



**Western Power's model alternative options service contract:
Synergy's response to the Economic Regulation Authority's
invitation for submissions**

10 November 2021

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EXECUTIVE SUMMARY

Matter	Model Alternative Option Service Contract (MAOC) published under Western Power's (WP) Alternative Options Strategy: Synergy's response to the Economic Regulation Authority's (ERA) invitation for submissions.
Context	On 14 October 2021, WP submitted its MAOC to the ERA for approval. The MAOC forms part of Western Power's alternative options strategy that it is required to publish under the <i>Electricity Network's Access Code 2004</i> (ENAC).
Scope	The ERA is seeking views from stakeholders on whether the MAOC is reasonable and meets the requirements of the ENAC. The ERA has invited submissions from stakeholders in relation to whether changes are required to the MAOC including details of the suggested change and associated reasons.
Issues	<p>Synergy has reviewed the MAOC against the Code objectives and ENAC, Chapter 6A requirements. Key issues from this review are:</p> <ol style="list-style-type: none">1. When developing an alternative options proposal/bid it is very important for an alternative options provider to have MAOC certainty. Contractual uncertainty will result in commercial risk that could materially impact an alternative option provider's proposal/bid.2. There is a lack of clarity on how the MAOC is intended to work across various types alternative option services.3. Onerous provisions exist in relation to safety and integrity because the MAOC assumes all alternative option services will have a material adverse impact on the network.4. The MAOC places significant commercial risk on the alternative options service provider for an uncertain reward.5. There is a lack of specificity in relation to key MAOC commercial details.6. The MAOC does not create a sufficient incentive to promote the efficient investment in, and efficient operation and use of services of the networks in the long term interests of consumers in relation to price.

1. Introduction

Synergy is Western Australia's (WA) largest network user, paying WP (the network operator) approximately \$1.3B annually. Synergy is also Western Australia's largest electricity retailer with more than 1 million customers.

On 7 April 2020 the Electricity Industry Amendment Bill 2019 (**Bill**) took effect and resulting in consequential changes to several pieces of subordinate legislation, including the ENAC to support the implementation of the State Government's Energy Transformation Strategy.

On 18 September 2020 the ENAC (Chapter 6A) was gazetted to include an Alternative Options Mechanism which consists of:

- Network opportunity map (**NOM**)
- Alternative options strategy (**AOS**)
- Vendor register
- MAOC

On 14 October 2021, WP submitted its MAOC to the ERA for approval. The ERA is seeking views from stakeholders on whether the MAOC is reasonable and meets the requirements of the ENAC.

Synergy's response to the ERA's draft decision is structured as follows:

- Part A – Overarching comments on the reasonableness of the MAOC.
- Part B – Comments on the reasonableness of the proposed MAOC, and compliance with other ENAC requirements in clause 6A.7.

2. Part A: Overarching comments on reasonableness of proposed MAOC

ENAC section 6A.7 requires the MAOC to form part of the network operator's alternative options strategy. The key objectives outlined in the published alternative options strategy is aimed at:

1. Supporting pro-active engagement with the market.
2. Seeking least cost solutions to network issues.
3. Keeping network costs as low as possible for customers.

Synergy supports the MAOC objectives in the delivery of least cost solutions to network issues.

Synergy sets out below its comments and observations around the workability of the MAOC (particularly for distributed energy resource (**DER**), contractual or technology based alternatives) and in certain respects, the reasonability and level of detail of the MAOC.

Part A to this submission provides Synergy's overarching comments in response to the MAOC.

Part B highlights specific issues with the MAOC and proposed solutions to those issues for the ERA's consideration.

2.1 Objectives

The concept of "alternative options" was introduced in section 6A.7 of the ENAC as a part of the State Government's Energy Transformation Strategy. One of the desired policy outcomes was to "provide greater transparency and opportunity for non-network service providers to deliver efficient solutions to WP to alleviate network needs".¹

The key objective of WP's Alternative Options Strategy (which WP is required to published under the ENAC, and of which the proposed MAOC forms a part), is "to support the proactive engagement between WP and the market to seek least cost solutions to network issues in order to keep network costs as low as possible for customers".²

2.2 Workable, reasonable and sufficiently detailed and complete

In Synergy's view, it is difficult to understand from the MAOC how it is intended to work across the various alternative options.

