Distribution Group Submission

Code amendment proposal: Default Distribution Agreement

Submission on the Electricity Authority's consultation paper

15 October 2019

This submission is made on behalf of the following electricity distributors:

Alpine Energy

EA Networks

Eastland Network

Electra

Marlborough Lines

Nelson Electricity

Network Waitaki

Northpower

PowerNet, representing:

- Electricity Invercargill
- OtagoNet
- The Power Company

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Code amendment proposal: Default Distributor Agreement

Introduction

This submission has been prepared by a group of distributors with common views on a number of the topics raised in the Electricity Authority's (the Authority) consultation paper: *Code amendment proposal: Default Distributor Agreement*, and supporting papers, draft amendments and template agreements (consultation papers).

The Distribution Group comprises small and medium sized distributors, including regulatory exempt and non-exempt businesses, and those owned by consumer or community trusts or local bodies. Together this group supplies approximately 375,000 customer connections (18% of all connections), maintains 32% of total distribution network length and services 47% of the total network supply area in New Zealand. We note that members of this group may make their own submissions on topics of particular interest.

We appreciate the effort of the Authority in preparing the consultation papers and draft amendments, and the option of meeting with relevant staff to discuss the proposals during the consultation period.

This submission proceeds as follows:

Summary of submission

1. The distributors which support this submission have previously questioned the justification for implementing a default agreement model. Distributors have invested considerable effort in updating use of system agreements (UoSA) to align with the Authority's model agreement, and negotiating and signing these refreshed contracts with retailers. New entrant traders have responded positively to these agreements.

2. The additional cost for distributors in having to establish default agreements is unwelcome, especially at a time when distributors are focussed on pricing reform, transformation to more open access networks, and managing increasingly complex risk and compliance circumstances including health and safety, cyber, traffic management and environmental risks. The proposal has the potential to require numerous existing contracts to be discarded and renegotiated. This is no small implementation task. We are not persuaded that the benefits will outweigh the costs.

3. Our comments on the proposed process for implementing Default Distribution Agreements (DDAs) and the associated draft Code amendments and templates are made without prejudice to our view that the MUoSA approach can be retained at lower cost and fully meet the Authority's objectives.

4. We submit that the proposed process for implementing the DDA model is amended as follows:

    a. Allow for a further technical drafting consultation and/or workshop to finalise the detailed drafting and resolve complex or particularly contentious issues.

    b. Remove the appeals process for operational terms, as the contract dispute resolution processes are sufficient. If the appeals process is retained, strengthen the principles to guide the Rulings Panel on operational matters and allow distributors to appeal where the ruling requires substantial cost to be incurred and/or changes to operational practices. Also require the Rulings Panel to have regard to the operational and cost consequences of its decisions.

    c. Allow for extensions to the implementation deadlines where the Rulings Panel processes delay finalisation of operational terms.

    d. Require parties to the contracts to formally execute them, and acknowledge in writing any future amendments. In addition the Authority should not be able to extend the regulation of contract terms by elevating the status of guidelines through default contracts.

    e. Remove fall back deadlines for DDAs for new retailers where both parties agree to contract under alternative agreements. Also increase the timeframe from 20 to 40 working days for contract acceptance. This will extend the time for available for parties to execute alternative agreements.

    f. Extend contract initiation deadlines from 5 to 20 days to allow new traders to be set up on a distribution network.

    g. Allow distributors to revise recorded terms within existing contracts. This is necessary because the recorded terms may be influenced by Commerce Act regulation.

    h. Restrict the Authority's publication of contracts to use of system agreements, and allow for redaction of any commercially sensitive information before publication.

5. The proposed Appendices A and B to Schedule 12A.1 address distributors wishing to make payments or provide credits to customers and to obtain information relevant to their trust

ownership. However these drafts include terms which are inaccurate and which could cause undue compliance issues and complexity. We have included drafting corrections to address these issues.

6. We support the proposed new template for the exchange of consumption data, but submit that the entire template, including the Clause 19 Data Agreement, should be included as default terms. Some amendments are necessary to the draft terms to ensure they do not unnecessarily limit the distributor use of the data, and distributors do not incur unreasonable costs, either through retailer charges or losses arising from actions of the trader.

7. We submit the draft DDA template does not achieve a reasonable balance of risk between traders and distributors and requires a number of improvements in this regard. Any undue risk is carried by customers or shareholders. If a retailer behaves inconsistently with the agreement, any costs borne by the distributor may ultimately be carried by the customers of other retailers. We therefore submit that revisions are required to the DDA to:

    a. reduce the punitive costs of additional security and remove the carve-out of access to this security where amounts are under dispute

    b. implement a stand-down period before a new agreement is entered into with a trader which has previously defaulted. Require the Authority's Market Operations team to review and approve the trader's status as an approved market participant before the stand down period expires

    c. correct for excessive distributor liability for failure to convey electricity or meet expected service standards. Amend the contract and schedules to acknowledge that distributors will undertake reasonable endeavours to meet service standards. Liabilities are limited to the lesser of the actual loss incurred and the caps specified in the agreement. The liability caps should be the lesser of $10,000 per affected ICP, and the lesser of $2m or 5% of total annual line charge revenue over the entire network for a network event or series of connected network events. In addition, strengthen obligations on traders to limit contractual liabilities, including for a network event.

8. In addition we have identified drafting issues with the templates which if implemented would add unnecessary complexity to the arrangements. Our comments extend to the operational and recorded term templates, because there is value in making these as useful as possible from the beginning, even though they may be modified by each distributor. Our detailed comments included in the body of the submission address:

    a. Communication protocols during unplanned interruptions.

    b. The ability to use load control.

    c. Incentives to manage non-technical losses and resolving loss factor disputes.

    d. Managing price changes, allocating ICPs to pricing categories and billing processes.

    e. The processes for connections and disconnections.

    f. The process for exchanging information.

