

Attachment 12.1

Model ETAC for AA4

Access Arrangement Information

2 October 2017



Access Arrangement Information (AAI) for the period
1 July 2017 to 30 June 2022

Model ETAC for AA4 Change Summary

Summary of proposed changes from AA3 Model

Public

2 October 2017



An appropriate citation for this paper is:

Model ETAC for AA4 Change Summary

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1. Introduction

The Model ETAC (or standard access contract) is a requirement of Chapter 5 of the *Electricity Networks Access Code 2004 (the Code)*, and provides the basis for the terms and conditions for a reference service provided to network users.

Section 5.3 of the Code defines that a *standard access contract* must be:

- (a) reasonable; and
- (b) sufficiently detailed and complete to:
 - (i) form the basis of a commercially workable *access contract*; and
 - (ii) enable a *user* or *applicant* to determine the value represented by the *reference service* at the *reference tariff*.

The Model ETAC for AA3 has been reviewed and amended based on Western Power’s experience during the period, and is proposed to apply for AA4. This document summarises the proposed changes to the Model ETAC for AA4 and the rationale for each of these proposed changes.

This summary document is supported by the proposed Model ETAC (submission document number 1565 and 1588), which details proposed changes in both “tracked change” mode and as an unmarked version.

2. Proposed amendments

Table 2.1 provides an overview of each issue identified with the AA3 Model ETAC, a summary of the proposed change and the rationale for the proposed change. Actual changes to the Model ETAC are located in the proposed Model ETAC included as part of the AA4 submission (submission document number 1565 and 1588).

Table 2.1: Summary of proposed amendments to the Model ETAC

Number	Section	Issue	Proposed Change	Rationale for change
1	1.3	CPI Adjustment The definition of CPI-Adjusted defines CPI_c as the CPI at the time of the previous adjustment. This is an issue in the case of the first adjustment as there is no previous adjustment.	CPI_c is now defined as the CPI published 12 months prior to CPI_n	The change removes an ambiguity in the clause. The change does not make a substantive variation in the parties' rights given the change represents the manner in which the parties would have assumed the clause would be applied.

Number	Section	Issue	Proposed Change	Rationale for change
2	3.1(c)	<p>Exceeding Contracted Capacity</p> <p>Under clause 3.1(c) the User must endeavour, as a Reasonable and Prudent Person, to ensure it does not exceed its Contracted Capacity.</p> <p>Exceeding Contracted Capacity threatens the integrity of the network. Given this the standard of “endeavour not to exceed” seems a low standard</p>	<p>The clause has been amended to require the User to ensure it does not exceed Contracted Capacity.</p>	<p>Given the potentially severe impact of exceeding Contracted Capacity on network integrity it is submitted this is the more appropriate standard.</p> <p>Western Power emphasises this change is not only a matter of protecting Western Power. A Network User exceeding its Contracted Capacity may adversely impact other Network Users and require curtailments.</p> <p>Western Power appreciates some Users themselves do not control the equipment at a connection point but supply electricity to a person at the connection point. However in this case the User should discharge its obligation by ensuring its contract with that person requires them to keep within Contracted Capacity.</p>
3	3.1(d)	<p>Recipient of Services</p> <p>Western Power has two contractual counterparties – the User and the Indemnifier. However the Indemnifier’s sole contractual role is to provide credit support in respect of the User – it is not a recipient of services and has no right to itself receive services.</p>	<p>Clause 3.1(d) has been added to clarify this matter and makes clear services are only provided to the User and the Indemnifier has no rights to claim against Western Power should there be any deficiency in the Services.</p>	<p>The change makes clearer the role of the Indemnifier and that the liability relationship under the ETAC is between Western Power and the User.</p>