For example, it is not clear from the proposed MAOC how it will work, or how it is appropriate, for a DER alternative options solution or another type of contractual or technology based solution that is not provided from a single facility. An example of a contractual based solution is customer behavioural change either by direct load control or price signal. The MAOC appears to be drafted with a single physical facility³ in mind. In this regard onerous maintenance, modification and testing obligations, availability provisions and practical matters like insurance requirements may not be workable or appropriate in a DER scenario (or at least this cannot be understood from the MAOC).

Further, the proposed MAOC assumes that all alternative options services will have a material adverse impact on the network. Based on this assumption there are onerous concepts related to "safety and integrity of the Network" and associated disconnection rights. These onerous concepts will not be reasonable for all alternative options services.

In Synergy's view, not all alternative options services will have such material network impacts and therefore require disconnection. For example, the service could involve the flow of electricity being curtailed or restricted. Under the ERA approved model electricity transfer access contract (**ETAC**), WP is permitted to curtail services if it is necessary to do so to preserve 'Power System Reliability'. Given the ETAC definition of 'Power System Reliability',⁴ it is not clear why disconnection is an appropriate right under the proposed MAOC. It is not reasonable to impose obligations based on the assumption, where the solution will not have the assumed material adverse impact.

In Synergy's view, this highlights the issue about how all alternative options services can work within the proposed MAOC, and whether the circumstances in which WP can exercise rights which affect the alternative options service provider (for example, disconnection) are reasonable considering the service being provided.

As a general premise, the proposed MAOC places most of the risk on the alternative options service provider, for an uncertain reward. This creates business risk for the alternative options service provider, coupled with the right for WP to terminate the MAOC, does not, in Synergy's view, satisfy the objective of providing least cost or efficient solutions to network issues.

¹ Energy Transformation Taskforce, *Energy Transformation Strategy: Proposed Changes to the Electricity Networks Access Code: Consultation Paper*, May 2020, p 9.

² Western Power, *Alternative Options Strategy*, 1 October 2021, p 3.

³ It does not contemplate contractual arrangement holders of an Access Contract may put in place with customers at various connection points.

⁴ As defined in the Wholesale Electricity Market Rules – i.e. the ability of the SWIS to deliver energy within reliability standards while maintaining Power System Adequacy and Power System Security. (Power System Adequacy is the ability of the SWIS to supply all demand for electricity in the SWIS at the time, allowing for schedule and unscheduled outages of generation, transmission and distribution equipment and secondary equipment. Power System Security is the ability of the SWIS to withstand sudden disturbances, including the failure of generation, transmission and distribution equipment and secondary equipment.)

2.3 Proposed MAOC lacks key commercial details – potentially inconsistent with section 6A.7(b), ENAC

Synergy does not consider that the proposed MAOC is specific enough on key commercial details. In this regard, Synergy considers the proposed MAOC is likely to be inconsistent with ENAC section 6A.7(b) which requires the MAOC to be sufficiently detailed and complete to enable the alternative options service provider to understand in advance how the MAOC will be applied. This advance understanding is necessary for service providers to understand risk and be incentivised to provide alternative options.

Synergy understands that the proposed MAOC is a model document – that is, it will not contain the full commercial details. However, in its current form, it is difficult to understand what the key commercial details will be in the ultimate contract that the alternative options service provider enters with WP.

2.4 Is the proposed MAOC consistent with the Code objective and the matters the ERA is required to have regard to under the ERA Act?

The ERA must approve a proposed MAOC if it is reasonably satisfied that it complies with section 6A.7 (section 6A.8, ENAC).

For the reasons set out above and in the comments in Part B, the proposed MAOC may require amendment before it can comply with ENAC section 6A.7.

In approving the proposed MAOC, the ERA must have regard to the Code objective which is:

"to promote the efficient investment in, and efficient operation and use of, services of networks in Western Australia for the long-term interests of consumers in relation to:

- (a) price, quality, safety, reliability and security of supply of electricity;
- (b) the safety, reliability and security of covered networks; and
- (c) the environmental consequences of energy supply and consumption, including reducing greenhouse gas emissions, considering land use and biodiversity impacts, and encouraging energy efficiency and demand management.

Synergy considers the proposed MAOC in its current form may not promote the efficient investment in, and efficient operation and use of services of the networks in the long term interests of consumers in relation to price as the contract terms appear to favour WP in terms of rights and alternative options service provider obligations. Synergy considers this may have the unintended consequence of imposing additional costs on the alternative options service provider or favouring a WP alternative options service.