9. The remainder of this submission responds in more detail to the DDA proposal and the draft Code amendments and DDA template.

Overview of proposals

10. The consultation papers propose that all distributors prepare and publish DDAs consistent with the process to be set out in Part 12 of the Code, and the templates to be issued by the Authority. Key features of the proposal are:

    a. Existing use of system agreements are to be replaced with distributor agreements for those operating on interposed arrangements. This requirement will be included in Part 12A of the Code.

    b. DDAs are to be made available by all distributors, and must apply if either a distributor or retailer opts to use it, or where parties have not agreed an alternative agreement within 20 business days of a retailer first notifying its intention to trade on a network.

    c. DDAs will include core terms and operational terms, and may include recorded terms and collateral terms. The core terms will be mandated, as will the scope and requirements for operational terms (although the actual contracted terms will reflect operational requirements which are unique to each distributor).

    d. Operational terms may be appealed to the Rulings Panel.

    e. Collateral terms must be agreed to by both parties.

    f. Templates are also to be provided for recorded terms, which primarily cover items which are regulated under Part 4 of the Commerce Act.

    g. Existing contracts are able to be carried over with the agreement of both parties. These are referred to as alternative agreements. Alternative agreements are also able to be entered into with the agreement of the distributor and a retailer.

    h. The publication of DDAs will be undertaken in two tranches. The five largest distributors will complete this process within 90 business days of Code amendments, and the remaining distributors within 150 business days of Code amendments.

    i. Part 12A of the Code is also to be amended to include default terms for additional services, including income distribution services, provision of trust and co-operative information and the provision of consumption data, which may be appended to DDAs.

    j. Specific obligations for distributors and traders on embedded networks are to be established in the Code.

    k. The Code amendments will allow for additional schedules to be added in the future to allow for regulation of additional services between distributors and other participants who use distribution networks.

11. The Authority also intends to:

    a. Require all retailers to provide the Authority copies of all distribution agreements, and any other agreements made with distributors during the negotiation of distribution agreements. The Authority may publish these on its website.

    b. Require DDAs to comply with future regulatory guidelines which may be published by the Authority.

    c. Consider prohibiting any terms, through future Code amendments, which appear to be prohibiting competition in and the reliability and efficiency of the electricity market.

Implementing the DDA

12. The distributors which support this submission have previously questioned the justification for implementing a default agreement model. Distributors have invested considerable effort in updating use of system agreements to align with the Authority's model agreement, and negotiating and signing these refreshed contracts with retailers. New entrant traders have responded positively to these agreements.

13. The confusion over the jurisdiction of the Authority to implement default contracts, and the overlap between regulated terms between retailers and distributors, and regulatory requirements for distributors under the Commerce Act regulatory regime has been unfortunate. It has added cost and uncertainty to this process.

14. The proposed solution is also complex. The modular approach involving core terms, operational terms, recorded terms, collateral terms, with varying degrees of standardisation and negotiation opportunity illustrates the challenges in attempting to achieve an industry standard contract model for use of distribution networks.

15. The additional cost for distributors in having to establish default agreements is unwelcome, especially at a time when distributors are focussed on pricing reform, transformation to more open access networks, and managing increasingly complex risk and compliance circumstances including health and safety, cyber, traffic management and environmental risks.

16. As demonstrated in this submission, the proposed contract templates will only increase distributor risk, some of which will be borne by increased costs for customers, and others by shareholders and owners, many of which are also customers. We do not believe that the proposals achieve an appropriate balance of risk between distributors and traders.

Cost benefit analysis

17. We acknowledge that the Electricity Price Review Panel[1] has concluded that distributors should offer retailers standard default terms for network access, which has been endorsed by the Minister of Energy. However, we continue to question where the real benefit is in this proposal and whether this benefit will outweigh the costs.

18. We are underwhelmed by the cost benefit analysis put forward in the consultation papers. The analysis has been based on un-validated survey information, which shows that the 'estimates' of the costs of contract negotiation differ significantly between distributors ($2,883 per contract on average) and retailers ($15,055 per contract on average)[2]. The retailer cost estimates appear to be skewed upwards by a single data point of $150,000 per contract. We do not find this estimate, or the divergence in cost estimates plausible.

19. We note that outliers have been excluded from the data used to quantify the cost impacts of the proposals. We submit that this same approach should be applied to the baseline (status quo) costs. The cost estimates should also be independently verified before being relied on to support the cost benefit analysis.

20. In addition to these data concerns, we also note that the benefits of the proposal are quantified at just $1.1m - $1.3m per annum between 2019 and 2021. In our view this is an insignificant amount when we consider the number of contract arrangements which will be affected. To quote the consultation paper, there were 541 UoSA in place at the end of 2017, involving 27 distributors, at an average of 15 retailers per network. 81 new UoSA were established in 2018[3].

[1] Electricity Price Review, Final Report, 21 May 2019, C4
[2] Consultation paper, para 5.30
[3] Consultation paper, para 5.23 – 5.25

21. All of these arrangements must be revisited under the proposal because there are requirements to ensure consistency between them for certain terms (as per Clause 8 of Schedule 12A.1 of the Code). In addition the proposal has the potential to require numerous existing contracts to be discarded and renegotiated. This is no small implementation task.

Unquantified benefits

22. The consultation paper suggests that the proposal for default contract terms will:

    a. Facilitate retailers entering or extending into new distribution networks, thereby encouraging retail competition

    b. Provide more balanced contracts and negotiations between participants

    c. Remove real or perceived barriers to emerging related services by third parties.

23. However, the experience of the distributors who support this submission has been that:

    a. Retailers which are new to the network willingly engage in negotiations to establish use of system agreements

    b. Incumbent retailers have also generally engaged positively in updating legacy use of system agreements, although for some smaller distributors retailer responsiveness has been variable, particularly where retailers have prioritised contracting with larger networks

    c. There are rarely any instances of conduct which is inconsistent with the requirements of existing use of system agreements, or which has escalated to dispute processes or termination. The exceptions have been agreements with some smaller retailers who have not met their payment obligations and/or information provision obligations.

