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Submissions

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Dear James

Submission on the Code amendment proposal: Default Distributor Agreement

1. Wellington Electricity Lines Limited (**WELL**) welcomes the opportunity to respond to the Electricity Authority's (the **Authority**) consultation paper '*Code amendment proposal: Default Distributor Agreement, Consultation*, and accompanying material, published on 20 August 2019.

2. WELL supports the ENA submission, and notes that the ENA has provided detailed drafting amendments in response to the consultation papers. While we support the issues identified in the ENA submission, in some areas we have put forward alternative solutions and drafting amendments for consideration.

3. The purpose of this submission is to highlight topics of particular concern to WELL regarding the proposed process for implementing a Default Distribution Agreement (**DDA**) via the Electricity Industry Participation Code (the **Code**) and the form of that agreement.

1. Executive Summary

4. We have previously opposed the proposal to implement default distribution agreements. Our 2016 submission on the previous consultation set out our reasons and our proposal for an alternative approach, based on a Model Use of System agreement (**MUoSA**).

5. WELL continues to support retaining the MUoSA approach. We do not consider that the DDA approach has been adequately justified as the estimated net benefits are small and appear to be based on unverified data. Distributors have progressed their MUoSA contracts in good faith. Considerable work has been undertaken to update legacy contracts in this regard. New traders are consistently signing on to existing agreements without concern.

6. The DDA proposal adds complexity and risk for distributors, and ultimately cost which may not be able to be recovered for those distributors subject to price-quality regulation under Part 4 of the Commerce Act. Even if the additional costs are able to be passed on, they will ultimately be borne by electricity consumers. In some instances the DDA might be expected to result in a transfer of costs between the consumers of different traders. We do not believe that these outcomes are consistent with the regulatory objectives of either the Authority or the Commerce Commission (**Commission**).

7. The modular structure of the proposed draft DDA reflects the inherent difficulties in implementing default contract terms; the requirement for contracts to reflect the operating practices of each distributor; and the jurisdictional boundaries between the Authority and the Commission. While the addition of the 'recorded terms' feature of the DDA attempts to resolve this latter issue, it is an awkward solution, which adds complexity to establishing the operational and default terms, and will create issues in the future where terms are revised.

8. Without prejudice to these views, this submission responds to the draft Code amendments and DDA template with a number of corrections and amendments which need to be made before they are implemented.

9. It is our recommendation that the reference to Default Distribution Agreement is replaced with Default Distribution Terms. The former implies negotiated outcomes, but the default terms are not negotiated, they are to be imposed through the Code.

10. WELL submits that the planned implementation of the proposal requires refining in a number of ways including the following.

    a. A further technical drafting consultation is undertaken before the DDA terms are finalised to avoid unnecessary errors and ambiguities;

    b. That the initial implementation period is extended where the Rulings Panel processes cause delays;

    c. Traders and distributors may agree to extend the period for establishing alternative agreements, to avoid the proposed fall back to the default agreement;

    d. The notice period for establishing an agreement with a new trader is extended to 40 days, and the contract becomes binding after a further 20 days to provide sufficient time to establish alternative agreements if desired, and to set up a new trader on a network;

    e. That the Rulings Panel guidance for operational terms be extended to align with the prudency and efficiency principles adopted by the Commerce Commission, including compliance with relevant legislation or regulation. In addition, the Rulings Panel is required to give consideration to the impact on the distributor's operating practices and costs before making a ruling on an amended term;

    f. That distributors or traders are able to appeal Rulings Panel decisions, where they require either party to make significant changes to current operating practices and/or incur significant cost;

    g. The Authority only publishes those agreements which relate to electricity distribution services, and only once commercially sensitive information has been removed;

    h. Traders are required to update their default distribution agreements periodically to reflect any changes in the default terms to ensure consistency in agreements based on the default;

i. The Authority undertake a periodic review of the default terms to ensure they remain fit for purpose. This would require a high threshold for change to avoid unnecessary disruption and associated cost of implementing widespread changes to default terms.

11. The draft terms in the DDA must be amended to correct for the imbalance of risk between traders and distributors. We consider that the draft terms should be amended to improve the incentives on traders to act prudently, and to reduce the opportunities for them to pass on losses to distributors. In this respect, in the body of our submission we specify changes which need to be made to the prudential arrangements, liability and indemnity provisions, obligations to meet service standards and the requirement to offer contracts to traders who have previously defaulted.

12. WELL also submits that where a trader has demonstrated behaviour which is inconsistent with its obligations as a market participant, the contracts between distributors and traders should not be solely relied on to resolve this behaviour. Market approval processes should intervene where a trader has not acted consistent with the expectations of the Authority at the time the initial market participant approval was made. The right to participate should be reviewed during a stand-down period, in this instance, before a new agreement is offered.

13. In addition, WELL does not support the proposal to introduce quasi-legislation through DDA references to compliance with 'guidelines' which have been or may be established by the Authority. This is poor regulatory practice, and given the DDA is an evergreen contract, commits the contracting parties to unknown terms.

14. The body of our submission also includes a number of recommended changes to the DDA for pricing and information exchange, load control, losses, billing processes, connection processes and communications for interruptions. In this respect we note that the industry has developed load control principles which should be reflected in the default terms.

15. Finally WELL supports the proposal to specify terms for the exchange of consumption data. In order to effectively fulfil our distribution service obligations, we require access to consumption data which is collected and collated by traders. We include suggested improvements to the draft terms, including the ability to combine data, the requirements to destroy data, the costs of providing the information and limiting liability. These are required to make the agreement more practical, and ensure distributors have access to the data required to fulfil our obligations under the DDA. We also submit that these terms should be more flexible to better accommodate the needs of a changing energy delivery system. The increased opportunity for consumers to install behind the meter generation, storage and EV charging requires market participants to work closer together to share information that maintains security of supply through distributed energy resource (**DER**) standards and access agreements, as core terms.