3. Part B: Comments on the reasonableness of the proposed MAOC, and compliance with other ENAC requirements in clause 6A.7

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
1.	1.3 (Safety and integrity of Network) and related provisions	Potentially inconsistent with section 6A.7(a) and (b), depending on the alternative option proposed	Unreasonable - particularly for options that do not actually have material network impacts Insufficient detail - It is not clear what the reference to "normal operating practices" in clause 1.3(d) means.	The contract needs to address what safety related mechanisms are required where the alternative option does not have the potential to materially impact the network. The reference to "normal operating practices" needs to be clarified.
2.	Various provisions – e.g., 3(b), 3(c)(iii), 3(c)(iv), 7.1, 8.1(b), 8.3(b), 8.4(b), 8.4(d), 8.3(e)(ii), etc	Section 6A.7(a) Section 6A.7(b)	Numerous provisions throughout the proposed MAOC: (i) allow the network operator to request information/documents from the Service Provider and (ii) require the Service Provider to undertake certain actions, including tests. There is no requirement for the network operator to apply a reasonable test when requesting the information/documents, nor when requiring the Service Provider perform the activities. The network operator should only require the Service Provider to provide information/documents and carry out requested activities where they are reasonably necessary for the conduct of the services. It would provide certainty to the Service Provider as to how the MAOC will be applied if the network operator is required to act reasonably when exercising its rights under the MAOC.	It is suggested that any provision allowing the network operator to: <ul style="list-style-type: none"> • request information/documents from the Service Provider; • require the Service Provider to perform specified tasks (including Tests), be limited by an obligation that the network operator act reasonably in so requesting the Service Provider to provide information/documents or requiring the Service Provider to perform specified tasks. This is a prudent requirement given different alternative option services will have different network footprints. Additionally, any provision which allows the network operator to determine whether a certain matter has been met (e.g., if a Test of the Facility is required, or if the network operator considers additional requirements for Testing are needed), should be subject to the network operator acting reasonably.

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
				It is also suggested that the network operator should be required to act as a "Reasonable and Prudent Person" for ENAC consistency noting that term is defined in the ENAC.
3.	Various provisions dealing with commercial details – e.g., clause 3(d), Schedule 2 (Contract Details), Schedule 3 (Facility Details), Schedule 4 (Works Schedule), Schedule 5 (Services Schedule), Schedule 6 (Fee Schedule)	Inconsistent with section 6A.7(b) (sufficient detail)	The proposed MAOC is a model document – that is, it will not contain the full, specific commercial details. However, the proposed MAOC in its current form lacks details around matters such as what the service might entail, what the specific service requirements for a particular category of option might be, and what the performance requirements might be. Some of these terms – e.g., "Performance Requirements" – are defined by reference to the Schedules. But what can the Service Provider expect to see in the Schedules?	The proposed MAOC should detail further – whether by way of explanatory notes or otherwise – what form/structure the commercial details are likely to take for each category of option, and how they will be dealt with.
4.	4 (Services)	Section 6A.7(c)(i) (scope and standard of the alternative option) Section 6A.7(b)	It is not clear from the proposed MAOC what the scope of the Services will be, and how this will be expressed in the MAOC. Schedule 5 is limited in detail. For example, there is no explanation of what the "Service Details" would include, what the "Specific Service Requirements" are, and what the "Performance Requirements" are. This is also potentially inconsistent with ENAC section 6A.7(b) which requires the MAOC to be sufficiently detailed and complete to enable the alternative options provider to understand in advance how the MAOC will be applied.	There should at least be an explanation of how the Services will be scoped and detailed in the MAOC. For example, this may be included in Schedule 5 (the Services Schedule). There should also be clarity around the "Performance Requirements" and what these might be, including whether there should be a defined limit on the performance requirements so that the Facility is not required to run beyond its parameters.
5.	4.2 (Facility)	Section 6A.7(a)	It is not clear why, in circumstances where the Service Provider owns the Facility and Equipment, why the network operator requires the level of detail specified in respect of the proposed	The proposed MAOC be updated to require the Service Provider to provide notice of the material modification to the Equipment, without the detailed level of information required (particularly in clause 4.2(e), which currently