24. In our 2016 submission[4], we opposed the proposal to introduce a DDA. We noted that:

    a. The justification for the DDA was built on assertions and assumptions regarding potential problems, without supporting evidence, or demonstrating that the problems were material.

    b. Many distributors and retailers had invested significant time and resources in agreeing new UoSAs, based on the Authority's model UoSA.

25. We recommended that:

    a. The Authority did not progress with the DDA proposal but retained the approach where industry participants agreed updated contracts between themselves based on a model UoSA.

    b. Either the current model or an updated version, developed with industry input and reflecting the learnings and experience of the industry in negotiating changes to the model, should be used for this purpose.

    c. The Authority continued to monitor uptake rates and provide a clear statement of its expectations of when updated UoSAs should be agreed by all parties and of the extent to which variations to the model UoSA are expected

    d. A 1-2 year period was a reasonable timeframe in which to expect all parties within the industry to agree updated UoSAs.

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[4] Submission to the Electricity Authority, on Default agreement for distribution services, Made on behalf of 18 Electricity Distribution Businesses, April 2016, Summary

26. We are disappointed that this option has not been progressed because it would have resulted in far less cost for the sector and would have avoided the disruption of establishing new contracts consistent with the templates, and drafting and agreeing operational and recorded terms for distribution services across 29 networks. Many distributors proceeded with the Authority's model UoSA process in good faith, and if the DDA proposal is implemented, these distributors will need to replicate this effort in order to comply with the Code.

27. The comments made throughout the remainder of this submission regarding improvements to the DDA proposal, are made without prejudice to our view that the model UoSA approach should be retained.

Implementing the proposal

28. In this submission we point out a number of corrections and amendments to the draft DDA templates and Code amendments which are required to correct for errors, remove unreasonable terms and address implementation problems. We anticipate that similar submission will be made by retailers and other distributors.

29. Given the significance of new regulated terms and the complexity and scale of the documents, we suggest that a further consultation round which focusses on the drafting is scheduled before the amendments are finalised. A technical drafting consultation process is recommended. This final step could also benefit from a workshop with members from the ENA's DDA working group and retailer representatives to discuss areas of significant debate, ambiguity or complexity.

Initial DDAs

30. The distributors which support this submission are required to implement their DDAs within 150 days of the proposed Code amendment coming into force. The five largest distributors must complete this within 90 days. This earlier process is expected to involve most retailers, who are to be consulted on operational terms. As a result these DDAs are expected to provide precedent templates that may influence the DDAs of the remaining distributors. We support a phased approach to implementing DDAs, noting that other distributors may also choose to adopt the earlier deadline.

31. Our experience has been that retailers are more likely to engage with large distributors than small distributors. Accordingly we anticipate that smaller distributors will not be able to make much progress with retailers during the initial 90 day period.

32. We consider there may be a potential constraint if multiple matters are appealed to the Rulings Panel. While the Rulings Panel is only to consider operational terms, it is likely that different retailers may have different views on these terms for each network. We think that there is a risk that the Rulings Panel may not be able to meet its deadlines (10 business days to respond to a notice of appeal, and a further 20 business days to issue its ruling) during this initial development, consultation and implementation phase.

33. This is likely to impact the distributors which are last in the chain, if a backlog of appeals eventuates. Accordingly we submit that the proposed 90 and 150 day periods (in Schedule 12A.4 (6) of Part 12A) include extension provisions where the Rulings Panel is considering appeals and has not resolved them during the prescribed periods. This would avoid an unfortunate situation where the Rulings Panel was forced to rush its deliberations due to an abnormally heavy workload during this initial set up period.

DDAs for new retailers

34. It is also proposed that DDAs will be deemed to apply to any new retailer on a network unless an alternative agreement is established within 20 working days, or at another date agreed by the parties. This could result in DDAs being applied by default, when neither party desires that

outcome, due to delays in executing an alternative agreement. This could occur even when an agreed date exists, but it is inadvertently exceeded. Accordingly we submit that the fall back default option in Schedule 12A.1 (6) does not apply where both parties agree to proceed with an alternative agreement. In addition, the initial contract acceptance period should be extended to 40 days, from 20 days. This will provide a more reasonable time period for traders to consider whether they wish to establish alternative agreements to the default, and work with the distributor to establish those terms.

35. In addition we suggest that the maximum time provided for contracting with a new trader is extended to 20 business days to allow for set up, prudential security to be paid, outage, connection and billing interfaces to be established. Generally this would not be able to be completed within 5 days, which is the period included in the draft of Schedule 12A.1.

Acceptance of contract terms

36. It is suggested that the initial DDAs will be deemed to apply, unless alternative contracts are agreed within 20 business days. It is also proposed that DDAs will be deemed to apply to any new trader on a network unless an alternative agreement is established within 20 working days. A further feature of the proposals is that the Authority expects that additional schedules or requirements may be inserted into the DDA templates following consultation, via Code amendments which will be deemed to apply to existing contracts.

37. In addition, operational terms in existing agreements may change following a Rulings Panel decision and distributors may need to update recorded terms from time to time, for example if the Commerce Commission changes its quality of supply regulations.

38. We think that these processes have the potential to cause considerable confusion about the status of contracts, particularly, as we understand it, there are no formal contract acceptance procedures proposed for the DDAs.

39. Accordingly we submit that:

    a. Distributors and existing or new retailers trading on each network are required to execute the initial default contracts, should they apply.

    b. Any amendments or new schedules which may be imposed into default agreements by the Authority or as a result of appeals to the Rulings Panel are also formally acknowledged by each affected retailer with each distributor at the time. This needs to occur in writing.

    c. Recorded terms are not locked into contracts in perpetuity, and amendment processes for recorded terms are added to the Code.