2. Introduction and context

16. WELL has engaged comprehensively with the Authority's previous consultations on proposals for MUoSA[1] and a DDA[2]. We have previously expressed our opposition to a mandated approach to

[1] WELL, Submission to the Electricity Authority, More standardisation of use-of-system agreements, 20 May 2014
[2] WELL, Submission to the Electricity Authority, Default agreement for distribution services, 9 April 2016

contract terms between distributors and traders on the basis that regulated terms lock in historical approaches - inhibiting innovation and emerging competition, overlap with the regulatory jurisdiction of the Commerce Commission, introduce additional risk for distributors, and have not been adequately justified.

17. The consultation paper suggests that the current use of system agreement (**UoSA**) arrangements generate higher than necessary transaction costs, limit retail competition and result in favourable terms for distributors[3]. However our own experience with retailer access to our network and the process for establishing and agreeing contract terms is not consistent with the issues identified in the consultation paper.

18. WELL has 20 use of system agreements in place across 27 traders and three of these have been entered into during the past two years. New entrants have signed up to our UoSA without raising concerns on any of the terms and conditions. We genuinely question the need for the disruption to both retailers and distributors, without more compelling evidence of the detrimental impact to retail competition.

19. We acknowledge that some improvements have been made to the proposals since the earlier consultation in 2016. We also acknowledge and support the intention to assist distributors to access consumption data which is collated by retailers. This is necessary for distribution system operations and management and unfortunately accessing this data has become difficult in some instances.

2.1. Cost benefit analysis

20. WELL considers that the financial justification for introducing a DDA is weak. The consultation paper estimates that the proposal will reduce the costs of negotiating UoSAs by between $1.1m to $1.3m between 2019 and 2021. This is based on high level assumptions about the costs of negotiating new DDAs against a counterfactual of costs associated with maintaining the existing UoSA model.

21. There is considerable disparity in the cost estimates of negotiating new UoSA provided by retailers ($15,055 per agreement) and distributors ($2,883 per agreement)[4]. The range of cost estimates provided by traders varies widely, with an excessive amount of $150,000 per contract a notable outlier. This difference has not been explained in the consultation paper, and we understand it was captured via survey with no supporting evidence or external verification. Without some form of verification, and given the divergence in the estimates we question whether the data can be relied on for the cost benefit analysis. At the very least, the outlier estimate should be ignored.

22. We also question whether the related services market benefit which it is claimed will result from the neutral approach to Part 12A is real. To date, as far as we are aware there is no evidence of a cost which will be avoided if this 'neutral' contract amendment is not introduced.

23. In any event the net benefits are insignificant, and in our view, do not justify the disruption for distributors and traders associated with the proposed regulation.

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[3] Consultation Paper, section 3
[4] Consultation Paper, 5.30

2.2. Comments on the proposal

24. In the remainder of this submission, and without prejudice to the above statements, we set out the corrections and improvements required to make the draft DDA proposal more reasonable and practicable.

25. It is our recommendation that the reference to Default Distribution Agreement is replaced with Default Distribution Terms. The former implies negotiated outcomes, but the default terms are not negotiated, they are to be imposed through the Code.

26. WELL's specific comments on each of the following topics are provided in the remainder of this submission:

- Implementing the proposed DDA model (provided in section 3);
- The draft DDA template (provided in section 4);
- Schedules and appendices (provided in section 5).

3. Implementing the proposed DDA model

27. In this section we comment on the proposed process for implementing and monitoring DDAs, and the proposed Code amendments to give effect to these processes.

3.1. Process for drafting default terms

28. In our 2016 submission on the Authority's DDA proposals we submitted for an alternative model agreement[5]. In addition, in good faith, we also provided significant drafting amendments to the 2016 DDA template, in the event that our proposal for an alternative model agreement was not accepted, and the Authority proceeded with a DDA proposal.[6]

29. Many of these proposed amendments corrected for errors or ambiguities in the 2016 draft. We acknowledge that the Authority has made some improvements to the 2016 version, however we are disappointed that a number of our suggestions have not been incorporated into the 2019 version, and as a result significant issues remain which need to be resolved before the agreement can be implemented.

30. Without such attention it is unlikely that the proposed DDA will be workable, the consequences of which mean that:

a. The implementation timetable will not be able to be met because of lack of agreement on the operational terms which must be consulted on, requiring intervention from the Rulings Panel, potentially across multiple agreements; and

b. The agreement will not be durable, it will require future refinements which will trigger a process of contract amendments across all distributors/traders, which will undermine the cost benefits claimed in the consultation paper, and create regulatory uncertainty.

[5] Refer Section 2 of our 9 April 2016 submission

[6] Refer Attachment 3 of our 9 April 2016 submission

31. Accordingly, WELL submits that following this submission process and prior to the finalisation of the Code amendments and the DDA templates, the Authority undertakes a further technical drafting consultation. This is a practice followed by the Commerce Commission prior to making its regulatory determinations for distributors under Part 4 of the Commerce Act. It is prudent and helps to avoid unintended consequences or ambiguity once the final decisions are implemented.

32. In addition we urge the Authority to carefully consider the points raised in this submission, [and the additional drafting suggestions provided by the ENA], and make the necessary changes to the draft Code amendments and the DDA templates. This will minimise unnecessary regulatory complexity and ensure the DDA is more durable than the version currently proposed.

