
Submission

Electricity Authority: Code amendment proposal:
Default Distributor Agreement

15 October 2019

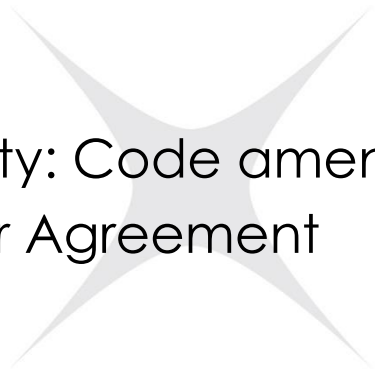


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1 Introduction

- 1.1 Aurora Energy welcomes the opportunity to respond to the Electricity Authority's (Authority) consultation paper "*Code amendment proposal: Default Distributor Agreement*", dated 20 August 2019 (Consultation Paper).
- 1.2 No part of our submission is confidential, and we are happy for it to be publicly released.
- 1.3 If the Authority has any queries regarding this submission, please do not hesitate to contact:
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2 Executive summary

- 2.1 Having adopted the model use-of-system agreement published by the Authority (MUoSA), we appreciate the uniformity and standardisation benefits that having such a framework can create.
- 2.2 However, our experience to-date with defaulting retailers and legacy agreements has reinforced the need for any default distributor agreement (DDA) that the Authority introduces to appropriately balance the risks between the parties, and to accurately reflect the operating environments and commercial practicalities of the relationship.
- 2.3 The framework that is adopted by the Authority needs to achieve a transparent and commercially robust outcome for the parties. While the DDA that the Authority has developed closely follows the structure and content of the MoUSA, we are concerned that some of the proposals made in the Consultation Paper do not achieve this outcome. In particular:
 - we are concerned by the evergreen of the DDA under the proposal and suggest that the core terms be incorporated into the Code as regulated terms instead. We also suggest that the termination and variation provisions be reconsidered;
 - the powers of the Rulings Panel are too broad and need to be reconsidered so that they do not create operational inefficiencies for distributors;
 - the risks and liabilities need to be adequately balanced in the contract; and
 - the data access arrangements, while a positive step forward, need to achieve practical outcomes.
- 2.4 It is imperative that sufficient thought and consideration is given to what will ultimately be mandated contractual terms. In the natural course of business, the contracting parties would have the opportunity to negotiate the terms of any agreement. In this process, however, the ability for the parties to express their views and request amendments is restricted to consultation periods. Therefore, we strongly urge the Authority to be open and receptive to the issues that are raised during consultation.
- 2.5 Our responses to the Authority's specific questions posed in the Consultation Paper are set out in Attachment A.

3 Support for ENA's submission

In addition to the points raised in this submission, we support the matters raised by the Electricity Networks Association in its submission on this matter.

ATTACHMENT A – FORMAT FOR SUBMISSIONS

Question	Question	Response
Q1	<p>What are your views on the problem definition? Specifically:</p> <ul style="list-style-type: none"> a. The efficiency problem b. The competition in retail markets problem c. The competition in related services problem/ 	
Q2	<p>What are your views on the revised:</p> <ul style="list-style-type: none"> a. Part 12A proposal b. DDA template proposal 	<p>Our main concern with the revised Part 12A and DDA template proposal is its evergreen nature. The revised Part 12A proposal does not provide any built-in mechanism for the Authority to review and update default core terms, nor does it provide any mechanism for any future changes to core terms to be incorporated into DDAs already in effect.</p> <p>The Consultation Paper outlines that retailers with legacy use-of-system agreements (UoSA) can refuse to renegotiate, which ultimately inhibits retail competition.¹ If distributors are to achieve standardisation and transparency across the retailers that operate on their networks, then the Part 12A and DDA template proposals need to prevent that situation from arising.</p> <p>One of the key net benefits of the proposal identified by the Authority is improved competition in the retail market because “retailers can compete within and across networks on a level playing field”². This will not be achieved without the ability for DDAs to evolve and adapt in line with the Code.</p> <p>In our view, this could be better achieved if:</p>

¹ Consultation Paper, paragraphs 3.23 to 3.27.

² Consultation Paper, page iv.