40. We note that these requirements will add compliance cost to the proposal, but we submit they are essential. It is consistent with good business practice to ensure contracted terms are formally acknowledged and clearly understood by the contracting parties.

Termination and default of contracts

41. It is proposed that DDAs are evergreen contracts, that is there is no ability for a distributor to terminate the contract without due cause. Due cause includes default, insolvency, force majeure and where a trader is no longer supplying electricity to ICPs on the network. In addition, a distributor must provide a DDA to a retailer which has previously defaulted, if that retailer has met the distributor's prudential requirements.

42. We note that under the default terms the distributor incurs substantial additional costs for any additional security required above the base level of security included in the template. We comment further on the prudential requirements in the next section of this submission.

43. We do not consider that the DDA should be the primary mechanism for enforcing retailer behaviour on the distribution networks used to supply to their customers. This is especially relevant for a previously defaulted retailer. We submit that it is also appropriate for the Authority's Market Operations function to enforce these expectations on retailers. This is even more applicable once the contract terms have become regulated terms.

44. Therefore we suggest that the Code is amended to allow for a stand down period before a distributor is required to enter into a new agreement with a retailer which has previously defaulted. During this stand down period the Market Operations team should be required to review whether the retailer continues to meet the requirements of a market participant and is satisfied that the retailer has undertaken sufficient steps to avoid contract defaults in the future. A new agreement should only be mandatory once this assurance has been provided to the distributor.

Rulings Panel decisions on operational terms

45. Our primary view is that there should not be any appeal rights to the Rulings Panel where there are disputes over operational terms. The dispute resolution procedure within the DDA should be sufficient to handle any disagreements. We therefore recommend deleting the relevant sections in Schedule 12A.4.

46. Without prejudice to this view we comment on the Rulings Panel proposals below.

47. The Rulings Panel is to be responsible for appeals on the operational terms to be included in the DDA. This will be a new role for the Rulings Panel. There is some guidance included in Part 12A.4 to assist them with this task, but we think that this guidance is insufficient because it does not address operational requirements, and may lead to decisions which are contrary to good operating practices.

48. We therefore submit that the principles for the Rulings Panel in clause 4 of Schedule 12A.4 include reference to the distributor's requirement to comply with applicable regulation and legislation, and to reflect prudent and efficient operating practices. These concepts are both used by the Commerce Commission when evaluating expenditure allowances for distributors[5]. We note these expenditure allowances are provided on the understanding that the distributor will meet agreed service standards.

49. We also consider that the Rulings Panel's decisions should be able to be appealed where a decision would require the distributor to incur significant costs or to make significant changes to current operating practices. In addition the Rulings Panel should have regard to the impact on distributor costs and operating practices when making its rulings, including the potential for the Rulings Panel to create different operational terms in different contracts.

Authority may publish agreements

50. Retailers are to provide the Authority with copies of all agreements with distributors, and the Authority may make these publicly available, including on their website. This requirement requires redrafting to allow for commercially sensitive information to be removed from public versions, and to ensure that only the use of system agreements (and any relevant schedules) are captured by the clause. As it stands the clause could capture a much broader range of agreements (for example property leases) which are not related to distribution services.

[5] Refer Commerce Act EDB Input Methodologies, expenditure objective, clause 1.1.4(2)

Code amendments

51. In addition to the comments raised above, in the following paragraphs we comment on the templates for the additional services which may be appended to a DDA. These are set out in Appendices A, B and C to Schedule 12A1. We address each in turn.

Appendix A: Income distribution services and Appendix B: Provision of trust and co-operative company information

52. The proposed new Appendix A is labelled 'income distribution services', however this title and explanation in the consultation paper misrepresents these services, and refers to them as dividends payments. This misrepresentation should be corrected in all future references to the services covered by Appendix A.

53. Trust owned distributors may elect to pass on line charge rebates, or posted, discretionary or proposed discounts which are credited to customer accounts. These are not dividends. We note that some Trust owned distributors may also pay dividends to their Trusts, which are passed on to qualifying beneficiaries. However the term income distribution is misleading as these are not necessarily income distributions to owners

54. The payments may be limited to those customers that are qualifying beneficiaries of a Trust, but this may not always be the case – for example for co-operative shareholders.

55. Since the 2016 consultation on the DDA, the IRD has clarified that certain discounts and rebates made by distributors are deemed to be revenue not earned, and therefore are not viewed as income to the distributor. It is important that the contract terms do not introduce unnecessary tax complexity for distributors by using inaccurate terminology.

56. We therefore submit that the terminology in the appendix is changed from income distributions to 'Payments or credits on behalf of distributors'. This is more accurate and avoids the potential for inadvertently excluding the practices of certain distributors due to the terminology in the template.

57. We have also included suggested edits for Appendices A and B in Table 1 below to improve the proposed timeframes for exchanging information and to better align the terms with the remaining contract terms. We consider that payment obligations and indemnity provisions, for example, should be more consistent throughout the various contract components.

Appendix C: Provision of consumption data

58. Appendix C is a new proposal to cover the provision of customer consumption data by retailers to distributors. It is consistent with the recommendation of the Electricity Price Review Panel, and has been endorsed by the Minister. We support this new addition to the contract terms, which should simplify the current requirements for obtaining the data that distributors require to provide distribution services, and as a result reduce costs and complexity.

59. We note that the permitted purposes for the information is specified in the clause 20 definitions. We support the intent to include in this definition reference to the obligations the distributor has under its distribution agreements with traders. We also support extending this to include obligations the distributor may have under Part 4 of the Commerce Act. This will assist distributors meet the customer consultation expectations of the regulatory frameworks administered by the Authority and the Commission. We anticipate that elements of the data will be used by distributors for customer surveys.