3.2. Developing a DDA

33. It is proposed that WELL is included in the first group of distributors to develop, consult on and implement DDAs. This process will also involve the traders on our network, who are to be consulted on the operational terms. This is to be completed within 90 days of the proposed amendment to Part 12A of the Code coming into effect. This requirement will also apply to four other large distributors and therefore the consultation process is expected to include most retailers.

34. We are concerned that this timetable will not be able to be met due to the number of terms to be consulted on and implemented during this 90 day period. For example if the Rulings Panel is required to adjudicate on operational terms for one or more distributor, with the potential for multiple retailers to refer terms to the Panel, the process may not be able to be finalised within the 90 day period. We note that any rulings by the Panel on a dispute between a distributor and a trader has consequences for the operational terms for all other traders on the distributor's network.

35. We submit that it is not appropriate for the consultation process to be curtailed in any way due to the 90 day deadline. The deadline is an artificial construct. It is not a prerequisite for any other regulatory compliance matter. As the DDAs established during this initial period are expected to provide reference contracts for other distributors and their traders, it is important that the proposed process is well executed. Accordingly we submit that:

    a. The Authority provides advance notice of the date the amended Code will come into effect, to allow the five distributors in the initial group to be as well prepared as possible before the 90 day period commences; and

    b. The Code includes an extension provision where the Rulings Panel is unable to meet the deadlines for appeals as set out in Schedule 12A.4 (8)[7] during this initial 90 day period.

3.3. Modular and flexible arrangements

36. We note that the proposal provides for future amendments to the DDA provisions in the Code, including the template schedules. The Consultation Paper indicates that the Authority may, following consultation, insert additional template schedules in the future. WELL understands

[7] Schedule 12A.4 (8) specifies that the Rulings Panel must respond to an appeals request within 10 business days, and issue its ruling within 20 business days of that response

the desire to maintain flexibility in the regulatory framework to address future developments, however the process for incorporating future amendments into each distributor's DDA and the consequence for existing agreements is not clear. This is particularly relevant because the DDA contracts are assumed to apply in perpetuity - that is they are not terminated other than by default or by agreement.

37. Once the amended terms come into effect, all DDAs will be deemed to align to the new terms. This raises the possibility of multiple versions of contracts being in use at one time, which undermines the objectives of standardised contracts, or an ongoing task of updating and reissuing agreements to traders on a network each time one of these events occurs.

38. Accordingly WELL submits that Part 12A.1 is modified to require traders to update their default distribution agreements periodically. This is necessary to ensure that where a distributor modifies schedules, operational or recorded terms, they flow through into those existing agreements which are based on the default. We note that the ENA has submitted a detailed proposal in this regard and we encourage the Authority to consider these drafting suggestions and incorporate appropriate amendments before the DDA is finalised.

39. We also suggest that the Authority undertakes a periodic review of the default terms to ensure they remain fit for purpose. This could be similar to the Commerce Commission's Input Methodology review process, and would require a high threshold for change to avoid unnecessary disruption and associated cost of implementing widespread changes to default terms.

3.4. Publication of agreements

40. Another feature of the proposals is that all agreements must be supplied to the Authority, and the Authority may publish these. This includes default agreements, and their operational terms, recorded terms and collateral terms. It also includes alternative agreements and 'any other agreement'. We submit that this proposal is too broad, and if introduced could result in commercially sensitive information being published.

41. WELL believes that the Authority is overstepping its mandate in this respect. We acknowledge that the Authority has the ability to regulate the terms between distributors and traders for distribution services, however other services which are not distribution services may be mutually agreed between parties. Such agreements should not be captured within this clause.

42. Accordingly WELL submits that Clause 11 of Schedule 12A.1 is amended to:

    a. Allow commercially sensitive information to be redacted from any version of an agreement which is to be made publically available (this is consistent with the Commerce Commission's regulatory disclosure regime for distributors); and

    b. Remove the reference to 'any other agreement' in subclause (1)(c) and clause (3). The reference to distribution agreement, as defined in clause (2) is sufficient because it captures the core, operational, recorded and collateral terms of a DDA and alternative UoSA agreements for distribution services.

3.5. Entering into a new DDA

43. It is proposed that new agreements with traders must be established within 20 business days. If this timeframe is not achieved the default agreement is assumed to apply. A further 5 business days is provided to commence trading. Our experience is that it can take some time to set up billing, outage management, network operations, connections and prudential security for a new trader.

44. We also submit that additional time is required to provide for alternative agreements to be negotiated, if desired. Genuine negotiations between willing parties may extend beyond 20 days for various reasons including work load and the need to seek external advice on certain contract clauses. The failure to agree contract terms within this timeframe is not necessarily an indication of a lack of desire to do so. It would not be appropriate for a DDA to apply if neither party wished it to.

45. Accordingly we recommend that:

    a. Clause 6(3) of schedule 12A.1 is amended to include a new subclause *(c) except where agreed by the parties*, to allow for the parties to mutually agree to defer the timeframe for the DDA to become binding;

    b. Clauses 3 and 6(3) of schedule 12A.1 are amended to replace 20 business days with 40 business days; and

    c. Clauses 5 and 6(2) of schedule 12A.1 are amended to replace 5 business days with 20 business days.

3.6. Role of Rulings Panel

46. We note the proposed role of the Rulings Panel to adjudicate on appeals on the operational terms which must be included in a DDA. The consequence of this is that the Rulings Panel will have the power to determine operational terms. This differs to its primary role which is to adjudicate on whether participants have acted consistent with the Code.

