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Submissions
Electricity Authority
PO Box 10041
WELLINGTON 6143

[Sent by email to: submissions@ea.govt.nz]

Dear Sir/Madam

Re: Consultation Paper – Default agreement for distribution services

1. Powerco Limited (Powerco) welcomes the opportunity to submit on the Electricity Authority's (the Authority) consultation paper *Default agreement for distribution services* (the Consultation Paper).

2. The proposal to introduce a default distributor agreement (DDA) into the Electricity Industry Participation Code 2010 (Code) is a significant matter that, if implemented, would materially alter the balance of rights and risks between electricity distribution businesses (EDBs) and electricity retail traders (Retailers), and as such, should not be considered lightly.

3. In addition to this cover letter, which highlights the critical areas to consider if the Authority decides to proceed with the concept of a default agreement; we have provided three appendices which directly respond to the Authority's questions in the format requested.

   Appendix A: Comments on the Authority's five posed questions.

   Appendix B: High priority comments on the detailed drafting of the Part12.A Code amendment and DDA template *(must be amended for DDA to be adoptable*).

   Appendix C: Comments on the detailed drafting of the Part12.A Code amendment and DDA template *(clauses in need of addressing to be fit for purpose).*

4. Powerco has actively participated in the development of the Electricity Networks Association (ENA) submission. We support the position presented by the ENA and provide further perspective and company specific concerns through this submission.

5. We encourage the Authority to read submissions to the current Consultation Paper alongside previous industry submissions. Significant time and resource has been spent by EDBs to produce information in a form that supports the Authority's understanding of the issues and develop a fair and practical outcome for all parties. It would be disappointing to see constructive and useful feedback not reflected in the Authority's final deliberations.

Voluntary migration to a MUoSA is preferred

6. Whilst we have provided substantive comment on the Authority's DDA proposal, Powerco continues to believe that the current approach, based on voluntary migration to a model use-of-system agreement (MUoSA), remains the best way to achieve standardisation of arrangements between distributors and traders. We are yet to see the Authority fully justify, via a compelling cost benefit analyses, a case for departing from commercially negotiated agreements.

7. If the Authority continues to pursue the proposal of a DDA, then it is essential it does so in a manner that will not result in the creation of future operational constraints that would stifle the innovation currently being achieved under commercial arrangements or introduce additional costs to the industry.

Summary of our highest priority concerns

8. Appendix B and C provide detailed commentary on issues with the current drafting of the DDA. However, there are a number of clauses that we have identified as materially affecting the ability of the proposed DDA to set the rights and obligations of the parties in a way that is clear and represents a fair and efficient balance of those rights and obligations. Without amendments to these clauses, we consider that the Authority will create a regime that from the outset will not be fit for purposes and result in outcome that not in long term interests of both consumers and parties to the agreement.

9. We wish to draw the Authority's attention to the highest priority concerns we have with the proposed DDA. More specific recommendations for suggested clause by clause amendment is provided in Appendix B.

a) Timeframe for negotiating an alternative agreement needs to be reviewed and extended

- The short timeframe of 20 business day's maximum for negotiating an alternative agreement is essentially mandating the DDA, is impractical and undermines the stated objective of incentivising negotiation of innovative terms for the betterment of the industry.

b) Distributors face unacceptable risks associated with termination rights and third party determination of operational terms

- The Code gives the Rulings Panel wide powers to amend operational terms of a distributor's DDA in a way that could prove to be costly or operationally unworkable for the distributor and could ultimately lead to a lack of standardisation across distributors' agreements.
- In addition, there is no right or ability for a distributor to update operational terms for existing agreements. This means that the distribution agreements entered into will effectively be perpetual in nature, with no right for the distributor to update the terms for changes in law and/or operational practices, or to terminate the agreement and offer the trader an updated version.

c) Imposition of Service Guarantee Payments overlaps with the Part 4 framework and creates unacceptable revenue risk for distributors

- This proposed SGP framework potentially places substantial amounts of revenue at risk, with a high degree of uncertainty over the level of exposure and

moreover, inappropriately overlaps with the Commerce Commission's Part 4 Price-Quality framework.