60. While we support the additional schedule, we consider it may be improved because it currently includes restrictions which are contrary to the use for the data. For example as there are multiple retailers which use each network, distributors must be able to combine data from other retailers to

understand customer use across the network. In addition distributors need to retain data for a period of time to understand trends including demand response. This is particularly important for developing and implementing new pricing structures and asset management.

61. We also submit that the costs of the service are not shared equitably. Accordingly the indemnity requirements for distributors must exclude losses which result from actions of the trader. In addition any charges from the trader to the distributor must reflect reasonable out of pocket costs to the trader.

62. Further the audit provisions can be greatly improved by allowing distributors to undertake annual independent audits and to share the results with traders.

Changes to draft Part 12 amendments

63. The following table sets out our detailed submission on changes to be made to the draft Code amendments and schedules. The rationale for many of these suggestions is set out above.

Table 1: Part 12 drafting suggestions

Topic	Reference	Changes required
Entering into distribution agreements (12A.1)		
	Clause 2	Insert subclause (3) which requires distributors and participants to execute distribution agreements. This requirement should also apply to any amendments or new schedules to the distribution agreement. (refer para 39)
	Clause 3	Extend the minimum time allowed for a trader to notify a distributor of the intention to trade to 40 business days. (refer para 34)
	Clause 5	Extend the maximum time allowed before a contract becomes binding from 5 to 20 working days. (refer para 35)
	Clause 6(2)	Insert a new subclause to allow for a stand down period before a distributor is required to enter into a new agreement with a retailer which has previously defaulted. This period should end once the Authority's Market Operations team has confirmed that the retailer is approved to continue as a market participant. (refer para 44)
	Clause 6(3)	Insert provision for both parties to agree that the default distribution agreement will not apply as a binding contract, and extend the time limit to 40 business days. (refer para 34)
	Clause 6(5)	Insert provisions for updating operational or recorded terms in existing contracts with traders which used the distributor's default terms. (refer para 39) This will also be required if default terms are changed, say as a result of a Code amendment.
	Clause 11(1) and (3)	Remove the reference to 'any other agreement' in subclause (1) (c) and clause (3).

Topic	Reference	Changes required
		Insert a subclause to clause 11(3) to require the Authority to notify each participant that the contract is to be published, and to allow the participant to provide a redacted version suitable for this purpose. (refer para 50)
	New clause 8(5)	Insert clarification that alternative agreements can be agreed at a later date, even after default agreements have been entered into.
Income distribution services (12A.1 Appendix A)		
	Title and throughout	Replace 'Income distribution services' with 'Payments or credits on behalf of distributors'. Make similar changes throughout the rest of the Appendix. Change references to 'income distribution paid or payable' to 'payments or credits made or to be made'. (refer para 56)
	Clause 4 (3)	Amend the 2 business days provided for distributors to return files to traders to 10 working days following the deadline for traders to supply the information (which is within 10 working days of the distributor's request). This is because a distributor requires files from all traders before the credits or payments can be calculated. The shorter timeframe is impractical because it assumes all traders provide the data files on the same day.
	Clause 8	Amend subclause (2) to require the distributor to pay on the 20th of the month following the trader's GST invoice. This is consistent with the payment terms in the default distribution agreement.
	Clause 10	Insert new subclause to require the trader to notify the Distributor immediately that it receives notification of a claim or potential claim. This is necessary to ensure the Distributor is able respond to the trader or affected party as soon as possible, and to limit potential cost or reputational damage which may result during the course of a claim.
Provision of trust and co-operative information (12A.1 Appendix B)		
	Clause 3(1) (c)	Change the term pay income distributions to align with the edits required to Appendix A as noted above. (Refer para 56) Also allow for payment to non-shareholders, as the restriction is unnecessary and would restrict current practices.
	Clause 3(1) (e)	Remove 'other' which is unnecessary. It is important that 'any' requirements are provided for in this clause.
Provision of consumption data (12A.1 Appendix C)		
	Clause 2	Insert a requirement for the trader to undertake reasonable endeavours to provide the information in the format required by the distributor.
	Clause 3(3)	Insert acknowledgment that the Data Agreement forms part of the ScheduleA.1, Appendix C, once executed.

Topic	Reference	Changes required
	Clause 3(5)	Insert 'reasonable' in the reference to traders costs, charges or other expenses (refer para 61)
	Clause 4(d)	Remove reference to combining with other data or database (refer para 60)
	Clause 5	Insert a requirement for the Trader to ensure that they have met their obligations under the Privacy Act for the Distributor to use the information as agreed under the Data Agreement.
	Clause 6	Insert a clause which permits the Distributor to use and disclose aggregated consumption information, on the condition that no individual ICP data is revealed or disclosed.
	Clause 12	Insert a subclause which excludes from the distributor's indemnity requirements, any losses which may arise from actions of the retailer. (refer para 61)
	Clause 12	Redraft 12(1) to tie any loss incurred by the Trader to the Distributor's breach of its obligations under the agreement.
	Clause 13(1)	Insert provision for distributors to undertake annual independent audits and provide results to all traders who had provided consumption data. This would reduce complexity and cost, and avoid distributors having multiple traders undertake audits on the same distributor processes. (Refer para 62)
	Clause 20	Include references to meeting obligations under Part 4 of the Commerce Act in the definition of 'Permitted Purposes'. (refer para 59)
Developing and amending DDAs (12A.4)		
	Clause 6 (1)	Extend 90 day and 150 day deadlines where Rulings Panel decisions on operational terms are outstanding, allowing for a minimum of ten working days to execute any decision of the Rulings Panel which requires a change to the proposed operational terms. (Refer para 33)
	Clause 4(2)	Add subclauses to the requirements for distributors operational terms which must: (e) enable compliance with applicable regulation and legislation (f) reflect prudent and efficient operating practices (Refer para 48)
	Clause 8	Insert a new subclause which allows an appeal of the Rulings Panel decision where the distributor is, as a consequence of that decision, required to incur significant quantifiable costs or to make significant changes to current operating practices. In addition, require the Panel to consider the impact on the operating practices and costs of the distributor when making its rulings. This should extend to the implications for the distributor of having different operational terms across multiple contracts. . (Refer para 49)

DDA template

64. In the remainder of this submission we comment on the draft DDA template. In Table 2 we set out our suggested drafting amendments to address the submission points raised below and other more minor drafting issues.