47. As we stated in our 2016 submission, we are concerned that the Rulings Panel may not have the appropriate experience for this new role. The consultation paper considers this issue, which was raised in 2016, but has not made any amendments as a result. We note that there are no criteria envisaged to guide the Rulings Panel on its decisions on operational terms, other than very high level principles set out in clause 4(2) of Schedule 12A.4.

48. To assist the Rulings Panel make decisions about the operational requirements of distributors we suggest that additional decision criteria are inserted into Schedule 12A.4 including the following:

    a. *To enable compliance with applicable regulation and legislation* (for example the Health and Safety at Work Act);

    b. *To reflect prudent and efficient operating practices* (as adopted by the Commerce Commission when assessing distributor plans);

c. *Be consistent with the regulation of distributors under Part 4 of the Commerce Act;*

d. *Treat all traders who trade on the distributor's network equally.*

49. This would also avoid the potential conflict which exists with the Rulings Panel intervening in pricing and pricing methodologies. In principle a trader could appeal a distributor's pricing approach to the Rulings Panel. This could create conflicts with the core terms set out in sections 7 and 8 of the DDA and the obligations on distributors when publishing prices and pricing methodologies under Part 4 of the Commerce Act.

50. We also submit that a prudent amendment would be to allow distributors or traders to appeal the findings of the Rulings Panel. This may be a valid option where the Panel's decision would require a distributor or a trader to make significant changes to current operating practices and/or incur significant costs. In addition we submit that the Rulings Panel must have regard to the following prior to making its decisions:

a. The operational and cost impacts of amended terms; and

b. The consequences of distributors having different operational terms applying in contracts with different traders.

4. The draft DDA template

51. In this section we highlight areas of particular concern with the draft DDA template, and include drafting suggestions to address these concerns.

52. An overarching concern is that the draft DDA template does not reflect an appropriate balance of risk between traders and distributors. This is of particular concern in respect of new entrant traders, or traders who do not operate with prudent financial and risk management policies. As drafted, this risk flows through to distributors, and ultimately the cost is borne by electricity users. As we have previously submitted[8] it is outside the Authority's jurisdiction to impose additional costs and risk on distributors who are limited in their ability to manage the transferred costs under Commerce Act price-quality legislation.

53. We consider that the draft terms should be amended to improve the incentives on traders to act prudently, and to reduce the opportunities for them to pass on losses to distributors. The following paragraphs raise a number of points in this regard.

4.1. Prudential requirements

54. Clause 10 of the DDA sets out the prudential arrangements between distributors and traders, and the circumstances under which a distributor may call on the security established under these arrangements. The maximum level of security, without the distributor incurring additional holding costs, is to be no more than the estimated value of two weeks of distribution charges for each trader.

55. In this respect WELL notes that it takes considerably longer than two weeks to complete a formal debt recovery process, and during this period a trader can continue to accumulate debt

[8] WELL submission, 9 April 2016, para 7

well beyond the value of the default security amount. The DDA requires us to bill in arrears, and payment is to be made by the 20th of the following month. If a trader defaults at that time there are approximately 6 weeks of line charges at risk, even before debt recovery processes commence. WELL therefore submits that the base level of security should be increased to two months to reflect the DDA payment terms and associated risk.

56. In addition clause 10.2 and 10.3 of the DDA should be amended to require a trader to maintain the agreed level of security at all times, not just at the time the contract is entered into.

57. Clause 10.22 limits a distributor's call on the security to 'amounts which are not subject to genuine dispute'. This is inconsistent with the provisions for contract termination in response to 'serious financial breaches' in clause 18.2 which assumes that the value of security can be called on as a remedy for financial breaches. Accordingly we submit that the amount of additional security able to be requested by the distributor under clause 10.7 should be able to be increased for the value of any monies owing.

58. If a financial breach is not able to be fully remedied by drawing down the security or otherwise remedied by the trader, a distributor is able to terminate the DDA through the clause 18 default processes. However these processes are also likely to extend well beyond two weeks, and thus without additional security the distributor will be exposed to financial losses.

59. Additional security may be requested by a distributor up to the value of two months of distribution charges. If a trader elects to provide this security by cash deposit the distributor must pay a holding cost equal to the prevailing bank bill rate plus 15%. The distributor is not able to access lower cost options, such as third party security, in this instance.

60. WELL submits that a fixed premium of 5% above the prevailing bank bill rate is more than sufficient particularly as distributors may not be able to access lower cost options for the reason outlined above. As demonstrated above, and consistent with our own experience, contract resolution for payment default is likely to extend beyond two weeks. Thus, holding additional security will be justified in limited circumstances. The proposed 15% premium holding cost is punitive, and the rate selected not adequately justified in the consultation papers.

61. It is proposed in clause 10.22 that any amounts subject to genuine disputes will be excluded from the security available to be called on by a distributor. This creates an incentive for traders to dispute charges to delay payment to distributors without risk of giving up the security. This action has little risk of contract termination, as the trader has the opportunity to remedy a financial breach prior to any termination taking effect.

62. Accordingly WELL submits that the following amendments are required to the draft DDA:

    a. Clauses 10.2 and 10.3 are amended to require traders to maintain the agreed levels of security at all times while party to the contract;

    b. Clause 10.6 is amended to extend the base value of security to 2 months of distribution service charges;

c. Clause 10.7 is amended to allow distributors to increase the value of additional security by the value of any monies outstanding or under dispute;

d. Clause 10.9 is amended to reduce the rate applied to cash deposits of additional security to 5% above the prevailing bank bill rate; and

e. Clause 10.22 is amended to remove the exclusion in sub-clause (c) of amounts subject to genuine dispute. An alternative option would be to require the trader to increase the amount of security provided by the amount under dispute.