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
			modifications to the Equipment. Synergy does not object to the Service Provider being required to notify the network operator of the proposed modification; but the obligations around the level of information that the Service Provider must provide to the network operator appear onerous. This is particularly the case where the alternative option will not be a single facility (such as DER, contractual or a technology based solution).	requires a "comprehensive and detailed explanation of" differences between any planned and actual modification). Thought should be given to whether it is reasonable to include much of clause 4.2 in the context of DER, contractual or a technology based solution.
6.	4.4 (Information)	Section 6A.7(a)	This provision, as currently drafted, is broad and far-reaching. It allows the network operator to request whatever information it might reasonably require from the Service Provider from time to time in relation to the Facility, the Services or the discharge of the Service Provider's obligations under the Contract. Whilst the provision requires the network operator to request those documents it <i>reasonably</i> requires, Synergy suggests that the other provisions of the proposed MAOC provide the network operator with the information it requires.	Delete proposed clause 4.4.
7.	4.5 (Metering)	Section 6A.7(a)	If the network operator can use metering data relating to the Facility (during and after the term of the Contract), assuming that the Service Provider is the owner of the metering data, then this metering data needs to be dealt with in accordance with the confidentiality provisions in the <i>Electricity Industry (Metering) Code 2012 (WA)</i> . Metering data cannot be shared with a third party unless in aggregated, unidentifiable form or with the customer's consent. Therefore, Service Providers will need to ensure that their contractual arrangements with end-user	MAOC Clause 4.5 should require the use of metering data consistent with the confidentiality provisions in the <i>Electricity Industry (Metering) Code 2012 (WA)</i> .

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			customers allow the Service Provider to disclose the metering data to the network operator.	
8.	5.1 (Overall Availability)	Section 6A.7(a) Section 6A.7(b)	<p>It is not clear how liquidated damages are calculated if Availability is less than the Required Availability Level. It is important that this is made clear to ensure that the liquidated damages are not a penalty – rather, a genuine pre-estimate of the network operator's loss if the Availability is less than the Required Availability Level.</p> <p>Also, there should be specified exclusions to when the Facility is Available – i.e. when it is Unavailable; and if the Facility is Unavailable for the specified reasons, then liquidated damages will not be calculated in those circumstances.</p>	<p>The MAOC should set out how the liquidated damages are calculated. For example, how is the "LD Rate: (referred to in Schedule 2) determined?</p> <p>Clarity is required on how is the Required Availability Level calculated/measured? For example, is it expressed as a percentage (perhaps determined by the number of days the Facility is available divided by the number of days in the contract period)? Synergy suggests that the least, this is described – whether by way of explanatory notes or otherwise – in the MAOC.</p> <p>Synergy would expect to see reasonable exclusions where liquidated damages do not apply, including for the network operator related issues/failings.</p>
9.	5.2 (Scheduled Maintenance)	Section 6A.7(a)	The ability for the network operator to have input into the Scheduled Maintenance Plan is excessive. Further, it is not clear how the provision would apply in a DER context.	The MAOC should require the Service Provider to provide its Scheduled Maintenance Plan to the network operator, and the network operator be permitted to suggest changes to the Scheduled Maintenance Plan (but that the Service Provider is under no obligation to make those changes to the Plans) and the Service Provider be able to amend its Scheduled Maintenance Plan without the written consent of the network operator.
10.	5.3 (Notification of Unavailability)	Section 6A.7(a)	Synergy suggests that the proposed MAOC needs to be clear on when permitted periods of unavailability are – e.g. because of an action due to the network operator /AEMO, or because of planned maintenance. Liquidated damages should not be payable during permitted periods of unavailability.	The proposed MAOC should be clear on when permitted periods of unavailability are – e.g. because of an action due to the network operator /AEMO, or because of planned maintenance. Liquidated damages should not be payable during permitted periods of unavailability.

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11.	5.4 (Deemed unavailability)	Section 6A.7(a)	The commencement date for unavailability as per clause 5.4(a)(i) could be unreasonable, depending on the alternative option service and context. For example, how it would work in a DER or technology based solution.	There should be provision to "split the difference" with the network operator – ie where it unknown when the service was last available, it could be the midway point between the last test and when the service was found to be unavailable.
12.	6 (Market Requirements)	Section 6A.7(a)	Clause 6(b) provides that the Service Provider must ensure that Standing Data for the Facility is consistent with the requirements of the MAOC. Synergy suggests that this provision should instead refer to the Standing Data being consistent with the requirements of the Wholesale Electricity Market Rules – that is the instrument under which Standing Data is required to be provided.	Synergy suggests that clause 6(b) is updated to refer to consistency with the Market Rules, rather than the requirements of the MAOC.
13.	7 (Access and protection of property)	Section 6A.7(a)	Clause 7.1 requires the Service Provider to provide the network operator with unfettered access to the Facility at times the network operator may require. Unfettered access is not reasonable – it is a usual term of service contract that reasonable access is provided during times that the other party reasonably requires. The ERA approved ETAC, for example, requires parties to allow, or use reasonable endeavours to procure, reasonable access rights. Access also depends on the type of option. We query how this would work in an aggregation scenario.	The proposed MAOC be amended to require the Service Provider to provide reasonable/sufficient access to the network operator.
14.	8 (Inspection and Testing)	Section 6.7A(c)	There are numerous provisions in the proposed MAOC which allow the network operator to require the Service Provider to undertake tests of the Facility (see, for example, at clause 3(b) and 8.3).	The Testing requirements in the MAOC need to be proportionate to the actual Services which are being provided under the Contract. Synergy suggests that, with Services such as DER solutions or a load shifting solutions, the Testing requirements are not appropriate.

