



Essential Energy Distribution Determination 2019 to 2024

April 2019

Attachment A
Negotiating Framework

Essential Energy Negotiating Framework Negotiated Distribution Services

April 2018



Table of Contents

1.	National Electricity Rules	3
2.	Negotiated Distribution Services	3
3.	Application of this Negotiating Framework	3
4.	Obligation to Negotiate in Good Faith	3
5.	Timeframe for Commencing, Progressing and Finalising Negotiations	4
6.	Provisions of Initial Commercial Information by Service Applicant	5
7.	Provisions of Additional Commercial Information by Service Applicant	6
8.	Provisions of Commercial Information by Essential Energy	6
9.	Confidential Information	7
10.	Impact on Other Distribution Network Users	7
11.	Suspension of Timeframe for Negotiation	8
12.	Dispute Resolution	8
13.	Payment of Essential Energy's Costs	8
14.	Termination of Negotiation	9
15.	Giving Notices	9
16.	Definitions and Interpretations	10

List of Tables

Table 1: Negotiating Timeframe	4
--------------------------------	---

1. National Electricity Rules

- 1.1. The National Electricity Rules (*NER*) provide that a distribution network service provider (distributor) must prepare a negotiating framework setting out the procedure to be followed during negotiations between that provider and any person (the *service applicant*) who wishes to receive a *negotiated distribution service* from the provider, as to the *terms and conditions of access* for the provision of the service.
- 1.2. This negotiating framework must comply with and be consistent with the applicable requirements of the distributor's distribution determination and the minimum requirements for a negotiating framework prescribed in subclause 6.7.5(c) of the *NER*.

2. Negotiated Distribution Services

- 2.1. This negotiating framework applies to services nominated by the *AER* as being *negotiated distribution services* and items not included in the *Essential Energy* price list. This framework does not govern the provision of unregulated services, Direct control services (standard control services and alternative control services, including metering types 5 and 6), third party shared or forced access services and contestable connection services.

3. Application of this Negotiating Framework

- 3.1. This negotiating framework applies to *Essential Energy* and each *service applicant* that has made an application in writing to *Essential Energy* for the provision of a *negotiated distribution service*.
- 3.2. *Essential Energy* and any *service applicant* who wishes to receive a *negotiated distribution service* from *Essential Energy* must comply with the requirements of this negotiating framework.
- 3.3. The requirements set out in this negotiating framework are in addition to any requirements or obligations contained in the *NER*.
- 3.4. In the event of inconsistency between the *NER* and this negotiating framework, the requirements of the *NER* will prevail.
- 3.5. Nothing in this negotiated framework or in the *NER* will be taken to impose an obligation on *Essential Energy* to provide a *negotiated distribution service* to the *service applicant*. *Essential Energy* has the sole discretion to determine if it will provide the *negotiated distribution service* to the *service applicant* at the conclusion of the negotiation process.
- 3.6. The *service applicant* acknowledges that *Essential Energy* is not liable for any loss or costs incurred or suffered by the *service applicant* as a result of *Essential Energy* not providing the *negotiated distribution service* at the conclusion of any negotiation process for such service.

4. Obligation to Negotiate in Good Faith

- 4.1. *Essential Energy* and the *service applicant* must negotiate in good faith the *terms and conditions of access* for the provision by *Essential Energy* of the *negotiated distribution service* sought by the *service applicant*.

5. Timeframe for Commencing, Progressing and Finalising Negotiations

- 5.1. Paragraph 5.4 sets out the timeframe for commencing, progressing and finalising negotiations in relation to applications for *negotiated distribution services* under the *NER*.
- 5.2. The timeframes set out in paragraph 5.4 may be suspended in accordance with paragraph 10.
- 5.3. *Essential Energy* and the *service applicant* must use reasonable endeavours to adhere to the time periods specified in paragraph 5.4 during the negotiation for the supply of a *negotiated distribution service*.
- 5.4. The preliminary program finalised under C in Table 1 may be modified from time to time by the agreement of the parties, and such agreement must not be unreasonably withheld. Any such amendment to the preliminary program will be taken to be a reasonable period of time for commencing, progressing and finalising negotiations with a *service applicant* for the provision of the *negotiated distribution service*. The requirement in paragraph 5.3 applies to the last amended preliminary program.