4.2. Contract termination

63. If a contract is terminated due to a financial breach on behalf of the trader, a distributor is required to enter into a new agreement with the trader, so long as that trader is able to meet the prudential requirements of the DDA. While a distributor is able to require additional security, this comes at a cost, as noted above. In these circumstances the distributor is obliged to take on additional risk, at additional cost, with no compensation or ability to offset this risk. This is not consistent with prudent commercial practice observed in competitive markets.

64. Accordingly WELL submits that the following amendments are required to the draft DDA:

a. A distributor is able to defer entering into a new contract with a trader until all previous contract obligations have been met by that trader; and

b. A distributor is able to defer entering into a new contract with a trader who has defaulted on a previous contract due to a financial breach, except where the breach is deemed a genuine breach and is subject to the clause 23 dispute resolution processes at the time the new contract is entered into.

65. We also note and support the ENA's submission that:

a. The dispute resolution process should not lead to contract termination, as currently suggested in clause 19.1 of the DDA; and

b. A new clause is inserted to allow for contracts based on the default to be terminated if the Code is amended to remove the obligation on distributors to maintain distribution agreements. This solves the evergreen nature of the DDA which arises under the current drafting.

66. WELL also submits that where a trader has demonstrated behaviour which is inconsistent with its obligations as a market participant, the contracts between distributors and traders should not be solely relied on to resolve this behaviour. Market approval processes should intervene where a trader has not acted consistent with the expectations of the Authority at the time the initial market participant approval was made. The right to participate should be reviewed in this instance. This is relevant for the phoenix trader situation described in the consultation paper[9].

67. Accordingly, WELL submits that following a contract default, distributors are able to initiate a stand down period before entering into a new agreement with the trader, subject to review by

[9] Consultation paper, para 4.59

the Market Operations team of the entitlement of the trader to continue as a market participant.

4.3. Indemnity and liability

68. The liability of distributors for failure to convey electricity is limited by the provisions in DDA clause 24.5. These include actions or failures of customers, traders and the system operator. The implication is that the distributor may be liable for any failure to convey electricity for any reasons not specified in this clause.

69. This is inconsistent with the standard of service delivery which is anticipated by the DDA including the operational terms, and the recorded terms which are to align to the Commerce Commission's regulation of the quality of service of electricity distributors. None of these standards or terms require a distributor to provide continuous supply, and they explicitly acknowledge that supply will be interrupted due to planned events initiated by the distributor and unplanned events.

70. As we have previously submitted[10], clause 24.5 which sets out the circumstances where a Distributor is not liable, should be amended as follows:

> *except to the extent that the failure is caused or contributed to by the Distributor not acting in accordance with this Agreement or Good Electricity Industry Practice.*

71. If WELL is required to contract under the draft terms, this will result in our insurance policies having significant carve outs, increasing our uninsurable risk. This is because the proposals expose us to significant financial risk, within insufficient limitation. We acknowledge we have obligations under the Consumer Guarantees Act (**CGA**), but the DDA should not place additional undue risk on us that we are unable to mitigate.

72. Clause 24.7 of the DDA limits liability under the contract to the lesser of $10,000 per ICP or $2m for a network event or a series of events. However Clause 24.8 carves out certain circumstances from those liability limits, and therefore imposes unlimited liabilities. WELL strongly opposes being mandated to provide distribution agreements which include unlimited liabilities. We submit that the only exclusion that should be recognised in respect of the limitation of liability is the CGA, and clause 24.8 (a) is amended to this effect. Clause 24.9 should also be amended to better align with the recent amendments to the CGA which limit the ability to contract out of the Act.

73. In addition we highlight a significant drafting error in clause 24.7 of the DDA. Currently the drafting refers to a limit of $10,000 per ICP. We assume this is an unintended error, as this would result in excessive amounts of liability which would be disproportionate to the services covered by each contract and any losses associated with the event. The necessary correction is to insert the term 'affected ICPs' and to cap the amount to the value of the actual loss for the affected ICP.

74. We also submit that a total cumulative liability limit of $5m per network event, or series of events across the traders is inserted in place of the $2m cap per contract. In addition the

[10] WELL, 2016 submission, Attachment 4, page 36

liability is capped at the lesser of $10,000 per affected ICP or the amount of the loss or damage suffered. This avoids the issue of escalating liability due to increases in the number of traders on a network. It also avoids the issue of the liability becoming grossly disproportionate for smaller distributors. This cap should be allocated between contracts by the distributor in proportion to the number of ICPs affected by an event.

75. Alternatively, as we submitted previously, a cap should be able to be agreed between the distributor and the trader for each contract. This will provide certainty for both parties, while being proportionate to the level of activity of each trader on a network.[11]

76. Clause 26 of the DDA addresses claims under a distributor's indemnity and requires the trader to notify a distributor if a customer has made claims against the trader, and the trader wishes to be indemnified by the distributor. This would apply where the claim involved a network event.

77. However we submit that the trader should be required to notify the distributor immediately a customer makes a claim which involves a network event and prior to providing any remedy to a customer, even if the trader has not yet decided whether to call on the distributor indemnity. This is because a trader may elect to pay out on a claim rather than bring into effect its own indemnities, relying on the distributor's indemnity. The trader's response to a claim could prejudice the distributor's position. An amendment to the DDA clause 26.1, requiring the trader to notify the distributor immediately of any customer claim which involves a potential network event would remedy this issue.

78. Clause 27.2 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 under certain circumstances. However the term direct loss is ambiguous, and therefore we submit that it 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.