Service interruptions

65. The DDA template implies that distributors must comply with the service interruption standards at all times. However this is not the case, and the DDA template should not infer that an absolute uninterrupted level of service is expected from the network. Retailers and customers understand that from time to time distributors are unable to meet target service levels. Unplanned interruptions may vary from the targets set due to external causes, and distributors may be required to diverge from planned interruption targets in order to maintain the network.

66. Schedule 1 of the DDA should acknowledge these circumstances, otherwise it is implied distributors may be in breach of contract for normal operating circumstances. This would be equivalent to indirect regulation of higher service standards than required under the Commerce Act, Part 4 regulation.

Load management

67. The DDA relies on controlled price categories when assigning control rights to distributors. However, increasingly it is expected that non-pricing arrangements may be used to provide different services, such as electric vehicle charging. Accordingly some price categories might allow for both controlled and uncontrolled load (such as time of use pricing). Clause 5.1 of the DDA should be amended to allow for non-pricing options for distributor's load control.

68. Also, it is possible that third parties may obtain the rights to control load on behalf of customers. As the Authority intends the DDA to be forward looking and flexible, especially in relation to emerging related services, the DDA template should accommodate such circumstances.

Losses and Loss Factors

69. The DDA requirements for losses and loss factors could be improved by amending clause 6 in regard to disputes over losses, and to re-instate the requirements for retailers to manage non-technical losses. The formal dispute process is expected to be unworkable given there are multiple methods for estimating losses, and should be removed.

Payment obligations

70. Section 9 of the DDA template sets out billing process requirements, however these do not recognise that estimated or pro-forma invoices are issued and subsequently washed-up. Distributors may be required to implement billing system changes to comply with the clause as drafted. This would add unnecessary cost and could delay implementation and compliance with a DDA.

71. As the timing of pro-forma invoices and wash-ups may differ between retailers and distributors, we suggest that clause 9.3 is moved to Schedule 2 and included as operational terms, to provide for this flexibility. This would also provide more flexibility to accommodate current billing procedures, and changes in billing systems which may be required to implement new distribution pricing structures.

Pricing and information exchange

72. The trader is obligated to allocate price categories and price options to ICPs under section 8 of the DDA. We submit that this clause needs to be strengthened to provide more incentive on traders to assign ICPs to the correct distribution pricing category.

73. Clause 8.5 should be extended to require a trader to assign an ICP consistent with all eligibility criteria, not just meter configuration. To do this the trader should be required to maintain all of the necessary information advised by the distributor for price eligibility purposes.

74. A distributor should also be able to recover lost revenue and any costs incurred in identifying and quantifying the lost revenue where a trader has failed to allocate an ICP to the correct distributor price category. This would remove an incentive for traders to allocate ICPs to incorrect pricing codes to reduce line charges.

75. Clause 7.3 contains drafting for recorded terms for price changes. However it includes unnecessary restrictions on price changes within annual cycles. It should be amended to allow for price changes to reflect pass through cost changes, new services provided to new or existing connections, agreements with retailers and compliance with any regulation within this period.

Prudential requirements

76. Clause 10 of the DDA provides for two weeks of line charges as a base level of security available to distributors. If additional security is required, the trader may elect third party security or cash deposits. If the cash option is elected, a distributor is to pay holding costs to the trader at the prevailing bank bill rate plus 15%. The distributor is not able to access lower cost security options through this contract.

77. In addition, a distributor is only able to call on security if the amounts are not subject to genuine dispute. However elsewhere in the contract (in clause 18), it states that the value of security can be called on as a remedy for a financial breach. In addition, even if a contract is terminated due to a financial breach, if a trader is able to provide security the distributor is required to offer a new contract.

78. The distributors who support this submission do not believe that the draft DDA contract correctly allocates risk between traders and distributors through the prudential arrangements. To be clear, security is rarely called on, and financial breaches are not common. However recently there has been an increase in late payments and defaults by smaller/new entrant retailers and some distributors have had to commence debt recovery and financial breach proceedings under existing UoSA. We do not think it is appropriate that distribution customers, and ultimately the customers of other retailers, carry the financial risk of the failure of new entrant retailers.

79. The proposed two weeks base level of security is insufficient, as formal debt recovery processes extend well beyond this period. A retailer is able to accumulate far more debt than the base security provided for, particularly as the contract requires distributors to bill in arrears with payment on the 20th day of the following month. In the event of non-payment, the distributor has potentially 50 days of charges which may be at risk of non-payment.

80. If a distributor proceeds to terminate the contract through the clause 18 default processes, it is expected these breach and termination processes will also extend well beyond two weeks. Accordingly, distributors may be exposed to considerable financial losses, if additional security is not provided.

81. The remedy available to the distributor is to pay excessive rates to hold additional security. We submit that these rates should be reduced to reflect normal commercial arrangements, and the risks outlined above. We also support an additional option where the distributor and trader agree an alternative value for the base level of security, which would not be able to exceed $5,000 per trader if elected. This would address the problem that arises for distributors when arranging security for new entrant traders with very few connections. The cost of obtaining the security exceed the value of the security for these small traders.

82. We also note that the proposed carve out, of amounts under dispute from the available security, creates an incentive for traders to dispute charges to delay payment to distributors, without risk of losing their security. The retailer is able to remedy a financial breach prior to any termination

taking effect. We submit that this carve-out must be removed to avoid this incentive. In addition, distributors should be able to call on security immediately a trader fails to pay, assuming the amount is not in dispute.