Table 1: Negotiating Timeframe

	Event	Indicative timeframe	Paragraph reference
A	Receipt of written application for a <i>negotiated distribution service</i>	X	
B	Parties meet to discuss a preliminary program with milestones for supply of the <i>negotiated distribution service</i> that represent a reasonable period of time for commencing, progressing and finalising negotiations for the provision of the <i>negotiated distribution service</i>	X + 20 <i>business days</i> , or negotiated timeframe	5.5.1
C	Parties finalise preliminary program, which may include, without limitation, milestones relating to: <ul style="list-style-type: none"> > the request and provision of <i>commercial information</i>, and > notification and consultation with <i>AEMO</i> > negotiation with affected <i>distribution network users</i> > notification of <i>Essential Energy's</i> reasonable direct expenses incurred in processing the application and the payment of those expenses by the <i>service applicant</i> 	X + 30 <i>business days</i> or negotiated timeframe, taking into account any request for additional information	5.5.2 7.4 9
D	<i>Essential Energy</i> provides <i>service applicant</i> with an offer for the <i>negotiated distribution service</i>	X + 120 <i>business days</i> , or negotiated timeframe	5.5.3
E	Parties finalise negotiations	x + 160 <i>business days</i> , or negotiated timeframe, taking into account the above variations in the timeframe	5.5.4

- 5.5. Subject to paragraphs 5.2 to 5.4, *Essential Energy* and the *service applicant* must, following a request for a *negotiated distribution service*, use their reasonable endeavours to:
 - 5.5.1. hold a meeting within 20 *business days* of receipt of the application, or such other period of time as agreed by the parties, in order to agree to a timetable for the conduct of negotiations and to commence discussion regarding other relevant issues;
 - 5.5.2. progress the negotiations for the provision of a *negotiated distribution service* by *Essential Energy* such that the negotiations for the preliminary program may be finalised in accordance with the timetable referred to in paragraph 5.5.1;
 - 5.5.3. adhere to any timetable established for the negotiation and to progress the negotiation in an expeditious manner; and
 - 5.5.4. finalise the negotiations for the provision of a *negotiated distribution service* by *Essential Energy* within a time period agreed by the parties.
- 5.6. Notwithstanding paragraph 5.1, or any other provision of this negotiation framework, the timeframes set out in paragraphs 5.2 to 5.4:
 - 5.6.1. do not commence until payment of the amount to *Essential Energy* pursuant to paragraph 13;
 - 5.6.2. recommence if there is a material change in the *negotiated distribution service* sought by the *service applicant*, unless *Essential Energy* agrees otherwise.
- 5.7. At the conclusion of the negotiations between *Essential Energy* and the *service applicant*, whether by way of agreed outcome or by termination pursuant to paragraph 14 of the negotiating framework, *Essential Energy* must publish the results of the negotiations on its website.

6. Provisions of Initial Commercial Information by Service Applicant

- 6.1. *Essential Energy* must request the *service applicant* to provide it with the *commercial information* held by the *service applicant* that *Essential Energy* reasonably requires to enable it to engage in effective negotiations with the *service applicant* in relation to the *service applicant's* application and to enable *Essential Energy* to submit *commercial information* to the *service applicant* for the provision of the *negotiated distribution service*. *Essential Energy* must use its reasonable endeavours to make the request within the period of time agreed by the parties pursuant to paragraph 5.
- 6.2. The *service applicant* must provide *Essential Energy* with the *commercial information* *Essential Energy* reasonably requires to engage in effective negotiations with the *service applicant* in relation to the application. Subject to paragraphs 6.3 and 6.4, the *service applicant* must use its reasonable endeavours to provide *Essential Energy* with the *commercial information* requested by *Essential Energy* in accordance with paragraph 6.1 within 10 *business days* of the request, or within a time period as agreed to by the parties.
- 6.3. Notwithstanding paragraph 6.1, the obligation under paragraph 6.1 is suspended as at the date of the notification of a dispute, if a dispute under this negotiating framework arises, until the resolution of the dispute in accordance with paragraph 12.