79. Clause 27.2 provides for unlimited indemnity to be provided by distributors, including where a trader is in breach of the agreement. A trader should not be able to rely on unlimited indemnities for distributors following a network event, simply because that trader had unlimited indemnities with customers. The DDA should provide incentives for retailers to limit indemnities with customers for network events.

80. 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. This is clearly unreasonable and exposes distributors to considerable risk which is unable to be mitigated by the distributor. We note that we are unable to insure for liability which we assume via the indemnity provisions.

81. Accordingly, WELL supports the proposed amendments to the indemnity provisions of the DDA (clauses 25-27) set out in the ENA's submission. These amendments appropriately:

    a. Ensure the distributor is not prejudiced by a trader's response to a customer claim for losses;

[11] WELL, 2016 submission, Attachment 4, page 37

b. Acknowledge the distributor's right to terminate the contract; and

c. Limit the distributor's indemnity to actual losses of the third party incurred in relation to any event which arises from the circumstances specified in clause 27.2.

4.4. Pricing and information exchange

82. Clause 7 of the DDA addresses the processes for changing distribution prices. It includes draft recorded terms for this purpose at clause 7.3 which appear to restrict price changes to annual cycles. However there are circumstances within a pricing year where prices may legitimately need to change. These include for new or amended pass through or recoverable costs or regulations, for new services, and also where agreed with retailers. As drafted, a single price change in the year may limit any price changes to any other customers.

83. Clause 7.1 requires information about schedules of price categories, price options and prices to be included in Schedule 7. As we have previously submitted it is not practical to include pricing schedules in the contracts, as this would require continual updates. This is managed well now with website notifications of prices and price schedules (as per the requirements of Part 4 regulation). However clause 7.1 can be read as requiring the information to be included in Schedule 7, and should be reworded.

84. Clause 8 of the DDA addresses allocating price categories and price options to ICPs. However the drafting does not correctly reflect the obligations for traders in assigning ICPs to pricing categories. Accordingly the following corrections are required:

a. In clause 8.5 a trader's selection of a price option for an ICP must be consistent with the meter configuration (as drafted) and also any other eligibility criteria which the distributor may require for a price option. Accordingly the trader must maintain the necessary information to ensure they are able to comply with these requirements, and notify the distributor within 10 working days of the pricing option for an ICP; and

b. Clauses 8.6 – 8.9 require amendments to allow a distributor to claim unrecovered revenue where a trader has failed to allocate an ICP to the correct pricing category. This will ensure traders have incentives to assign ICPs to the correct category and maintain the data necessary to do so. Failing this there is an incentive for traders to misallocate ICPs to pricing codes to minimise distribution charges.

85. Clause 31 of the DDA refers to distributors and traders exchanging information in accordance with EIEPs. This clause should also state that traders must provide distributors with the customer information required for distributors to fulfil their obligations under the DDA, and that distributors may audit the data. This provision was included in earlier versions of the draft but has been removed from the 2019 version. It is necessary because other requirements, such as the proposed new Appendix C, and other EIEP requirements are insufficient to ensure the distributor is able to meet its obligations, where these are dependent on information only available to the trader.

4.5. Regulated guidelines

86. The DDA refers to guidelines which may be issued or revised by the Authority. Examples include 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). As the DDA is drafted, these guidelines will become quasi-regulation. We do not support this proposal.

87. These provisions will also allow the Authority to change or introduce future regulations for distributors which will be enforced directly through the DDA. The DDA will have been issued prior to these potential new or revised regulations coming into force. This is poor regulatory practice because it introduces regulatory uncertainty and risk.

88. Accordingly WELL submits that any reference to these or future guidelines should be changed from 'must comply with' to 'have regard to'.

4.6. Load shedding

89. Clause 4.4 addresses the requirement to maintain security and safety during load shedding. This refers to maintaining a safe environment, with reference to the health and safety policies of the distributor. As we have previously submitted, this should be extended to refer to public safety policies which is more consistent with the Health and Safety at Work Act, 2015.

4.7. Load management

90. We remind the Authority that a robust set of principles for load management have already been established by an industry working group, which was co-ordinated by the ENA. WELL submits that the default agreement should be consistent with these principles.

91. The DDA assumes that the rights to load control are limited to the trader or the distributor under certain circumstances. However, in the future it is possible that customers may wish to assign their control rights to third parties. Recognising this opportunity in the DDA is consistent with the Authority's objective to make the default agreements sufficiently flexible to encourage increased competition in emerging related –services markets[12]. The DDA should therefore provide for contractual arrangements between the Distributor and third parties or consumers which assign load control rights.

92. In addition, the current drafting assumes that the ability for a distributor to control load depends on controlled price categories. While this has been common practice to date, pricing may not be the only arrangement for controlled load in the future, for example controlled electric vehicle charging. Pricing may also apply consistently to controlled and uncontrolled load, without separate price categories. Accordingly we submit the following amendment is required to clause 5.1 of the DDA:

    a. To include '*or a price option which allows for non-continuous level of service*'.

[12] Consultation paper, page 39

93. Also, as we have previously submitted[13] the trader should also be required to pass on the non-continuous supply pricing category to consumers.

94. Finally, as we have submitted previously,[14] the provision for assigning customer load to third parties must ensure that the rights holder has obtained the right, and that the obligations set out in Clause 5 and Schedule 8 are met.

4.8. Losses

95. We recommend amendments to clause 6 of the DDA to improve the incentives on traders to manage non-technical losses and to clarify how disputes over loss factors are to be addressed. We note that there are different methods that can be used to calculate loss factors, and no one agreed accepted method. We therefore submit that there is little benefit in applying a formal dispute process to loss factors.