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
			The testing requirements appear to be disproportionate to the scope of the Services (which is unclear).	Synergy suggests that clause 8.4(c) require the network operator representatives to not cause any loss or damage to the Facility or Equipment and not interfere with the operation of the Service Provider's business.
15.	9 (Fees)	Section 6A.7(a) Section 6A.7(b) Section 6A.7(c)(vii)	<p>The fee provisions will be pivotal in service providers deciding to provide services or not – but there is very little detail to perform any analysis of whether providing a service under the MAOC will be a profitable exercise.</p> <p><i>Clause 9.1(b)</i></p> <p>It is not clear from clause 9.1(b) (nor from the remainder of the MAOC) how the Fees will be reduced to reflect any Unavailability – on what basis will the Fees be reduced? What is the Unavailability? How is Unavailability measured? Is the Unavailability linked to the 'Required Availability Level? If so, what is that Required Availability Level (i.e. how is it measured)? Is it a percentage? These are important matters for an alternative options service provider and need to be clarified in the MAOC.</p> <p><i>Clause 9.2</i></p> <p>Invoicing procedures is heavily weighted in favour of the network operator.</p> <p>At the least, Synergy considers that the notification of the Fees (determined by the network operator) should set out how the network operator has determined the Fees, or the MAOC should allow Synergy to request the network operator to explain how it has determined the Fees.</p>	<p><i>Clause 9.1(b)</i></p> <p>At a minimum, the MAOC should reference the principles in the network operator's Alternative Options Strategy for the development of payment levels (see section 6A.5(f) of the ENAC).</p> <p>Synergy suggests that the clause also needs to detail how the Fees will be reduced to reflect any Unavailability. In Synergy's view, there should be a clear method of calculating any reduction, whether that be by reference to a percentage of the Fees against the 'Unavailability'.</p> <p><i>Clause 9.2</i></p> <p>Clause 9.2 should be updated to allow the Service Provider to request the network operator to provide it with information/details on how the network operator has calculated the Fees.</p> <p>Additionally, if the network operator requests information from the Service Provider to allow it to calculate the Fees, Synergy suggests that the provision should be limited to information that the network operator <i>reasonably requests</i> and that it <i>reasonably requires</i> to calculate the Fees.</p>

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
			<p>Synergy also submits that if the Service Provider disputes the amount of Fees that the network operator has determined, the Service Provider should not be required to issue an invoice for the amount the network operator specifies – instead, the Service Provider should be required to issue an invoice for the amount the Service Provider considers is the correct amount, and the balance can be referred for dispute resolution. Synergy submits that this position is reasonable, and better complies with section 6A.7(b) of the ENAC. It is also in line with the provisions of the ERA approved ETAC and the Model Service Level Agreement regarding the payment of disputed portions of invoices.</p> <p>Synergy submits that the timeframe in clause 9.2(c) for the estimation of Fees – "once the network operator is able to determine those Fees" – is too broad. This is potentially inconsistent with ENAC section 6A.7(b).</p> <p>Finally, the obligation in clause 9.2(d) is discretionary – Synergy submits that, to comply with ENAC section 6A.7(a), it should be mandatory. If an adjustment to the invoice is required (for example, because there has been an under calculation of the Fees payable to the Service Provider), then the network operator should be obliged to notify the Service Provider of the adjustment.</p>	
16.	10 (Change in Rules)	Section 6A.7(a) Section 6A.7(b)	As the Service Provider is providing the Services to the network operator, Synergy suggests that clause 10 specifically call out what changes may materially	Clause 10(a) be amended to specifically refer to material impacts in the case of the Service Provider including in relation to costs.