		<ul style="list-style-type: none"> • the core terms were incorporated into Part 12 as regulated terms; • the regulated terms were incorporated by reference into each DDA. This would enable the regulated terms to be amended from time to time by way of a Code change and those changes would flow through to each DDA where that regulated term has been incorporated; • with the agreement of both parties, one or more of the regulated terms could be expressly excluded from the DDA and the parties could be left to determine an alternative equivalent clause if appropriate. This would mean that if, for example, only one regulated term was not incorporated, the remaining regulated terms would still form a part of the DDA and would be live to any Code amendment; and • the template DDA in Appendix A of Schedule 12.4 continued to provide guidance on recorded terms and operational terms.
Q3	<p>What are your views on the draft Code, appended to this paper, which would introduce the proposal?</p>	<p><u>Schedule 12A.1: Requirements for entering into distributor agreements</u></p> <ul style="list-style-type: none"> • Clause 11: Participants must provide distributor agreement to the Authority We are concerned by the proposed clause 11(3). While we have no objection to traders providing the Authority with any agreements that they enter into with us, we are concerned that the Authority has the power to publish any other agreement given to it, without having consideration for any commercially sensitive information that may be contained within those other agreements. • Inability to refuse traders We are concerned that there is no ability to prevent a defaulting trader being able to trade on our network after previously defaulting. Distributors need to be adequately protected under the Code against irresponsible traders. The Code should provide a mechanism whereby a distributor is able to reasonably prevent an irresponsible trader from trading on its network. <p><u>Schedule 12A.1, Appendix C: Provision of consumption data</u></p> <p>Having the ability to obtain data from traders, as contemplated by the provision of consumption data agreement in Appendix C of Schedule 12A.1 (Data Agreement), is a positive step towards better data access. However, the terms upon which the access is granted need to be commercially workable and of practical use to distributors.</p> <p>To be of practical use, the Data Agreement should allow distributors to combine consumption data that is obtained from multiple traders so that a complete dataset for their network can be created. Without the ability to do this, the data is of little practical use for developing pricing or planning and managing the network.</p>

		<p>The indemnity contained in clause 12 of Appendix C should be limited only to matters that are within the distributor's control. The indemnity is, in our view, currently too wide. Distributors should not indemnify for loss arising due to voluntary representations made by the trader to its customers in relation to their data.</p> <p>A distributor needs to be adequately protected during any audits that are carried out pursuant to the Data Agreement. If auditors are to have access to a distributor's systems and premises during an audit, then any information that is discovered during that audit needs to be kept confidential.</p> <p>Distributors should be able to retain the consumption data for record keeping purposes. The requirement for distributors to destroy the consumption data set out in clause 16 should be removed.</p> <p>The Data Agreement needs to also provide the distributor with adequate safeguards, for example that the trader has ensured that the data provided is up to date, complete and accurate.</p> <p><u>Schedule 12A.4: Requirements for developing, making available, and amending default distributor agreements</u></p> <ul style="list-style-type: none"> • <i>Schedule 12A.4, clause 8: Rulings Panel appeal process</i> In our view, a more appropriate body to rule on operational matters would be a body that comprised of members who have day-to-day experience in the operations of distributors and traders. <p>The Rulings Panel's function³ is to hear and determine complaints about breaches or possible breaches of the Code, hear and determine appeals from decisions made under the Code, and consider and resolve certain disputes between industry participants relating to the Code. Each of these functions centre around the application and interpretation of the Code and its membership reflects these functions.</p> <p>Operational terms are to be drafted by distributors as necessary to ensure that their terms accurately reflect their unique business needs. They are not codified and therefore the determination of any amendments to operational terms appears to fall outside of the functions of the Rulings Panel.</p> <p>It is important that any challenge process does not have negative operational effects on distributors, such as inconsistent or inefficient processes and/or procedures, which could come at a long-term cost to consumers.</p> <p>We are also concerned that, as currently drafted, Schedule 7 and its contents (pricing methodology, price categories, price options and prices) are part of the operational terms and are therefore vulnerable to amendment by the Rulings Panel. The Rulings Panel should not have the ability to rule on these matters.</p>
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³ Section 25 of the Electricity Industry Act 2010