- The DDA provides in its core terms for payments made by distributors to traders for failure to meet Service Standards under the DDA: Service Guarantee Payments. In addition, the proposed Code amendment provides the Rulings Panel wide powers to amend operational terms of a distributor's DDA and this includes specifying the scope and quantum of SGPs.
- The Authority's DDA framework covers the same ground as the Commission's Quality Standards framework in the EDB DPP Determination, and therefore "purports to regulate" something that the Commission is authorised to regulate under Part 4. Section 32 precludes the Electricity Authority from regulating anything that the Commission "is authorised or required to do or regulate".
- For example, both the Commission's framework and the Authority framework:
  (a) Establish service standards that must be achieved
  (b) Impose financial penalties on an EDB for failing to meet those service standards.
- The consequence of the above is that the DDA should leave service levels and any financial payments associated with service levels to the parties to agree through commercial negotiation.

d) Constraints around the use of Prudential Security require reconsideration

- Under the current DDA proposal a distributor cannot draw down on a prudential security to cover unpaid charges if the amount owing is disputed by the trader, and the trader is not obliged to top up the security by the amount in dispute.
- This means that charges placed in dispute are effectively ignored by the prudential regime in calculating the distributor's overall credit exposure to the trader, even though disputed amounts may ultimately be shown to have been due and payable.
- To date, distributors have managed this risk largely by taking care as to which traders they allow on their network. However, under the new regime proposed for Part 12A, this will no longer be an option.

e) We have identified multiple issues with the Indemnity / Liability clauses that affect appropriate risk allocation, operability

- In appendix B we have suggested clause amendments to address the following issues:
  - Replication of the statutory indemnity found in s46A of the Consumer Guarantees Act that could cause future inconsistency,
  - A failure to provide for claims brought under the identical statutory indemnity in s46A of the CGA,
  - The treatment of Retailer claims against an EDB,
  - Drafting that effectively makes the EDBs liable for the Retailer's defence costs merely because the Retailer wishes to be indemnified, irrespective of whether the Retailer is actually entitled to be indemnified,
  - A requirement for EDB's to pre-fund consumer pay-outs by Retailers, before it is clear whether or not the EDB will be found liable for the payment under the Distributor Indemnity, and

- The indemnity given by the EDB in clause 27.2 is not subject to any exclusions or limitations, other than a requirement that the loss or damage suffered be “direct”. The concept of “direct loss” does not have a clear legal meaning, and in the context of clause 27.2 is ambiguous.

10. Thank you for considering the points raised by this submission. Please contact me if you wish to discuss any aspects of it.

Yours sincerely

Richard Fletcher
General Manager Regulation and Government Affairs

APPENDIX A – Powerco Response to Submission Questions

No	Question	Powerco Response
1	What is your view of the Authority's assessment of the arrangements that are currently in place governing the way distributors and retailers develop, negotiate, and agree UoSAs, and of the issues that the Authority has identified? Please provide your reasons.	Powerco continues to support the Authority's work on More Standardisation and believes that the Authority's continued focus on looking for solutions to that reduce industry cost and barriers to entry is justified. We also recognise that it is a challenging environment to develop solutions in however consider that ensuring any new regime is fit for purpose and will not lead to any unintended consequences is essential. The Authority's presentation of an identifiable and proven problem with contractual agreements between EDBs and retailers continues to be unsubstantiated in the Consultation Paper. Apart from a cost benefit analysis, that lacks the expected rigour for such an important issue, the Authority have provided little or no evidence to demonstrate that a genuine link between their problem definition and a solution, the DDA, exists. As stated in previous submissions, we are yet to see that the Authority has fully justified the need or benefits that would arise from departing from commercially negotiated agreements to regulated alternatives. Regulation in the form of a DDA has serious potential to stifle innovation and impose cost on businesses to comply through having to realign business processes for no material benefit to end customers. We believe that the current approach based on voluntary migration to a model use-of-system agreement (MUoSA) remains the best way to achieve greater standardisation of arrangements between distributors and retailers. This is demonstrated by the number current agreements that have been signed with only slight variations from the MUoSA. In Powerco's experience, the increased standardisation of terms resulting from the development of the MUoSA has already enhanced our engagement with retailers, and the voluntary nature of the regime has provided a useful degree of flexibility, enabling both parties to tailor arrangements to local and retailer-specific needs. Once achieved, improved clause innovations are offered to all existing and future Retailers. This important approach to ensure that agreements reflect the current operating environment would be lost under a DDA proposal. We understand that the Authority's expectation was for agreements to closely reflect the MUoSA and be adopted by Retailers and EDBs was higher than has been currently achieved. However we do not believe that ample opportunity was provided to allow the industry to proceed to a point that would demonstrate the process was working efficiently. We consider that collaboratively, the Authority,

