SAC does not deal with relocation per se, but the consequences of such activity on capacity requirements. The processes involved in relocation are dealt with separately in the application and queuing policy and the transfer and relocation policy to avoid any duplication or inconsistency arising between the SAC and those policies.

The transfer and relocation policy is discussed below.

### **2.3 Service Standards**

The MAC requires that the service provider be contractually bound to meet the relevant service standard for each service requested by a particular user. The service standard benchmarks specified in the access arrangement reflect targets for particular groups according to network configuration and location, and are not applicable on an individual user basis. Therefore, any reference to the service standards has been removed from the SAC.

### **2.4 Title to electricity**

Under the model access contract, on transfer electricity at an entry point, the user has the right to an equivalent amount of electricity at an exit point. This clause has not been adopted in the SAC for a number of reasons including:

- The concept of electricity balancing does not fit with the concept of a WEM pool.
- Western Power is required under the Code to provide entry services without exit services and vice versa, and this clause contradicts that requirement.
- Practically, users are never going to have a single exit point that consumes the exact amount of electricity provided at a single entry point. Even under the current balancing regime, users are more likely to have several exit points for each entry point.
- The clause did not take into account loss factors.
- Taken in reverse, the clause might have implied that if the user transferred no electricity at an entry point, the user was not entitled to electricity at an exit point. This will not be the case under the WEM.

The intent of the clause appeared to be to protect a generating user's right to be compensated for its generation. These rights will be protected under the Market Rules and the Metering Code, and so an obligation on both parties to observe their obligations under these pieces of legislation has been added to the SAC.

### **2.5 Relationship between the User and the Controller**

The relationship between the user and a controller has been made clear in the SAC. For each contracted point, the user must nominate a controller. If the user is the controller, then the user must comply with the connection provisions. If the user is not the controller, then the user must procure compliance from the controller, unless the controller has entered into a connection contract with Western Power.

An avoidance of doubt clause has been added to the SAC to specify that the user will be held liable to Western Power for any direct damage caused by a controller unless the user can prove that it is not in breach of its requirement to use reasonable endeavours to procure technical compliance from the controller. Whilst this appeared to be the position under the MAC, as the user would be liable for any default, and a breach regarding procuring technical compliance from the controller could be such a default, the inclusion of clause A3.62 (actions of third parties causing user to breach technical rules) was confusing.

Western Power believes that the SAC is clear that neither party has any liability for any action regarding a third party, except as regards controllers, who are special class of third party, and therefore, clause A3.62 from the MAC has not been adopted in the SAC.

Western Power retains the right to contract with any person, including a controller. The integrity of connected facilities and equipment is critical to network system reliability and security yet Western Power has little opportunity to mitigate the risk of damage or failure and the consequences to users in general. Consequently, it is essential that risk be allocated to users or controllers as appropriate, and that the rights and obligations of the user, the controller and Western Power are clear to enable the safe and reliable management of the network.

## **2.6 Tariffs and charges**

The MAC has a clause describing a situation when no new Price List had been published. In this case, Western Power believes it is reasonable to continue charging based on the published Price List, as this is, by the fact that it is published, the current Price List. Similarly, no Price List can be published under the Code unless that publication is pursuant to an approved access arrangement, so the provision relating to these events, allowing the user to claim an overpayment, has not been adopted in the SAC.

Two other changes have been made in the SAC to allow for tariffs that, under the Price List are to be adjusted under the contract (such as a connection charge) and to allow Western Power to recover non-tariff charges. The latter might consist of billing administration charges, meter reading charges, customer transfer charges and similar applicable fees.

The defined term “standing charges” from the MAC has not been adopted, as all charges will be applicable under a force majeure event, rather than just a selection of them. Also, in the SAC, it is now made clear that the user must pay the Charge (including tariff charges, and any other applicable charges) for the provision of each Service even if the user is not ready, willing and able to make use of the Affected services during the relevant period. Western Power believes that this is in any event the intent of the MAC, but has sought to make this more explicit.