Confidentiality requirements – Commercial Information

- 6.4. *Commercial information* may be provided by the *service applicant* subject to the condition that *Essential Energy* must not disclose the *commercial information* to any other person unless the *service applicant* consents in writing to the disclosure. The *service applicant* may require *Essential Energy* to enter into a confidentiality agreement with the *service applicant*, on terms reasonably acceptable to both parties, in respect of any *commercial information* provided to *Essential Energy*.
- 6.5. A consent provided by the *service applicant* in accordance with paragraph 6.4 may be subject to the condition that the person to whom *Essential Energy* discloses the *commercial information* must enter into a separate confidentiality agreement with the *service applicant*.

7. Provisions of Additional Commercial Information by Service Applicant

Obligation to provide additional Commercial Information

- 7.1. *Essential Energy* may give a notice to the *service applicant* requesting the *service applicant* to provide *Essential Energy* with any additional *commercial information* that is reasonably required by *Essential Energy* to enable it to engage in effective negotiations with the *service applicant* in relation to the provision of a *negotiated distribution service* or to clarify any *commercial information* provided pursuant to paragraph 6.
- 7.2. The *service applicant* must use its reasonable endeavours to provide *Essential Energy* with the *commercial information* requested by *Essential Energy* in accordance with paragraph 7.1, within 10 *business days* of the date of the request under paragraph 7.1, or such other period as agreed to by the parties.
- 7.3. The provision of additional *commercial information* by the *service applicant* pursuant to paragraph 7.2 is subject to the provisions in paragraphs 6.4 and 6.5 above.
- 7.4. The *service applicant* must use its reasonable endeavours to provide the following information to *Essential Energy* within 10 *business days* of the written request (step C of table 1 in paragraph 5.4) being submitted to *Essential Energy*, regardless of whether it is requested by *Essential Energy* under paragraphs 6.1 and 7.1:
 - 7.4.1. technical information such as lifecycle analysis, maintenance requirements, performance criteria, electrical specifications, or any other information relevant to the application for a *negotiated distribution service*;
 - 7.4.2. financial information such as technology costs, maintenance costs, or any other information relevant to the application for a *negotiated distribution service*;
 - 7.4.3. details of the compliance of the *service applicant's* application with any law, the *NER*, or applicable guidelines; and
 - 7.4.4. details of the compliance of the *service applicant's* application with AS/NZ 3000, or AS1158, AS61000 series or any other applicable standard.

8. Provisions of Commercial Information by Essential Energy

Obligation to provide Commercial Information

- 8.1. *Essential Energy* must provide the *service applicant* with all *commercial information* held by *Essential Energy* that is reasonably required by the *service applicant* to enable it to engage in effective negotiations with *Essential Energy* for the provision of a *negotiated distribution service* within a timeframe agreed to by the parties, including the following information:
 - 8.1.1. a description of the nature of the *negotiated distribution service* including what *Essential Energy* would provide to the service provider as part of that service;
 - 8.1.2. the terms and conditions on which *Essential Energy* would provide the *negotiated distribution service* to the *service applicant*; and
 - 8.1.3. the reasonable costs and/or the increase or decrease in costs (as appropriate) of providing the *negotiated distribution service* to the *service applicant* which demonstrate to the *service applicant* that the charges for providing the *negotiated distribution service* reflect those costs and/or the cost increment or decrement (as appropriate).
- 8.2. *Essential Energy* reserves the right to withhold information requested by the *service applicant* pursuant to paragraph 8.1 if such information is legally privileged.

- 8.3. For the purpose of paragraph 8.1.3, *Essential Energy* must have appropriate arrangements in place for the assessment and review of the charges and the basis on which they are made.

Confidentiality requirements

- 8.4. *Essential Energy* may provide the *commercial information* in accordance with paragraph 8.1, subject to the condition that the *service applicant* must not disclose the *commercial information* to any other person unless *Essential Energy* consents in writing to the disclosure. *Essential Energy* may require the *service applicant* to enter into a confidentiality agreement with *Essential Energy*, on terms reasonably acceptable to both parties, in respect of *commercial information* provided to the *service applicant*.
- 8.5. A consent provided by a *service applicant* in accordance with paragraph 8.4 may be subject to the condition that the person to whom the *service applicant* discloses the *commercial information* must enter into a separate confidentiality agreement with *Essential Energy*.