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
			<p>impact the Service Provider – <i>including the costs of providing the services</i>, to trigger the parties negotiating amendments to the MAOC. That is because the reference to "materially impacts" may not necessarily cover, for example, an increase in the Service Provider's costs of providing the Services.</p>	<p>Synergy also suggests that the reference to "the minimum necessary amendments to the provisions of this Contract required to enable this Contract to continue to operate and to be administered..." should be expanded to also refer to the minimum necessary amendments to preserve the return/cost from the service provider's perspective.</p>
17.	11 (Liability of Western Power)	Section 6A.7(a)	<p>Synergy does not consider the network operator 's liability position vis the Service Provider to be reasonable.</p> <p>The network operator has no liability to the Service Provider (except for gross negligence or breach of the Contract). This position does not seem reasonable, particularly in contrast to the position the network operator is seeking under clause 12.</p> <p>Finally, the Western Australian Supreme Court of Appeal recently determined that the network operator owned a common law duty of care to persons in the vicinity of its electricity distribution system. The duty was to take reasonable care to avoid or minimise the risk of injury to those persons, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its electricity distribution system. Under the MAOC, the Facility will presumably be installed on or in proximity to the network operator 's distribution system. the network operator 's liability to the Service Provider cannot then be excluded in respect of its common law duty of care.</p>	<p>Synergy suggests that as a minimum, the network operator's liability should extend to include acts of fraud and wilful misconduct (in addition to gross negligence and breach of Contract). Additionally, the exclusion for consequential loss should not apply for fraud. Other liability (for example damage to service provider equipment due to the network operator fault/failure – may need to be considered depending on the service. In that regard, a series of options may be a better approach opposed to a one size fits all.</p> <p>Synergy suggests that the MAOC be clear that the network operator 's common law duty of care to persons in the vicinity of its electricity distribution system (which should include the Service Provider) is not excluded.</p>

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18.	12 (Liability of Service Provider)	Section 6A.7(a)	<p>Synergy does not consider the Service Provider's liability position vis the network operator to be reasonable.</p> <p>The proposed liability provisions for the Service Provider are very broad and include liability for Third Party Claims but there is no exclusion for consequential losses.</p> <p>The liability for Third Party Claims in respect of a failure by the Service Provider to provide the Services in accordance with the Contract (howsoever caused) or a breach of contract by the Service Provider are particularly concerning – these circumstances are extremely broad and far-reaching. The network operator is responsible for the network safety and integrity of the Network – a failure to provide the Services or a breach of any contract by the Service Provider should not in all circumstances rest with the Service Provider.</p> <p>It is also unclear why the Service Provider's liability to the network operator and the Service Provider's liability to the network operator for Third Party Claims is not reduced proportionality to the extent the network operator 's negligent act or omission, breach of contract or breach of its common law duty of care contributed to the loss. This is a usual position in contractual indemnity provisions and Synergy submits it is therefore a reasonable position to adopt for the MAOC. In this regard for example, Synergy notes that the ERA approved ETAC includes a provision dealing with apportionment of liability – the liability or indemnity owed by a party (the 'first party') to</p>	<p>To represent a reasonable position under the MAOC, Synergy suggests:</p> <ul style="list-style-type: none"> • If the current broad ranging liability provisions are to be maintained, then at the least, the Service Provider's liability should be capped. • Liability for Third Party Claims should be limited to a breach of the MAOC, tortious act or omission by the Service Provider or breach of any Law. • The Service Provider's liability for Third Party Claims be reduced proportionality to the extent the network operator 's negligent act or omission, breach of contract or breach of its common law duty of care contributed to the loss. • A similar provision to clause 11.2(b) be included the MAOC in respect of the Service Provider – i.e. the Service Provider is not liable to the network operator on any basis whatsoever for any Consequential Loss.

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
			<p>another is limited to the proportion of damage suffered by the other party as a consequence of the first party's Default (as defined in the ERA approved ETAC), negligence or fraud giving rise to the liability or indemnity.</p> <p>It is particularly important, for users of the network that have an electricity transfer access contract with the network operator, that the network operator's rights under the MAOC do not limit a user's rights under the ETAC. For example, if the Service Provider is also the controller of a connection point under an ETAC, then the network operator should indemnify the Service Provider for any act or omission by the network operator which causes the Service Provider to be in breach of its obligations under the ETAC.</p> <p>Finally, it is not clear why clause 12.4(f) (which deals with the conduct of litigation in the event a Third Party Claim is made against the network operator) does not apply to any party that is conducting the defence – i.e. the network operator or the Service Provider.</p>	
19.	13 (Insurance)	Section 6A.7(a)	<p>Given the varying scope of the Services which may be provided under the MAOC, Synergy is not sure that the insurance provisions are appropriate for application across all services that may be supplied. They appear to be most relevant to larger scale facilities only.</p> <p>The reference to \$100,000 in clause 13.8 may not be appropriate where the Services being provided are larger scale (and not, for example, smaller DER facilities).</p>	<p>In the circumstances, Synergy suggests it more appropriate for the insurance provisions (and Schedule 7) to be replaced with a provision to the effect that – the Service Provider is to maintain such policies of insurance that a prudent person providing similar services to the Services would maintain and provide evidence of that insurance to the network operator when requested to do so.</p>