## **2.7 Security**

Western Power’s experience is that an approach to assessing credit risk and the associated need for security on an individual case-by-case basis may lead to stranded costs. This arises for four main reasons.

- Western Power Networks is not equipped to conduct credit vetting, which requires a specialized skill-set.
- The cost of outsourced credit vetting for all circumstances is prohibitive.
- A case-by-case approach to credit vetting can lead to accusations of bias or discrimination.
- Alternative forms of security, such as trust accounts, have been proven to be insecure.

In combination, these factors may result in stranded or inefficient costs that must be borne by all users.

The SAC seeks to balance the costs of complexity with flexibility and comprises the following key components with regard to security for network charges:

- There is no need to provide security if the user can provide evidence of either a BBB Standard & Poor’s rating or better, or a Baa Moody’s rating or better. The ratings selected are in line with those required by NEM network service providers.
- A parent company guarantee is acceptable if the user can provide evidence that the parent has a credit rating of either a BBB Standard & Poor’s rating or better, or a Baa Moody’s rating or better.

- Otherwise, security is required which is either in the form of an appropriate bank guarantee, or equivalent financial instrument, or a cash deposit.

In each case, the security must be adequate to meet two month's charges.

However, the user must secure the full amount of any unpaid contribution calculated under the capital contributions policy with a bank guarantee.

## **2.8 Costs of Compliance with Technical Rules**

In circumstances where there is no technical breach, costs might still be incurred by Western Power to facilitate technical compliance by the user. An example of this is modification by Western Power to grade protection settings to accommodate a facility's continuing compliance. Consequently, the SAC makes it clear that the user must pay for the costs of achieving technical compliance, including its own costs and those of Western Power. This is consistent with the Technical Rules.

## **2.9 Information from Application**

A clause has been added to the SAC to ensure that the technical information provided in the original access application, and that the original access offer was based on, is captured in the contract. This clause also requires the user not to materially change their facilities and equipment without making an application under the applications and queuing policy. This provision ensures that Western Power has available to it accurate information on the characteristics of the equipment connected to the network. This information improves the accuracy of planning studies undertaken to assess the integrity of the system. Also, a change in the characteristics of, in particular, generating plant can impact on the network in the same way as a capacity increase, and so might trigger augmentation or other measures, as may be associated with any other application.

## **2.10 Contracted point deletion**

The provisions in the MAC regarding removal of equipment by the user have been modified to remove the limits on what Western Power's instructions to the user might be, and hence to add that Western Power's instructions must be reasonable. This modification is necessary because the nature of the electrical connection might mean that some of the user's removal work will be on the user's premises (for example, protection equipment). Also, the phrase "what is not otherwise required under another contract" is problematic, as the user is not in a position to judge whether this is fulfilled without breaching confidentiality and thus has been removed.

This section has been moved from the MAC's termination clauses (but is still referenced by them) to ensure that the SAC is internally consistent with regard to the concept of multiple contracted points under the one contract.

## **2.11 Warranties**

The SAC places a mutual exclusion on implied warranties and a mutual limit on any implied liabilities that are prohibited in law from being excluded. This is consistent with the MAC and a step forward from previous arrangements, under which the exclusion was in favour of Western Power only.

## **2.12 Liability and indemnity**

Western Power has specified various limits of liability to reflect the different levels of technical risk posed by various types of facilities. These different limits again cater for multiple contracted points under the one contract.



The SAC provides that each Party indemnifies the other party for personal injury of its workers, however caused. This reflects standard industry practice and is particularly relevant because contracted points often have joint electrical isolation procedures with each Party relying on the other in some measure to effect safe isolation. This indemnity is not included in the limit of liability.

The only other substantive modification to the MAC liability provisions is to extend the indemnity to the parties' personnel.