Serious financial breach

83. The proposed definition of a serious financial breach is ineffective for smaller retailers and small networks. This is because materiality is defined as the greater of $100,000 or 20% of monthly line charges. This definition will never apply for smaller retailers.

84. The consequence of this definition is that a serious financial breach for smaller retailers is limited to a material breach of the prudential requirements. This is a much more complex and lengthy process than that envisaged under the first part of the definition. Accordingly we submit that the definition of serious financial breach in clause 33.2 is amended to incorporate criteria which capture serious breaches by smaller traders.

Indemnity and liability

85. Clause 24.5 of the draft DDA limits the liability of distributors for failure to convey electricity under certain circumstances. These include actions or failures of customers, traders and the system operator. Distributors may be liable for any failure to convey electricity for any reasons not stated. Thus failure to convey electricity for any reason associated with a network event is not acknowledged by the limitations.

86. This implies a higher service standard than elsewhere in the contract (for example Schedule 1 service standards and schedule 5 service interruption communication). It also implies higher service standards than those required under Commerce Act, Part 4 regulation. These standards or terms do not require a distributor to provide continuous supply. In fact they explicitly state that supply will be interrupted due to planned and unplanned outages.

87. In order to address this issue we submit that reference to Good Electricity Industry Practice is inserted in to the indemnity provisions, for both traders and distributors.

88. Clause 24.7 of the DDA specifies the liability cap for parties to the agreement as the lesser of $10,000 per ICP or $2m. As drafted this would result in excessive amounts of liability, which would be expected to grow significantly as more traders enter each network, and would be disproportionate for smaller networks. We note that a $2m cap applied across 20 traders (say) would amount to a $40m liability per event. In FY18 there were 12 distributors with total annual line charge revenue less than $40m.

89. Accordingly we submit that this clause is amended to limit the per ICP liability to $10,000 per affected ICP, and to the lesser of $2m or 5% of annual line charge revenue across the network per event, not per contract.

90. Clause 26 of the DDA requires a trader to notify a distributor if the trader wishes to be indemnified by the distributor following a customer claim involving a network event. This should be amended to require a retailer to notify the distributor immediately after a customer makes such a claim, to help to avoid the situation where a retailer elects to pay out on a claim relying on the distributor's indemnity rather than its own. The retailer's actions could affect the distributor's ability to challenge or influence a claim.

91. Clause 27.2 should be modified to refer to actual losses incurred by the third party, where the distributor is at fault and in breach of the terms of the agreement. In addition there is no limit on the indemnity to be given by distributors under clause 27.2, even when the trader is in breach of the agreement.

92. The DDA should provide incentives for retailers to limit indemnities with customers for network events. This clause provides for the distributor to indemnify the trader against direct loss or

damage suffered or incurred by the trader as a result of a customer claim. But a trader should not be able to rely on unlimited indemnities for distributors following a network event, if that trader has not sought to limit its indemnities with customers.

Regulated guidelines

93. It is anticipated that in the future the Authority may, following consultation, introduce future regulations for distributors which will be enforced directly through existing contracts. We do not support this proposal which we consider introduces undue regulatory risk and uncertainty and is contrary to good regulatory practice.

94. Of immediate concern is the proposal that the DDA refers to certain guidelines. Examples in the template include guidelines for loss factors (clause 6.2), distribution pricing (clause 7.4), medically dependent and vulnerable customers (clause 17.4) and unmetered load management (clause 17.5). Any reference to these, or future guidelines should be changed from 'must comply with' to 'have regard to' to ensure new regulatory obligations cannot be inserted into existing contracts, and that the status of these existing guidelines is not promoted to regulation.

95. Any further guidelines must also be subject to transparent and considered consultation processes.

Changes to draft DDA template

96. The following table sets out our detailed submission on changes to be made to the draft DDA template and schedules. The most significant of these are discussed above, however additional more minor drafting issues are also addressed in the table below.

Table 2: DDA template drafting suggestions

Topic	Reference	Changes required
Service Interruptions		
	Schedule 1	Insert the following after S1.5: Failure to meet these service levels does not of itself constitute a breach of contract The distributor will use all reasonable endeavours in accordance with Good Electricity Industry Practice to meet these service standards. (refer para 66)
	Schedule 5.2(a)	The proposed communications standards for unplanned interruptions during the initial event period are not reasonable, and should not be included as a suggested standard. It is impractical during a major event to notify all traders of each unplanned interruption within 10 minutes of becoming aware of an interruption. Suggest replace the 10 minute standard with 30 minutes for staffed control rooms.
	Schedule 5.8	Where a trader is contracted to manage fault calls it should do so under normal operating conditions. However during major storm events it may be reasonable, and the distributor may prefer to manage fault calls directly. Schedule 5.8 should be amended to state, at the Distributor's request, the Trader may provide the Distributor's contact details.
Load management		
	Clause 5.1	Insert a subclause to recognise that a distributor may control load even where specific controlled load pricing categories are not used. Suggest