Number	Section	Issue	Proposed Change	Rationale for change
4	3.2(c) and 3.2(d)	<p>Service Change</p> <p>The ETAC does not allow Western Power to initiate a change in the service a customer receives, even if conditions change.</p> <p>Western Power accepts that is appropriate for large customers and changes with them should be negotiated. However for the volume customer market it may be necessary for Western Power to initiate changes to reflect new types of equipment or changes in government policy.</p>	<p>New clause 3.2(c) (which is limited in its application to small customers) allows Western Power to change the service for the small customer’s connection point where Western Power considers this is required:</p> <ul style="list-style-type: none"> (i) because Western Power modifies or replaces the equipment at or in proximity to the connection point (including the metering equipment); or (ii) due to new policies implemented by Western Power in respect of small customers (for example changes to the type of metering equipment to be used). <p>It would defeat the purpose of clause 3.2(c) if, once a change is made, the User can require the small customer revert to their old service. Consequently new clause 3.2(d) provides no such request may be made without Western Power’s consent.</p> <p>A definition of small customer has also been added to the definitions section of the ETAC.</p>	<p>Without this ability to vary small customer services Western Power cannot vary services to adapt to the changing configuration and characteristics of the network. This right is becoming more critical in an era of rapid technological change.</p>

Number	Section	Issue	Proposed Change	Rationale for change
5	3.3(b)	<p>Compliance with Eligibility Criteria</p> <p>Clause 3.3(b) provides that where a User has sought to change its Reference Service then its obligation to comply with the Eligibility Criteria is subject to Western Power complying with the Applications and Queuing Policy.</p> <p>This statement is not correct as to preserve network integrity the User must comply with the Eligibility Criteria at all times, even if Western Power is in breach of the Applications and Queuing Policy.</p>	Delete clause 3.3(b)	<p>The change removes a clause which potentially adversely affects network integrity.</p> <p>The change does not adversely impact a User's rights against Western Power. If Western Power fails to comply with the Applications and Queuing Policy the User will have an action against Western Power under clause 3.2(b) for breach of contract.</p>

6	6.2(b)	<p>Claims by Controllers</p> <p>Clause 6.2(b) requires a User to ensure its contract with a Controller provides that Western Power is not liable to it for Indirect Damage. However this, in itself, does not protect Western Power because that covenant by the Controller would be given in favour of the User not Western Power. Also clause 6.2(b) should, in Western Power's opinion, make clear the Controller cannot sue Western Power for an amount greater than Western Power's monetary liability to the User.</p> <p>Also clause 6.2(b) only applies if the User enters into a contract with its Controller. However there seems no reason why a User should not enter into a contract with its Controller to ensure the requirements of clause 6.2(a) and 6.2(b) are met – indeed the Users should ensure they do so, so as to give them effective legal rights to enforce the Controller's obligations.</p>	<p>Amendments to clause 6.2(b) provide:</p> <ul style="list-style-type: none"> • The User must ensure it has a contract with the Controller. This should not be an issue for the User – if the Controller is agreeing to control the User's facilities for the User, there is no reason this agreement should not be documented in contract; • For the Controller to give a direct covenant in favour of Western Power in its contract with the User. Western Power will then, as a third party beneficiary, be able to enforce that covenant using section 11 of the <i>Property Law Act 1969</i>; • The content of the covenant is that the Controller will not sue Western Power for Indirect Damage nor for a monetary amount such that Western Power's aggregate liability to the User and the Controller would exceed the monetary caps in the ETAC; • Since the intent of the clause is to protect Western Power against claims for indirect damage the exclusions in the ETAC for User 	<p>This change mitigates the risk for Western Power that a Controller can circumvent the limits on Western Power's liability in the ETAC.</p> <p>While individual Controller's/User's may prefer Western Power's liability to them not to be limited, this would be inconsistent with market practice. Further it is a threat to the long term viability of the network if Western Power's potential liability to network users, taken as an aggregate, is excessive.</p>
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Number	Section	Issue	Proposed Change	Rationale for change
			<p>liability for indirect damage cannot apply. If they did the clause would be of no benefit to Western Power because it could not recoup any of the loss it would suffer due a breach. This should not be an issue for Users since there is no reason they cannot ensure contracts with Controllers contain these provisions.</p>	
7	9(i)	<p>Cash Security</p> <p>Currently interest on a cash deposit is only remitted to the User when the security is returned.</p> <p>Western Power considers it will be fairer to remit interest on a monthly basis.</p>	<p>Clause 9(i) has been amended to provide for interest earned on a cash deposit to be remitted to the User on a monthly basis if Western Power holds (once interest net of fees and taxes is determined) on behalf of the User cash above two months charges.</p> <p>In the context of the new wording added to clause 9(i) to give effect to this, the clause has been broken out into three clauses – 9(i) to 9(k).</p> <p>In response to customer feedback (see section 3 of this report), Western Power has also made clear in clause 9 that once the User is entitled to have a cash deposit returned, Western Power must return it within a reasonable time.</p>	<p>This change is to the benefit of Users who provide cash security.</p>