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20.	14 (Security)	Section 6A.7(a) Section 6A.7(b)	Synergy suggests that the network operator should only require a service provider to provide security where it is reasonable to so require it, and any security provided should be a reasonable value (considering the value of the service to be provided under the contract). Otherwise, this may rule out a lot of players from being able to provide any services.	A service provider should only be required to provide security where it is reasonable for security to be provided, and any security amount should be reasonable in light of the Services to be provided under the contract.
21.	15 (Record keeping)	Section 6A.7(a)	<p>The record keeping obligations in the proposed MAOC are, in Synergy's view, rather onerous. For example, it is not clear why a Service Provider needs to maintain records of Testing as described in clause 15.1(b), when the Service Provider is required to provide such information to the network operator following the conduct of Tests.</p> <p>Also, clauses 15.2 and 15.3 allow the network operator to inspect and audit records – but there's no reference to any confidentiality measures.</p>	<p>Record keeping obligations should be limited to maintaining the records that the Service Provider considers, acting in accordance with Good Electricity Industry Practice, it is required to maintain to demonstrate compliance with the Contract and that it is able to provide the Services.</p> <p>The network operator's ability to inspect and audit the Service Provider's records should be subject to confidentiality provisions.</p>
22.	18 (Force Majeure)	Section 6A.7(a)	<p>The definition of "Force Majeure Event" contains an exclusion for a COVID-19 event (at paragraph (l) of the definition). Synergy submits that the exclusion (which itself contains an exclusion to the exclusion) is unclear. Does the COVID-19 event qualify as a Force Majeure Event where the party is aware that the impact of the COVID-19 event will be beyond the reasonable control of the party? The current drafting in paragraph (l) is ambiguous.</p> <p>In any event, Synergy submits that in the current climate – even though COVID-19 is a known event – it is problematic to exclude COVID-19 as a Force Majeure Event. Circumstances in Western Australia</p>	Synergy suggests the more reasonable position is to delete paragraph (l) from the definition of Force Majeure Event.

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
			could quickly change, and could impact either of the parties' obligations under the MAOC.	
23.	19 (Disconnection)	Section 6A.7(a) Section 6A.7(b)	<p>Clause 19.1 allows the network operator to disconnect the Facility from the Network if the Facility fails to comply with the requirements of the Contract and due to the failure there is a material risk to the safety and integrity of the Network and the Service Provider fails to remedy the failure. However, Synergy suggests that – depending on the Service being provided – disconnecting the Facility from the Network is not an appropriate or proportionate action in all circumstances – instead, curtailment may be appropriate. For example, it may not be appropriate to disconnect a DER solution, but instead curtail the solution.</p> <p>In this regard, Synergy notes that the ERA approved ETAC includes a curtailment provision, and one of the circumstances in which the network operator can curtail the provision of services is if it considers it necessary to do so to preserve 'Power System Reliability'. Given the definition of 'Power System Reliability' in the ETAC,⁵ it is not clear to Synergy why disconnection of a Facility is an appropriate right in all circumstances under the proposed MAOC.</p> <p>Clause 19.3 provides that the Service Provider may be required to reimburse the network operator for its disconnection/reconnection costs. Synergy</p>	<p>Synergy suggests that measures other than disconnection are included in the MAOC (as per the ERA approved ETAC), proportionate to the Service being provided.</p> <p>Synergy suggests that the circumstances referred to in clauses 19.5(b) and 19.5(c) be deleted.</p>

⁵ As defined in the Wholesale Electricity Market Rules – i.e. the ability of the SWIS to deliver energy within reliability standards while maintaining Power System Adequacy and Power System Security. (Power System Adequacy is the ability of the SWIS to supply all demand for electricity in the SWIS at the time, allowing for schedule and unscheduled outages of generation, transmission and distribution equipment and secondary equipment. Power System Security is the ability of the SWIS to withstand sudden disturbances, including the failure of generation, transmission and distribution equipment and secondary equipment.)