96. We note that the Authority's guidelines are not mandated and therefore should not become so indirectly through the DDA. Accordingly, we suggest the following amendments to the DDA:

    a. Reinstating clause 6.5 from the 2016 version of the DDA regarding trader obligations for non-technical losses;

    b. Change clause 6.2 to include '*must have regard to any loss factor guidelines published by the Electricity Authority*';

    c. Change clause 6.1 to '*The distributor may obtain information from the reconciliation manager';* and

    d. Delete clause 6.6 which escalates disputes over loss factors to the dispute resolution process. Clause 6.5 is sufficient, because it requires a distributor to consider any complaint received over loss factors, and if required, to change the loss factors.

4.9. Billing

97. The billing processes are specified in some detail in section 9 of the DDA. However these do not adequately reflect current practice, particularly in respect of wash-up invoices. The DDA suggests that wash-ups will be applied the month after the data is received, but this is not always the case, as the wash-ups continually roll over longer durations. A more suitable contract term would be to align the wash-ups with the reconciliation manager cycles. There may be value in some flexibility in this regard, especially to accommodate the timing of pro forma (estimated) invoices and subsequent wash-ups, and specific billing system processes.

98. We also anticipate that billing systems will need to change as new pricing structures are implemented, and more flexibility in this respect would ensure that the DDA is more durable.

99. For these reasons we suggest that clause 9.3 is moved to the schedules, and included as an operational term. If this change is not made, it is possible that contracts will not be able to be implemented, where changes to billing systems need to be made. We submit that it is not

[13] WELL, 2016 submission, Attachment 4, page 28

[14] WELL, 2016 submission, Attachment 4, page 28

reasonable for default contract terms to impose new billing systems. We do not believe that this is the intent.

100. As we have previously submitted[15], due date for payment should not be deferred if the trader caused the delay. This should be corrected by adding the following to the end of clause 9.4:

> *Unless the delay is due to the Trader not meeting its obligations in accordance with Schedule 2. In this latter circumstance no extension will be provided to the Trader.*

101. In addition throughout Clause 9 there are references to 'Use of Money' adjustments which must be paid as part of debit and credit processes. However the cost of implementing these adjustments may be disproportionate to the value of credits or debits. This is because the processing may be complex, due to GST and RWT considerations, and often the amounts are small. We submit that the DDA is amended to acknowledge that use of money adjustments 'may' be paid or credited, acknowledging that the treatment should be consistent for debits and credits.

4.10. Distribution services

102. The obligations on distributors under the DDA are set out in clause 2.2, and traders in clause 2.3. As we have previously submitted[16] the phrase 'in accordance with Good Electricity Industry Practice' should be included in both clauses, as it was in the MUoSA. It is important to set the expectations of the DDA obligations against this standard. This term should also be included in the definitions in section 33 of the DDA.

103. The term distribution services is defined in section 33 of the DDA as the 'provision, maintenance and operation of the Network for the conveyance of electricity to Customers'. This definition attempts to be too precise, but misses certain aspects of the service. It is also inconsistent with similar legislated definitions which are relevant for electricity sector regulation. We suggest that the definition which aligns to the definition in Section 5 of the Electricity Industry Act, 2010 should be used, as follows:

a. *Distribution services refer to the services provided by distributors in conveying electricity on lines other than lines that are part of the national grid.*

5. Schedules and appendices

104. In this section we include our comments on the schedules to the draft DDA, and the draft schedules and appendices to be inserted into Part 12 of the Code.

5.1. Schedule 12A.1: Appendix C - Access to data

105. WELL supports the proposal to include a new schedule to Part 12 of the Code which sets out a template for the exchange of historical consumption data between traders and distributors. In order to effectively fulfil our distribution service obligations, we require access to consumption data which is collected and collated by traders.

106. However we submit that the draft Appendix C must be improved as follows:

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[15] WELL, 2016 submission, Attachment 4, page 31

[16] WELL, 2016 submission, Attachment 4, page 25

a. Apply the same status to the Data Agreement (specified in clause (2) and (19)) as the remainder of the Appendix C template. The Data Agreement includes the majority of the terms that matter, but as drafted these terms are entirely subject to agreement between traders and distributors, with no fall back. This is contrary to the remainder of the contracted terms which apply as defaults;

b. Remove the limitation in clause 3.4(d) that distributors cannot combine data. As there are multiple traders on a network, consumption data from individual traders is of little value;

c. Limit the indemnity requirements for distributors in clause 12 to exclude any losses which result from actions of the trader. In addition the trader should be expected to undertake actions to mitigate potential losses, and any losses should be limited to those that were not foreseeable at the time the agreement was entered into;

d. Specify that the audit provisions in clause 13 are limited to the audit of the distributor use the data provided by the trader, and that any audit is obliged to maintain confidentiality over any distributor information accessed during the audit. In addition, we note that there is the opportunity to draw on existing audit processes (such as the registry information audit obligations for distributors under Part 11 of the Code) and allow distributors to undertake annual audits and share results with all traders to avoid multiple audits by traders. The format of the template should be revised to reflect these options;

e. Specify that the trader's costs, charges or other expenses to be recovered from the Distributor, as specified in clause 3(5)(a), are 'reasonable' to the Trader, which ensures consistency with Clause 4;

f. Amend clause 19 to acknowledge that distributors will wish to retain consumption data over multiple years because trend data will provide important information for asset management and pricing purposes;

g. Align the termination requirements in clause 14-15 with those in the wider default agreement to avoid unnecessary complexity and inconsistency in the expectations on traders and distributors; and

h. To assist the distributor in contacting a customer for operational purposes, include provision of additional customer information (such as names, addresses and contact information), subject to appropriate confidentiality safeguards.