Number	Section	Issue	Proposed Change	Rationale for change
8	13	<p>Modifying Generators</p> <p>Clause 13 provides the User must not materially modify a generating plant without complying with the Applications and Queuing Policy.</p> <p>However there may be modifications to a generating plant which do not activate the Applications and Queuing Policy but still need to be reviewed by Western Power to confirm they will not adversely impact the network.</p>	<p>Clause 13 has been amended to oblige the User to notify Western Power of a proposed material modification to its generating plant and to only make the modification if it will not adversely impact the safety and security of the Network.</p>	<p>This change protects the integrity of the network by ensuring changes to plant are not made without Western Power reviewing whether they will adversely impact network integrity being informed of the potential change (and therefore having the opportunity to raise any concerns it may have).</p> <p>In response to customer feedback (see section 3 of this report), Western Power has excluded from the scope of this provision generating plant owned by small customers, noting it would be impracticable for a User with small customers to give notice each time a small generator is changed.</p>

Number	Section	Issue	Proposed Change	Rationale for change
9	19.5(c)	<p>Adjusting Liability Caps</p> <p>Clause 19.5(c) provides for liability caps to be renegotiated every 3 years. In the absence of agreement the matter is referred to dispute resolution (which involves court proceedings).</p> <p>The clause involves a number of problems. Firstly the procedure is cumbersome and does not tend to be invoked. Secondly the provision is silent as to what caps apply pending the completion of negotiations or if the parties fail to agree. Thirdly a court is unlikely to be able to resolve such a dispute – the role of courts is to interpret agreed contracts not to resolve disputes as to failure to agree changes to contracts.</p>	<p>Clause 19.5(c) has been amended to provide for liability caps to be escalated every 3 years to reflect changes in the CPI.</p>	<p>This is a simple unambiguous procedure for adjusting liability caps to ensure they remain appropriate given changes in the value of money</p>

Number	Section	Issue	Proposed Change	Rationale for change
10	19.8	<p>Apportionment of Liability</p> <p>Clause 19.8 provides for the apportionment of the Indemnifier’s liability where loss is partly caused by Western Power.</p> <p>However the clause could potentially create confusion because the primary role of the Indemnifier is to indemnify Western Power for loss caused to Western Power by the User. If a \$100 loss was suffered by Western Power and 70% of the loss was caused by the User, then what should occur is the User’s liability is reduced to \$70 and if the User does not pay this \$70 the Indemnifier would have to step in and pay it. There should not be any further reduction downward of the Indemnifier’s liability.</p> <p>In this context clause 19.8(a) is confusing in its reference to the Indemnifier’s liability being apportioned.</p>	<p>Clause 19.8(c) has been added to address this issue and make clear that clause 19.8(a) does not reduce the Indemnifier’s liability to indemnify Western Power for liabilities the User failed to discharge.</p>	<p>This change achieves greater clarity in the operation of clause 19.8.</p> <p>It does not disadvantage the Indemnifier because the Indemnifier gets the benefit of any reduction in the User’s liability by virtue of clause 19.8(a) (noting the Indemnifier’s role is to meet liabilities the User fails to meet).</p>