9. Confidential Information

- 9.1. A party disclosing information pursuant to paragraphs 6, 7 or 8 may be required by the party receiving such information to enter into a confidentiality agreement on terms reasonably acceptable to both parties, before the disclosure of the *confidential information* to that person.
- 9.2. Notwithstanding paragraph 9.1, a party in receipt of *confidential information* under this negotiating framework (the *disclosing party*) shall:
- > keep confidential the *confidential information* of the *disclosing party*
 - > take all reasonable steps to protect the confidentiality and security of the *confidential information* of the *disclosing party*
 - > without limiting paragraph 9.1, comply with the *disclosing party's* instructions regarding security of its *confidential information*
 - > not, directly or indirectly, divulge, use, disclose or publish the *confidential information* of the *disclosing party* to any person
 - > not make or allow to be made copies of, or extracts of, any part of the *confidential information*, except for the purposes of negotiating the *terms and conditions of access* to a *negotiated distribution service* sought by the *service applicant*.
- 9.3. Nothing in paragraph 9.2 restricts the disclosure of such information to the extent required by law.
- 9.4. Each party is liable for and indemnifies the other in respect of any claim, action, damage, loss, liability, cost, expenses or payment which the *disclosing party* suffers or incurs or is liable for as a result of a breach of this paragraph 9.

10. Impact on Other Distribution Network Users

- 10.1. *Essential Energy* must determine the potential impact on *distribution network users*, other than the *service applicant*, of the provision of the *negotiated distribution service*.
- 10.2. *Essential Energy* must notify and consult with any affected *distribution network users* and ensure that the provision of the *negotiated distribution service* does not result in non-compliance with obligations in relation to other *distribution network users* under the *NER*.
- 10.3. *Essential Energy* is required to consult the affected *distribution network users* pursuant to paragraph 10.2, the timeframes provided for in paragraph 5 shall be suspended until the information required to assess the impact is received from the affected *distribution network user*.

11. Suspension of Timeframe for Negotiation

- 11.1. The timeframes for negotiating the provision of a *negotiated distribution service* as contained within this negotiating framework, or as otherwise agreed to between the parties, are suspended if:
- 11.1.1. within 10 *business days* of *Essential Energy* providing the *commercial information* to the *service applicant* pursuant to paragraph 6.1, the *service applicant* does not formally accept that *commercial information* and the parties have agreed to a date for the undertaking and conclusion of commercial negotiations;
 - 11.1.2. a dispute in relation to the *negotiated distribution service* has been notified to the *AER* under Part 10 of the National Electricity Law (*NEL*). In this event, the timeframe for the negotiations will be suspended from the date of the notification of the dispute to the *AER* until:
 - (a) the withdrawal of the dispute under section 126 of the *NEL*;
 - (b) the termination of the dispute by the *AER* under section 131 or section 132 of the *NEL*; or
 - (c) a determination is made in respect of the dispute by the *AER* in accordance with section 128 of the *NEL*.
 - 11.1.3. within 10 *business days* of *Essential Energy* requesting additional *commercial information* from the *service applicant* pursuant to paragraph 7, the *service applicant* has not supplied that *commercial information*;
 - 11.1.4. without limiting paragraphs 11.1.1 to 11.1.3, if either of the parties does not promptly meet any of its obligations as required by this negotiating framework or as otherwise agreed to by the parties;
 - 11.1.5. *Essential Energy* has been required to notify and consult with any affected *distribution network users* under paragraph 10.2, or *AEMO* at any time regarding the provision of the *negotiated distribution service*. In those circumstances, the time frame for the negotiations will be suspended from the date of notification to the affected *distribution network users* or *AEMO* until:
 - (a) the end of the time limit specified by *Essential Energy* for any affected *distribution network users* or *AEMO*; or
 - (b) the receipt of information from the affected *distribution network users* or *AEMO* regarding the provision of the negotiation distribution service,whichever is the later.

12. Dispute Resolution

- 12.1. All disputes between the parties as to the *terms and conditions of access* for the provision of a *negotiated distribution service* are to be dealt with in accordance with the relevant provisions of Part 10 of the *NEL* and Part L of Chapter 6 of the *NER* for dispute resolution.