		<p>The proposed Code does not provide distributors with a right to appeal any decision that is made by the Rulings Panel. Distributors need to have that ability to ensure that the decisions that are being made are appropriate and practical in the circumstances.</p> <ul style="list-style-type: none"> <p>Schedule 12A.4, clause 10: Effect of Rulings Panel amendments to operational terms on existing agreements</p> <p>We strongly disagree with the current drafting of this clause. If the Rulings Panel amends an operational term, the trader should not be given the sole discretion to determine whether the amendment is made to its agreement. As currently drafted, this could result in different operational terms being included within the agreements that a distributor has on its network, meaning that its operational practices will not be standardised. This would lead to significant operational inefficiencies and higher costs for distributors.</p> <p><u>Schedule 12A.4, Appendix A: Default distributor agreement for distributors and traders on local networks (interposed)</u></p> <ul style="list-style-type: none"> <p>Clause 10: Prudential requirements</p> <p>Clause 10.6 sets out that the value of the prudential security that the trader is required to provide “<i>is the Distributor’s reasonable estimate of the Distribution Services charges that the Trader will be required to pay to the Distributor in respect of any period of not more than 2 weeks</i>”.</p> <p>While this is currently consistent with the requirements of Part 12A, in our experience, when a trader defaults, there is a period of approximately two months during which the charges that the trader is required to pay to us are at risk. This is because of the time that it takes for a trader default to come to our attention, couple with the fact that we bill one month in arrears.</p> <p>It is not appropriate that distributors, and ultimately consumers, bear the risk of traders (which are private companies) defaulting on their network. While we acknowledge that there is the ability for distributors to take additional security, this can come at a cost where traders elect a cash deposit or third-party guarantee. At a minimum, distributors should be protected against a realistic and reasonable estimate of the charges that they are exposed to. To this end, clause 10.6 should be amended so that the value of ‘standard’ prudential security is increased to “<i>any period of not more than 2 months</i>”.</p> <p>We consider that extending the ‘standard’ prudential security in this manner would align distributors rights with those of the clearing manager (we remain perplexed as to why this dubious distinction between the risk borne by distributors and the clearing manager was made in the promulgation of Part 12A in 2011).</p>
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		<ul style="list-style-type: none"> • Clause 19: Termination of Agreement No provision has been made for the parties to terminate the DDA by providing notice. This is particularly concerning given our experience with legacy UoSAs on our network. We strongly recommend that the Authority reconsiders this omission and makes provision for termination at will within the DDA. Without that ability, parties can find themselves locked into an agreement which is no longer commercially workable, inconsistent with the regulatory framework, and where the other party is not incentivised to either amend or terminate the agreement. • Clause 22: Amendments to Agreement We are similarly concerned that there are only limited avenues available to the parties to vary the agreement. At a minimum, distributors need to have the ability to amend recorded terms, and to add additional service appendices after a contract is formed. Given the Authority's proposal that the DDA should not expire, and that the parties be prevented from terminating at will, there needs to be sufficient ability for the agreement to flex over time. • Clauses 24 to 27 The indemnity and liability clauses that are included in the DDA must appropriately allocate the risk between the parties. In our view, an appropriate balance has not been struck and these clauses should be reviewed. As currently drafted, they place unacceptable risks on distributors. In our view, traders should be under an obligation, in clause 26, to notify a distributor as soon as the trader becomes aware that a claim may be related to an event on the distributor's network. Furthermore, the indemnity provided by a distributor in clause 27 should be limited to only those circumstances where the distributor is at fault. The indemnity should also be subject to a monetary limitation so that a trader is not able to pass through to the distributor any unlimited liability that it has. Where a network event is the basis of the claim, a limit should be included in the DDA, as the trader is able to limit its liability in its arrangement with its customers. Relevant third parties are in a better position to assess and mitigate any significant losses from network events, whereas if they were passed through to the distributor, they will ultimately be borne by all consumers. In addition, there are challenges for distributors being able to insure for liability which is assumed by way of an indemnity, whereas the third party should be able to insure themselves against the loss that they may suffer as a result of a network event. These are critical clauses and their drafting needs to be carefully considered before mandating them. • Clause 31: Electricity Information Exchange Protocols The proposed DDA template omits a number of clauses relating to EIEPs that were included in the MUoSA.
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<p>Q4</p>	<p>What are your views on the Regulatory Statement? Specifically:</p> <ul style="list-style-type: none"> a. the efficiency costs and benefits b. the costs and benefits in the retail market c. the costs and benefits in the related-services market. 	

⁴ Clauses 6.2, 7.4(a), 17.4 and 17.5(c) of Schedule 12A.4 Appendix A