Number	Section	Issue	Proposed Change	Rationale for change
11	19.11	<p>Intermediary Indemnity</p> <p>An issue Western Power has faced from time to time is where the User registers as intermediary in the Wholesale Market for someone else who owns, operates or controls plant and that person is not party to the ETAC.</p> <p>The difficulty for Western Power is that if only the intermediary is party to the ETAC Western Power has the risk of incurring liability in negligence to the other party but which liability will not be subject to the caps in the ETAC.</p>	<p>New clause 19.11 requires the User, where they are an intermediary, to indemnify Western Power against any claims by the person for whom they act as intermediary.</p>	<p>This change avoids the agreed liability regime in the ETAC being circumvented by negligence claims against Western Power.</p> <p>If the person for whom the User acts as intermediary wishes to have a right to claim against Western Power they can be a joint party to the ETAC.</p> <p>Western Power notes that such persons either own, operate or control a facility registered in the Wholesale Market. They will therefore be sophisticated persons who can make an assessment whether they wish to be party to the ETAC (and therefore have the benefit of direct rights against Western Power in return for having obligations to it) or not be party to the ETAC.</p>

Number	Section	Issue	Proposed Change	Rationale for change
12	9(f)/33.8	<p>Deletion of reference to Expiration</p> <p>Clause 9(f) refers to security being returned upon expiry of the Contract.</p> <p>Clause 33.8 refers to documents containing confidential information being returned on termination or expiration of the ETAC.</p> <p>However elsewhere in the ETAC where referring to the end of the ETAC only the term termination is used. Using expiration in clause 33.8 might suggest (incorrectly) those other references are only intended to capture early termination and not expiry. (See for example clauses 19.7, 28, 33.10, 37.12).</p>	<p>The reference to expiry in clause 9(f) has been deleted.</p> <p>The reference to expiration in clause 33.8 has been deleted.</p>	<p>This is essentially a legal clarification. It does not make any substantive change to the parties rights.</p>
13	35.1/35.4(C)	<p>Notices</p> <p>Clause 35.1 provides for services of notices by ordinary post and also by facsimile.</p> <p>Clause 35.4(c) refers to a communication sent by facsimile.</p>	<p>The references to ordinary post has been updated to priority post to reflect Australia Post's revised services.</p> <p>Reference to notices being given by facsimile has been deleted.</p>	<p>Given the unpredictability of ordinary post as compared to priority post, business letters should be sent by priority post.</p> <p>Facsimile machines are being phased out of use and so serving notices by such machines is not appropriate.</p>

Number	Section	Issue	Proposed Change	Rationale for change
14	37.13	<p>Common law termination rights</p> <p>Clause 37.13 provides that the rights, powers and remedies provided in this Contract are cumulative with and not exclusive of the rights, powers or remedies provided by Law independently of this Contract.</p> <p>However the operation of this provision is potentially too broad as it may mean common law termination rights apply to the ETAC.</p>	<p>Clause 37.13 has been amended to make clear common law termination rights do not apply.</p>	<p>Common law termination rights are vague and difficult to apply. They do not necessarily allow for a cure period which would contradict the direct intent of clause 27 which is to give both parties an opportunity to cure defaults.</p> <p>Reinforcing that rights to terminate are to be solely determined in accordance with clause 27 is consistent with the historical understanding of how the ETACs operate.</p>
15	Definition of Insolvency Event	<p>Drafting Clarifications</p> <p>The current definition under paragraph (a) states that “any suspension or cessation to payment of all or a class of its debts by an insolvent within the meaning of section 95A of the Corporations Act”. This wording appears to confuse two concepts and should simply refer to insolvency within the bounds of the Corporations Act.</p>	<p>Two minor changes have been made to this clause.</p> <p>The paragraph now simply states that a party is insolvent if they are insolvent within the meaning of section 95A of the Corporations Act.</p> <p>The reference to scheme in paragraph (c) has been amended to solvent scheme</p>	<p>These are principally drafting changes. They better clarify the operation of the definition.</p>