13. Payment of Essential Energy's Costs

- 13.1. Prior to commencing negotiations, the *service applicant* must pay an application fee to *Essential Energy*. The fee must be no more than *Essential Energy's* reasonable estimate of its *costs* in dealing with the application.
- 13.2. The application fee lodged pursuant to section 13.1 will be deducted from the reasonable direct costs incurred in processing the *service applicant's* application to *Essential Energy* for the provision of a *negotiated distribution service*.
- 13.3. From time to time, *Essential Energy* may give the *service applicant* a notice setting out the reasonable direct costs incurred by *Essential Energy* and the off-set of any amount applicable under paragraph 13.1.

- 13.4. If the aggregate of the reasonable direct costs exceed the amount paid by the *service applicant* pursuant to paragraph 13.1, the *service applicant* must, within 20 *business days* of the receipt of a notice in accordance with paragraph 13.3, pay *Essential Energy* the amount stated in the notice. If the aggregate of its actual reasonable direct costs is less than the amount paid by the *service applicant* pursuant to paragraph 13.1, *Essential Energy* must promptly notify the *service applicant* and must within 20 *business days* of the date of that notice refund to the *service applicant* the amount by which the application fee paid by the *service applicant* under paragraph 13.1 exceeds *Essential Energy's* actual aggregate reasonable direct costs.
- 13.5. *Essential Energy* may require the *service applicant* to enter into a binding agreement addressing conditions, guarantees and other matters in relation to the payment of ongoing costs.

14. Termination of Negotiation

- 14.1. The *service applicant* may elect not to continue with its application for a *negotiated distribution service* and may terminate the negotiations by giving *Essential Energy* written notice of its decision to do so.
- 14.2. *Essential Energy* may terminate a negotiation under this framework by giving the *service applicant* written notice of its decision to do so where:
 - 14.2.1. *Essential Energy* has reasonable grounds to believe that the *service applicant* is not conducting the negotiation under this negotiating framework in good faith;
 - 14.2.2. *Essential Energy* has reasonable grounds to believe that the *service applicant* will not acquire any *negotiated distribution services*;
 - 14.2.3. An act of *solvency default* occurs in relation to the *service applicant*.

15. Giving Notices

- 15.1. A notice, consent, information, application or request that is to be given to or made of a party under this negotiating framework is only given or made if it is in writing and delivered or posted to that party at its address set out below.

If a party gives the other party 5 *business days* notice of a change of its address, a notice, consent, information, application or request is only given or made by that other party if it is delivered or posted to the latest address.

Essential Energy

Name: Essential Energy

Address: PO Box 5730, Port Macquarie NSW 2444

Service applicant

Name: *Service applicant*

Address: The nominated address of the *service applicant* provided in writing to *Essential Energy* as part of the application.

Time notice is given

- 15.2. A notice, consent, information, application or request is to be treated as given or made at the following time:
 - 15.2.1. if it delivered, when it is left at the relevant address;
 - 15.2.2. if it is sent by post, 2 *business days* after it is posted;
 - 15.2.3. if sent by facsimile transmission, on the day the transmission is sent (but only if the sender has a confirmation report specifying a facsimile number of the recipient, the number of pages sent and the date of transmission); or
 - 15.2.4. if sent by email, once it reaches the recipient's electronic address.
- 15.3. If a notice, consent, information, application or request is delivered after the normal business hours of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next *business day*.

16. Definitions and Interpretations

- 16.1. Words and expressions in italics have the same meaning as they do in the *NEL* and *NER* unless context requires otherwise.
- 16.2. A reference to any law or legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.

Definitions

- 16.3. In this document the following definitions apply:

AEMO means Australian Energy Market Operator

AER means the Australian Energy Regulator, as defined by the *NER*

business day means a day other than a Saturday, a Sunday or a public holiday

commercial information includes, but is not limited to, the following classes of information:

- > details of corporate structure
- > financial details relevant to credit worthiness and commercial risk
- > ownership of assets
- > technical information relevant to the application for a *negotiated distribution service*
- > financial information relevant to the application for a *negotiated distribution service*
- > details of an application's compliance with any law, standard, *NER* or guideline

but does not include:

- > *confidential information* provided by another person to either:
 - a. the *service applicant*; or
 - b. *Essential Energy*
- > information that the *service applicant* is prohibited, by law, from disclosing to *Essential Energy*; or
- > information that *Essential Energy* is prohibited, by law, from disclosing to the *service applicant*.