Topic	Reference	Changes required
		broaden description of pricing categories to refer to a price option which allows for non-continuous level of service. (refer para 67)
	Insert new clause	To provide for contractual arrangements between the Distributor and third parties or customers which assign load control rights. (refer para 68)
	S8.1	The priorities for load management should refer to network emergencies as well as grid emergencies, and this should be prioritised above 'any other right to control load'.
	S8.3(c)	The trader and the distributor should both be required to negotiate in good faith when agreeing on load control equipment upgrades. The Trader should not be able to prevent upgrades to equipment which requires renewal due to age or obsolescence, where the equipment is required to provide agreed services under the distribution agreement. Accordingly sub clause (c) should be amended to include the phrase 'the trader and distributor must negotiate in good faith to agree suitable terms for the upgrade of the trader's load control equipment'.
Losses and loss factors		
	Clause 6.2	Change reference to 'in accordance with guidelines' to 'have regard to guidelines'. (Refer para 94)
	Delete clause 6.6	Clause 6.5 is sufficient for responding to complaints over losses. Dispute resolution processes are not helpful as there are many different ways to estimate losses. (refer para 69)
	Add back clause 6.5 from 2016 DDA	Imposes requirements on traders for non-technical losses. This is not included anywhere in the current draft contract terms. (refer para 69)
Payment obligations		
	Clause 7.3 Recorded terms	Remove unreasonable restrictions on price changes within annual cycles. Allow for pass through cost changes, new services provided to new or existing connections, agreements with retailers and compliance with any regulation within this period.
	Clause 7.4	Change references to complying with guidelines to 'have regard to pricing guidelines' and remove reference to specific guidelines because they may change(Refer para 94)
Billing information and payments		
	Clause 8.5	Add a subclause to require the trader to maintain all information required for assigning price categories and to assign ICPs to pricing categories based on all of the distributor's price category criteria. (refer paras 73)
	Clause 8.6	Add subclause to allow a distributor to claim unrecovered revenue, and associated costs incurred, where a trader has failed to allocate an ICP to the

Topic	Reference	Changes required
		correct pricing category (refer para 74)
	Clause 8.12(c)	Amend clause to apply only where a distributor is responsible for disconnections under Clause 6.
	Clause 9.3	Amend to recognise that pro-forma estimated invoices are issued, then washed-up at a later date. As these arrangements may differ between distributors and retailers, due to billing cycles and systems, this clause should be included as an operational term in Schedule 2. This would also better accommodate changes to pricing structures. (refer para 71)
Prudential requirements		
	Clause 10.1	Include an additional sub-clause which states that the trader is required to comply with the prudential requirements at all times under the contract. This will help to mitigate the situation where the Trader's financial position deteriorates unbeknown to the distributor, compromising the security available to the distributor.
	Clause 10.6	Include an additional option where the distributor and trader agree an alternative value for the base level of security, which would not be able to exceed $5,000 per trader if elected. This would address the problem that arises for distributors when arranging security for new entrant traders with very few connections. The cost of obtaining the security exceed the value of the security for these small traders. (Refer para 81)
	Clause 10.9	Change the rate required for additional security to 5% above the bank bill rate (refer para 81)
	Clause 10.22	Remove sub-clause (c) which excludes amounts subject to genuine dispute from security available to the distributor. (refer para 82)
	Clause 10.23	Remove reference to 'on 2 working days' notice' to allow a distributor to call on security immediately if clause 10.22 applies. (refer para 82)
	Clause 33.2	Insert sub-clause into the definition of Serious Financial Breach to improve materiality criteria for smaller traders as follows: (c) a failure by the Trader to pay the lesser of $100,000 or 100% of the actual charges payable by the Trader for the previous month, unless the amount is genuinely disputed by the trader in accordance with clause 9.7 (refer para 84)
Connections, disconnections and decommissioning		
	Clauses 17.4 and 17.5	Change references to complying or in accordance with guidelines to 'have regard to guidelines'. Include reference to compliance with any Code requirements for medically dependent and vulnerable customers. (Refer para 94)

Topic	Reference	Changes required
	Schedule 6.5	The reference to connection of a new connection or change in capacity of an existing connection within 2 days requires amendment. This can only occur if the site is ready for connection. Suggest include 'subject to the party providing a code of compliance and record of inspection for the site, where relevant'.
	Schedule 6.13(a)	Reference to the customer's last address provided by the trader for disconnection warnings should be deleted, as the DDA template does not require traders to provide customer addresses to distributors. Reference to the address on the Registry is sufficient.
	Schedule 6.14	Distributors are not able to make changes to the Registry as implied by this clause which relates to temporary disconnections.
	Schedule 6.15	Modify the date by which a restoration following a temporary restoration, must be made. Change to the date 'agreed' with the customer. It may not always be possible to meet the requested date, as currently drafted.
	Schedule 6.25	Distributors are not responsible for removing meters when decommissioning ICPs under the agreement, and the reference to Metering Equipment should be removed from the template.
Liability		
	Clause 24.5	Amend this clause to acknowledge that Distributors are not required to provide continuous supply on their networks, and that their supply targets and service standard expectations are specified in Schedule 1 and Schedule 5. (refer para 86)
	Clause 24.7	The limitation on liability must be amended to be the lesser of the actual value of the loss or damage incurred and the liability caps. These caps should be set as • the lesser of $10,000 per affected ICP; and • the lesser of $2,000,000 and 5% of annual lines charge revenue for the entire network (not per agreement) per event or connected events. (refer para 88-89)
Indemnity		
	Clause 26.1	Amend subclause (a) to require the trader to notify the distributor as soon as a claim has been made involving a potential network event. (refer para 90)
	Clauses 27.1 and 27.2	Amend references to 'direct loss or damage' to actual losses incurred by the third party where the trader (cl 27.1)/distributor (cl 27.2) is at fault and in breach of the agreement. (refer para 91/92) Include references to recognise compliance with Good Electricity Industry Practice: • on behalf of the Trader in clause 27.1(a) (ii)

Topic	Reference	Changes required
		• on behalf of the Distributor in clause 27.2(a)(ii)
	Clause 27.2	Add an additional sub-clause to state that the distributor shall not indemnify the trader against any losses which arise as a result of the trader breaching the agreement. A similar sub-clause can be added to Clause 27.1 to protect the trader. (refer para 91/92)
	Clause 33	Insert definition of losses to state that a direct loss is a direct, natural and probable consequence of the event.
	Clause 33	Insert definition of Network Event, to provide clarity for interpretation of the indemnity and liability clauses.
Exchanging information		
	Clause 31.1	Add subclause to insert a requirement that retailers must provide distributors with the customer information required for distributors to fulfil their obligations under the DDA, and that distributors may audit the data.