### **2.13 Insurance**

In order to protect the interests of users in general, the proposed SAC seeks to ensure that users have appropriate insurances in place. Each party is required to hold a products and public insurance policy for each category of liability held under the Contract, as well as workers compensation to cover their personal injury liability and other relevant forms of insurance.

Insurance policies are required to have a cross liability clause, but not a waiver of subrogation clause on advice from Western Power's insurer.

### **2.14 Force Majeure**

"FM Period" has been defined to improve operation of the Force Majeure clauses, and terrorism has been added to the list of possible force majeure events.

Western Power considered the release from liability under a force majeure event to be too broad, and so the SAC has more precise drafting to state that a force majeure event only results in the affected obligation being suspended (which is probably the intention of the MAC).

A clause has been added to include a reasonable qualification to the obligation to incur expenditure during force majeure on an event of breach by the other party.

### **2.15 Curtailment of services**

Under the MAC, and in the event of technical non-compliance by a controller, the service provider has the right to curtail service until the controller has agreed to be bound by the technical compliance obligations and the non-compliance has been rectified. Western Power considers that it would be also be reasonable not to commence such services given similar non-compliance.

Western Power also proposes to slightly broaden its curtailment rights for unplanned maintenance where necessary in accordance with Good Electricity Industry Practice. This is not only consistent with other applications of Good Electricity Industry Practice elsewhere in the MAC, but avoids circumstances under which Western Power is prevented by a technicality from exercising prudent measures for the benefits of all network users.

A minor change has been made requiring Western Power to make reasonable endeavours to provide notice of curtailment before the curtailment where practical rather than always as soon as practicable after the curtailment as worded in the MAC.

Finally, for clarity, the proposed SAC now makes it clear that the contractual right to curtail set out in the access contract does not limit other powers that Western Power might have arising from any other agreement between the Parties or any Law, including section 57 of the Energy Operators (Powers) Act 1979.

## **2.16 Termination**

The SAC proposes an obligation on users to pay any unpaid Charges owed to Western Power under the Contract and any application Contribution under the Capital Contributions Policy. This provides for a commercially workable contract and is consistent with the MAC.

## **2.17 Assignment**

The SAC requires the user to act as a reasonable and prudent person in making a bare transfer.

The SAC also provides that the user's ability to assign is governed by the transfer and relocation policy, which makes some clarifications about the assigned rights not leading to the assignment of obligations.

These clarifications provide for a commercially workable agreement.

It should be noted that the MAC (and hence the SAC) requires the user to notify Western Power of the identity of the assignee and the nature of assigned rights, which contravenes section 5.18 (b) of the Code, which states that Western Power can only require the assignee to make such notification. This would appear to have been an error in the Code, given the MAC position and the impracticality of requiring a third party to notify Western Power.

## **2.18 Augmentation**

Western Power has made several additions to the SAC to properly incorporate the IWA, but to retain sufficient flexibility to allow the original MAC schedules to be used to capture contribution and works provisions.

## **2.19 Precedence**

The access arrangement is being submitted at a time of considerable regulatory change, with the introduction of various new codes and regulations under the Act. Several of these new pieces of legislation will specifically relate to the services being provided under the SAC. Therefore, Western Power has expanded the MAC provision relating to meeting relevant obligations under the Customer Transfer Code to ensure that this legislation, and other parts of the access arrangement take precedence over the SAC when there is a conflict.

## **3 STANDARD CONNECTION CONTRACT**

The standard connection contract consists of all parts of the standard electricity transfer contract except those directly dealing with electricity transfer.

## **4 STANDARD INTERCONNECTION WORKS AGREEMENT**

The standard IWA replicates the requirements of the payment contract, the works contract and the payment in kind contract referred to in the various appendices in the Code. In the Code, the MAC addressed these matters in schedule 5. Given that a party to an IWA, such as the developer of a subdivision, may not be required to sign an access contract, Western Power has created this separate contract.