confidential information means information held by either party that is, by its nature, confidential, is marked confidential, or the receiving party knows or ought to know is confidential, and specifically includes:

- > information relating to, or about, the business affairs and operations of *Essential Energy*
- > *commercial information* provided by *Essential Energy* to the *service applicant* pursuant to paragraph 8
- > information provided to *Essential Energy* by the *service applicant* pursuant to paragraphs 6 and 7, and
- > trade secrets, information, ideas, concepts, know-how, technology, processes and knowledge and the like provided to, or obtained by, a party by the other party (including but not limited to in relation to a party, all information, reports, accounts or data in relation to that party's business affairs, finances, properties and methods of operations, regardless of the form in which it is recorded or communicated).

costs means any costs or expenses incurred by *Essential Energy* in complying with this *negotiating framework* or otherwise advancing the *service applicant's* request for the provision of a *negotiated distribution service*.

disclosing party has the meaning provided in paragraph 9.2.

distribution network user means a distribution customer or an embedded generator as defined in the *NER*.

Essential Energy means Essential Energy, ABN 37 428 185 226.

negotiated distribution service means a distribution service that is not a standard control service and that is specified as that service in the *NER* or by the *AER*.

NEL means the National Electricity (NSW) Law.

NER means the National Electricity Rules made under Part 7 of the *NEL*, as amended from time to time in accordance with Part 7.

service applicant means a person who asks *Essential Energy* for access to a distribution service, as defined by the *NER*.

solvency default means the occurrence of any of the following events in relation to the *service applicant*:

- > an originating process or application for the winding up of the *service applicant* (other than a frivolous or vexatious application) that is filed in a court, or a special resolution that is passed to wind up the *service applicant*, and is not dismissed before the expiration of 60 days from service on the *service applicant*
- > a receiver, receiver and manager, or administrator is appointed in respect of all or any part of the assets of the *service applicant*, or a provisional liquidator is appointed to the *service applicant*
- > a mortgagee, chargee or other holder of security, by itself or by or through an agent, enters into possession of all or any part of the assets of the *service applicant*
- > a mortgage, charge or other security is enforced by its holder or becomes enforceable or can become enforceable with the giving of notice, lapse of time or fulfilment of a condition
- > the *service applicant* stops payment of, or admits in writing its inability to pay, its debts as they fall due
- > the *service applicant* applies for, consents to, or acquiesces in the appointment of a trustee or receiver of the *service applicant* or any of its property
- > a court appoints a liquidator, provisional liquidator, receiver or trustee, whether permanent or temporary, of all or any part of the *service applicant's* property
- > the *service applicant* takes any step to obtain protection, or is granted protection from its creditors under any applicable legislation, or a meeting is convened, or a resolution is passed to appoint an administrator or controller (as defined in the Corporations Act 2001), in respect of the *service applicant*
- > a controller (as defined in the Corporations Act 2001) is appointed in respect of any part of the property of the *service applicant*
- > except to reconstruct or amalgamate while solvent, the *service applicant* enters into or resolves to enter into a scheme of arrangement, compromise or reconstruction proposed with its creditors (or any

class of them) or with its members (or any class of them) or proposes re-organisation, rearrangement, moratorium or other administration of the *service applicant's* affairs

- > the *service applicant* is the subject of an event described in section 459C(2)(b) of the Corporations Act 2001, or
- > anything analogous or having a substantially similar effect to any of the events specified above happens in relation to the *service applicant*.

terms and conditions of access means the terms and conditions described in clause 6.1.3 of the *NER*, as defined by the *NER*.

Interpretation

16.4. In this document, unless the context otherwise requires:

- 16.4.1. terms defined in the *NER* have the same meaning in this negotiating framework
- 16.4.2. a reference to any law or legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision
- 16.4.3. a reference to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced from time to time
- 16.4.4. a reference to a paragraph, part, schedule or attachment is a reference to a paragraph, part, schedule or attachment of or to this document unless otherwise stated
- 16.4.5. an expression importing a natural person includes any company, trust, partnership, joint venture, association, corporation, body corporate or government agency, and
- 16.4.6. a covenant or agreement on the part of two or more persons binds.