Number	Section	Issue	Proposed Change	Rationale for change
16	Definition of Wilful Default	<p>Drafting Clarification</p> <p>The current definition is in error in that the words “a deliberate and purposeful act or omission carried out with” are in paragraph (a) rather than forming part of the lead sentence so they apply to paragraphs (a) and (b).</p>	Drafting amended to address this error	Drafting clarification. Without this change the definition does not make sense.
	Minor Changes		A number of minor corrections (cross-referencing corrections, typographical corrections, updating legislative references and grammatical drafting type corrections) have been made.	

3. Stakeholder Engagement Summary

3.1 Approach

Western Power provided a marked-up version of the proposed ETAC and summary of key changes to Stakeholders on 10 July 2017, seeking feedback be provided by 24 July 2017.

Western Power received two responses to the proposed Model ETAC – from Eureka Electricity and Synergy. A summary of these responses and Western Power’s consideration of these responses are provided in section 3.2.

3.2 Western Power consideration of Stakeholder responses

Stakeholder	Issue Raised	Western Power response
Eureka	General - the network operator must operate on a non-discriminatory basis, and creation of different variants of ETAC potentially creates competitive advantage amongst users. This is especially relevant given the possibility of very large, legally assertive new entrants in the near future.	The ETAC must evolve over time to reflect changing conditions and the experience from administering existing contracts. Western Power does not consider the changes it has proposed will materially impact Users competitive positions. The issue of the bargaining power of large new entrants is not one Western Power can address in the ETAC.
Eureka	Clause 3.1.c Contracted Capacity This is unreasonable by virtue of its impracticality. Insofar as Western Power applies a charge for excess usage, the use of the excess is sanctioned.	Western Power does not consider it unreasonable to require Users to keep to their contracted capacity. Users who operate plant should do so within their contracted capacity limits and users who sell electricity can pass through the obligation to their customers. Exceeding contracted capacities is a threat to the integrity of the network. Western Power does not consider that the financial penalty applied through the Excess Network Usage Charge in any way sanctions such usage.

Eureka	<p>Clause 6.2 Where the User is not the Controller</p> <p>Please provide a context and justification for this</p>	<p>The rationale for the change is explained as Change No. 6 in Table 2.1 of this report. The changes give better effect to the intent of clause 6.2 which is to ensure that Controllers do not circumvent the limits on Western Power’s liability in the ETAC.</p>
Eureka	<p>Clause 9 Security for charges</p> <p>Please add a statement to require WP to return non-required deposits within a reasonable time. In my experience, it makes 2 reviews per year and refuses to return cash until the next review, even where a customer has churned away and all outstanding amounts have been paid.</p>	<p>This change has been made.</p>
Synergy	<p>Clause 3.1.c Contracted Capacity</p> <p>The draft ETAC imposes a strict obligation on users to ensure that contracted capacity in respect of a connection point is not exceeded. In Synergy's view:</p> <p>(a) beyond conducting themselves in accordance with good electricity industry practice and establishing appropriate contractual arrangements with end-users, retailers are unable to ensure their customers do not exceed contracted capacity in respect of an exit point;</p> <p>(b) it is therefore impractical and unreasonable to impose such an obligation on retailers;</p> <p>and</p> <p>(c) Western Power has not demonstrated any commercial, policy or operational reason why the existing provision is insufficient to protect Western Power's legitimate commercial interests or network safety and security.</p>	<p>It is important to the integrity of the network that contracted capacity not be exceeded.</p> <p>Western Power considers the current wording ambiguous and also as setting too low a standard:</p> <p>“The User must endeavour, as a Reasonable and Prudent Person, to ensure that the rate at which electricity is transferred into or out of the Network by or on behalf of the User does not exceed the Contracted Capacity for that Service.”</p> <p>The extent of the obligation to endeavour is unclear.</p> <p>Western Power can’t see any reason why the operator of a facility cannot keep that facility within its contracted capacity.</p> <p>Western Power understands the issue becomes more difficult for a User who is selling electricity to others but Western Power expects that the User would pass through the obligation to its customers.</p>