The IWA meets the requirements under the Code, specifically:

- A2.103 – terms included in an access offer (as set out in the applications and queuing policy);
- A4.12(b) – security provisions in the payment contract (as set out in the capital contributions policy);
- A4.14(a) – financial provision for contribution (as set out in the capital contributions policy);
- A4.14(c)(i) – adjustment of periodic payments (as set out in the capital contributions policy);

- A4.14(c)(i) – reimbursement of up-front payment (as set out in the capital contributions policy);
- A4.21 – security provisions (as set out in the capital contributions policy).

Western Power will always require a signed payment contract or works contract prior to commencing any augmentation. This will either be in the form of the standard IWA provided in the access arrangement, or for augmentations involving less technical and commercial risk, in the form of a signed offer. In such circumstances, the terms of the offer will be similar to those of an IWA but with no greater contractual obligation on the applicant than would exist under the IWA.

#### **4.1 Key Features of the standard IWA**

The IWA recognises that applicants might request Western Power to perform some of the applicant’s works, or Western Power might choose to tender for the applicant’s works (works related to excluded services), and so these works have been foreshadowed in the standard IWA for convenience as “Customer Works”. Where appropriate due to the different nature of the works, different provisions have been specified for the Customer Works and the Western Power Works.

It is important to ensure an appropriate allocation of risks, given that unlike a normal contractor, Western Power cannot reasonably refuse to undertake the works. Therefore, Western Power will accept capped insurable liabilities only, and will require a third party indemnity for persons associated with the applicant.

One notable feature of the IWA is that Western Power has included a liquidated damages provision capped at a maximum of \$500,000 for the Western Power Works. Liquidated damages for the Customer Works will be treated as any other commercial matter to be negotiated between the parties.

In other respects, the IWA is similar to normal construction contracts, allowing for the difference in final ownership of the assets being constructed.

### **5 TRANSFER AND RELOCATION POLICY**

The MAC includes some clauses related to assignment and relocation that have been incorporated into Western Power’s transfer and relocation policy, and are discussed further here.

#### **5.1 Assignment**

Under the Code, Western Power is required to permit a “bare transfer” without Western Power’s consent. Beyond adding some clarifications regarding the non-assignment of obligations under a bare transfer, the MAC clauses have been largely adopted for the transfer and relocation policy. However, the transfer and relocation policy also expressly forbids the assignee to make a further bare transfer.

Other standard assignment clauses have been added to the transfer and relocation policy, including allowing the user to assign rights in favour of an Australian Bank.

#### **5.2 Relocation**

Relocation has been removed from the SAC and placed in Western Power’s transfer and relocation policy, as envisaged by section 5.21 of the Code, and to avoid conflict between the contract and the policy.

Relocation is related to the fundamental question of capacity rights. In considering this matter, Western Power considered whether a user that has contracted capacity at one point should have the right to decrease capacity at that point and take up similar capacity at another point, even when there are applicants in the queue seeking that capacity. Western Power believes that such arrangements, if implemented would significantly bias the access regime in favour of existing users and thus not meet the Code objective. Therefore, the transfer and relocation policy states that a user who wants to “relocate” capacity must

decrease capacity at the first contracted point in accordance with the contract and increase it at another point in accordance with the contract (effectively, the application and queuing policy).

This means that if an applicant is currently in the queue, and capacity becomes available because of the decrease by the relocating user at a contracted point, then that applicant has first access to that capacity under the first-come, first-served principle. In general, the mechanisms in the capital contributions policy will ensure that costs are shared fairly. However, if there is insufficient network capacity to provide the requested services to both parties, the first-come, first-served principle will apply.

## **6 CONCLUSIONS**

The variations between the SAC and the model access contract have been explained. Western Power believes that users will regard these changes as reasonable and commercially workable. In other respects, the SAC follows the model access contract set out in the Code.

Copies of the electricity transfer contract, connection contract and IWA are included in Appendix 4 of the access arrangement. The transfer and relocation policy is included in Appendix 2 of the access arrangement.