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
			<p>submits that this is not appropriate in all circumstances, particularly when curtailment may be a more appropriate option.</p> <p>Finally, clause 19.5 provides that the Facility will be regarded as Unavailable during any period it is disconnected from the Network due to a disconnection under the Contract, or due to a disconnection under another contract or because the Service Provider has breached a contractual or legal obligation binding on it. In Synergy's view, the Facility should only be regarded as Unavailable if it is disconnected under the Contract for breach – not any other reasons. Disconnections in those circumstances will have separate consequences and should not have any bearing on the Contract. Also, in those circumstances, the network operator is not necessarily a party to the contractual arrangement, nor has it any interest in the relevant legal obligation.</p>	
24.	20 (Default and termination)	Section 6A.7(a)	<p>Synergy is concerned that the time periods for rectification of the various events of default listed in clause 20 are not reasonable. For example, by reference to the ERA approved ETAC, there is (i) 5 business days for a party to rectify a default (other than the payment of money), and then a further (ii) 20 business days, following which the other party can terminate the contract. This represents a more reasonable position for the parties, and gives more certainty that the MAOC will continue if the affected party is able to remedy the default.</p> <p>It is not clear to Synergy why there is a longer rectification period for a breach relating to a failure</p>	The default provision be updated in line with the default and termination provision in the ERA approved ETAC.

Matter	MAOC clause/s	ENAC assessment / relevance	Issue (in principle)	Synergy recommendation
			<p>to pay money, than a breach relating to the Facility's compliance with the requirements of the contract. A breach relating to a failure to pay money should be able to be rectified in a shorter period.</p> <p>Synergy also suggests that the default process should be a stepped process, like that in the ERA approved ETAC – e.g. x business days to rectify following notice, and then a further x business days to rectify, following which the non-defaulting party may terminate the contract.</p> <p>Synergy also suggests that as an alternative to a right of termination, if a party fails to cure its defect, then the other party might withhold any payments due under the contract.</p>	
25.	21 (Cure of Service Provider breaches by Western Power)	Section 6A.7(a)	<p>The requirement for clause 21 is not clear. It appears of no benefit to the Service Provider, and may in fact expose the Service Provider to additional costs (because the network operator can demand reimbursement of its costs for taking steps to remedy the breach). This is not a reasonable position.</p> <p>Under the proposed clause, if the network operator elects to take steps to remedy the breach, it can cease taking such steps at any time and has no liability to the Service Provider for ceasing to take such steps. The network operator is then entitled to demand reimbursement of its costs for attempting to remedy a breach.</p> <p>It is unclear under then MAOC what happens if the network operator has taken steps which cause damage to the Facility or Equipment?</p>	Synergy suggests clause 21 is deleted or the liability the network operator causes to the Service Provider or its equipment is addressed.

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26.	22 (Termination for convenience)	Section 6A.7(a)	<p>Synergy does not consider that this provision is reasonable, in light of the MAOC as a whole. Clause 22 of the proposed MAOC allows the network operator to terminate the Contract in <i>its absolute discretion and for any reason whatsoever</i>.</p> <p>In any event, it is not clear to Synergy why the network operator would require a termination for convenience provision when it has entered the MAOC for a cost effective service (which it will have vetted via its processes before entering the MAOC).</p> <p>If the network operator terminates the Contract for convenience, the Service Provider's sole right is a termination payment (if any). In circumstances where the MAOC is heavily weighted in favour of the network operator and the Service Provider is taking most of the risk, the termination payment will need to adequately compensate the Service Provider for the lost opportunity to continue the provision of the Service.</p>	<p>Synergy suggests that the termination for convenience provision is removed from the MAOC.</p> <p>Alternatively, if it is retained, then Synergy suggests that the termination right be mutual. In any event, Synergy suggests that there should be a termination payment payable to the Service Provider if the network operator terminates the Contract.</p>
27.	28.3 (Ownership of the Facility)	Section 6A.7(a)	<p>Clause 28.3 provides that the Service Provider may not deal with an ownership interest in the Facility without the network operator 's prior written consent, and the network operator may impose conditions (without limitation) on any consent given.</p> <p>Synergy does not consider that this is a reasonable position in circumstances where the Service Provider owns the Facility.</p>	<p>Any conditions the network operator imposes should be limited to the person acquiring the ownership interest in the Facility having the technical or financial capability to comply with the conditions of the Contract.</p>