<p>Synergy</p>	<p>Clause 3.3(b) Eligibility Criteria</p> <p>In Synergy's view, it is essential Reference Services are capable of being easily adapted to existing ETACs as well as the applicable model ETAC. This should be reflected in the eligibility criteria for given reference services.</p> <p>Further, Synergy considers the proposed deletion of clause 3.3(b) is not fair or reasonable.</p> <p>The effect of that clause is, in essence, that a user will not be in breach of its obligation to comply with relevant eligibility criteria in respect of a reference service if Western Power has not complied with the applications and queuing policy (AQP).</p> <p>Removing that provision will mean a user may be in breach of its obligation to comply with relevant eligibility criteria even where its breach arises as a result of Western Power's breach of the AQP. For example, Western Power may place a user on a reference service that is different to the reference service requested by the User. In such circumstances it would be unfair for the user to be in breach of its obligation under clause 3.3(a).</p>	<p>The logic for the removal of clause 3.3(b) is that the User must comply with the eligibility criteria for a service until it moves to a new service. The User should not be implementing changes to the way it utilises its services until the AQP processes have been completed and Western Power has moved it to the new service.</p> <p>If Western Power fails to process a request in accordance with the AQP then the User will have a claim against Western Power for breach of contract. The removal of clause 3.3(b) does not change this.</p>
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<p>Synergy</p>	<p>Clause 13 Technical Characteristics of Facilities and Equipment</p> <p>The draft ETAC imposes new obligations on users with respect to the material modification of generating plant in circumstances where such modification does not require an application under the AQP. In Synergy's view:</p> <p>(a) Synergy cannot assess references to the AQP without being afforded the opportunity to review the draft AQP that is being proposed for AA4;</p> <p>(b) however, Synergy supports Western Power adopting a more prescriptive approach to determining "material" modifications to generating plant which require an application under the AQP and those which are not material, which do not;</p> <p>(c) the proposed new clause 13(c)(ii) of the draft ETAC does not adequately specify what "materially modify" means;</p> <p>(d) Western Power has not sought to provide any basis for it to be notified in writing at least 60 days prior to the anticipated modification, Synergy notes that such a notification period is likely to impact Synergy's customers and the small-scale renewable energy industry in the SWIS in particular; and</p> <p>(e) Clause 13(c)(ii)(B) is unacceptably broad in that it does not appear to require Western Power to determine that the modified generating plant does not adversely impact the safety or security of the Western Power network prior to the generating plant being modified.</p>	<p>Western Power notes Synergy's concerns in respect of this clause and has therefore amended it to provide that the clause does not apply to the generating plant of small customers.</p> <p>The reference to Western Power making the determination of whether plant will adversely impact the network has also been removed. The test is therefore objective and plant owners must make their own assessment of this issue.</p> <p>As revised, the main purpose of clause 13 is to ensure Western Power is given notice of proposed changes so it has the ability to raise a concern.</p> <p>The clause also obliges a User not to make a change which will adversely impact the safety or security of the Network. Western Power anticipates this is unobjectionable.</p> <p>In respect of Synergy's concern as to what material means, Western Power notes the existing ETAC uses material but does not define it. Western Power is happy to discuss further potential definitions of material but at this point is not convinced much would be gained from further defining the concept.</p>
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