107. WELL submits that the draft access agreement fails to acknowledge the changing nature of the electricity system. The increased opportunity for consumers to install behind the meter generation, storage and EV charging requires market participants to work closer together to share information that will assist to maintain the security of supply through DER standards and access agreements, as core terms. Appendix C reflects the traditional energy market model by focusing on energy consumption. However, this needs to be more flexible to accommodate provision of other forms of information, which is critical for managing network capacity constraints and enables a future where customers, through their Retailers, can offer their DER

for distribution support services. Information about the location and use of distributed energy technologies, including electric vehicles, must be able to be captured within this agreement to manage security of supply. Further, we submit that because of the criticality of this information, the data agreement should be included as a core term.

108. We also suggest that the title of Appendix C is amended to 'Data Exchange Terms', which better reflects its purpose.

5.2. DDA Schedule 1 – Service standards

109. As drafted Schedule 1 implies that the service standards are absolute, and distributors must comply with them at all times. This is inconsistent with the expectations of distributors, traders, regulators and consumers - each party understanding that from time to time distributors are unable to meet target service levels. As we have previously submitted, distributors cannot guarantee continuous service.[17]

110. Accordingly, we submit that the following clauses are included in the Schedule 1 template to explicitly acknowledge this understanding. Without it distributors may be held to account for service standards which are not achievable or consistent with trader or customer demands.

    a. *Failure to meet these service levels does not of itself constitute a breach of contract*; and

    b. *The distributor will use all reasonable endeavours in accordance with Good Electricity Industry Practice to meet these service standards.*

5.3. DDA Schedule 5 – Service interruption communication requirements

111. This schedule is intended to be included in the DDA as recorded terms. Recorded terms are not mandatory, they are optional. However the core terms of the DDA (for example section 4 – Service interruptions) refer to this schedule in a number of places (including clauses 4.4, 4.5, 4.6, 4.9 and 4.10). There are no alternative references in the core terms.

112. While we acknowledge that it is likely that default agreements will include terms similar to those set out in schedule 5, if they do not, the DDA's core terms will not be able to be complied with. We therefore submit that section 4 of the DDA is amended to refer to 'any' terms or requirements set out in schedule 5, rather than 'the' terms or requirements.

113. In addition we submit that clause 4.7 of the DDA (which refers to the process for communicating customer requests for restoration) should be moved to schedule 5 as it is not a core term. This is an operational arrangement which is consistent with the other operational arrangements included in the schedule.

114. It may not always be possible for distributors to meet the service interruption communication requirements, especially when a network is stressed during significant events. It is important this this is recognised in the DDA templates to ensure that performance expectations are realistic and well understood. Accordingly we suggest that schedule 5 is amended to include the following with regards to communication of unplanned outages:

[17] WELL, 2016 submission, Attachment 4, page 27

a. *the distributor will use all reasonable endeavours in accordance with Good Electricity Industry Practice to meet these criteria.*

115. Clause S5.2 suggests that the communication standard for unplanned interruptions during an initial event is to notify all traders of each unplanned interruption within 10 minutes of becoming aware of the interruption. This is not achievable during significant events, and should be changed to 30 minutes for staffed control rooms (sub-clause a).

116. Clause 5.8 should be modified to acknowledge that during major events a distributor may prefer to manage fault calls, even where a trader is contracted to provide this service. However, this option should not be the default under normal operating conditions, as currently drafted.

5.4. DDA Schedule 6 – Connection Policies

117. It is suggested that new connections should be electrically connected within 2 working days assuming equipment is in place. Currently we operate to a 4 day deadline, subject to ensuring that the site is ready for connection, and the party wishing to be connected producing a Certificate of Compliance (COC) and a Record of Inspection (ROI). We submit that clause S6.8 should be amended accordingly.

118. There are a number of clauses which assign tasks to distributors for activities which they may not be responsible for. These require amendment, and include:

a. Vacant site disconnection (clause 8.12);

b. Removing meters on decommissioning (S6.25); and

c. Updating the registry for temporary disconnections (S6.14).

119. Other minor drafting improvements required include:

a. Removing the requirement to reconnect customers on the date requested by the customer and replacing with a requirement to reconnect on a date 'agreed' with the customer (S6.15). This will avoid situations where it is not possible to reconnect on a nominated date.

b. Removing reference to addresses provided by retailers, as these are not required to be provided (S6.13).

5.5. DDA Schedule 8 – Load management

120. As we have previously submitted[18], it is necessary to extend the provisions for priority use of load control to network security events. These should be assigned a higher priority than market participation rights, in the same way that Grid Emergencies are prioritised under the DDA. The grid can be deep or shallow across different parts of the country, so it is critical to recognise the importance of load control right across the delivery network during time of network stress.

[18] WELL 2016 submission, Attachment 4, page 28

121. In addition, amend Schedule 8 to include provision for a central load control co-ordination role for distributors. This will help to avoid network security risk during periods of high or low load control, or transitioning off periods of load control. We anticipate this would include sharing load control plans and policies, establishing rules and conventions such as maximum step changes in load, and the ability of distributors to intervene if network security is at risk.

6. Closing

WELL appreciates the opportunity to comment on the proposed default distribution agreement proposal and the opportunity to outline our concerns around the practical implementation of the model contracts, and the default contract terms.

If you have any questions or there are aspects you would like to discuss, please don't hesitate to contact Scott Scrimgeour, Commercial and Regulatory Manger, at sscrimgeour@welectricity.co.nz .

Yours sincerely

Greg Skelton

Chief Executive Officer