		EDBs and Retailers could develop a framework based around agreed timing and standardisation of agreements, to satisfy the Authority that a commercial approach that meets the statutory objectives can be achieved.
2	What feedback do you have on the information in section 3, which describes the Authority's proposed new Part 12A of the Code, which includes a DDA template, requirements to develop a DDA, and provisions that provide that each distributor's DDA is a tailored benchmark agreement?	As the DDA is currently presented, there is significant work to do on drafting both the core and draft terms. This is because: • the original terms set out in MUOSA and used as the basis on which to develop the DDA were intended to apply to a very different commercial negotiation framework, that being a bilateral negotiation between Distributors and Retailers. Industry participants did not expect the MUoSA to be made either default or mandatory, and so were only concerned that issues be worked through to the extent required to establish a model contract; and • the current draft is the product of a lengthy 'drafting process by committee' where various working groups have provided input to varying degrees; as a result, there are places where the rights and obligations of the parties are simply unclear and, more generally, there is room to improve the clarity and consistency (without altering what we believe the intent of the terms to be). The success of the DDA proposal is dependent on its ability to provide an agreement that not only caters for a single EDB/Retailer relationship in the present environment, but one that caters for the variety of EDB business models operating now and in future environments. Currently this is not the case with the proposed DDA. In response to the work conducted to development the MUoSA during the Authority's More Standardisation work programme, we reviewed our use-of-system agreements in 2013 and reduced the number of departures from the MUoSA to a minimum, where they are objectively justified. This resulted in the Powerco UoSA having a high level of alignment with the MUoSA yet contains company specific amendments and addresses areas of poor MUoSA drafting. Re-conducting the review exercise in light of the DDA proposal to have a regulated agreement with core and operational terms highlights the fact that a very different contractual relationship between EDBs and Retailers is being created and one that the MUoSA is far from suitable for. This is exacerbated by the enduring nature of the DDA and inability to make amendments to the core terms. An example of how the MUoSA, designed as a model agreement, is not fit for purpose when simply rolled over with little thought or review into a DDA, is Clause 8 – Allocating Price Categories and Price Options to ICPs. Apart from some terminology changes, Clause 8 has undergone no change. However, it contains numerous clauses that are related to the process and system capabilities of an EDB, yet different EDBs operate different business models and IT systems to others and therefore would not comply if the clause transitioned to the DDA unchanged. This is just one small example of how careful consideration need to be paid to the drafting of every clauses to ensure core terms, by definition, relate to the generic distribution of electricity and there is 'no good reason' why they should

		be tailored to particular Distributors or Retailers, or to the features of a particular region. This is not the case in the proposed drafting of the DDA.
3	What are your views of the Authority's assessment of the likely levels of demand for new and replacement UoSAs in coming years?	We agree with the Authority that there will be an increase of demand for UoSAs in the coming years and generally retail competition is a positive market characteristic. However, we have reservations over the stated premise that easing access to the market will lead to increased competition and consumer benefits. There are currently 16 retailers operating on the Powerco network, with a total of 22 electricity retailers in New Zealand serving four million people. This compares with 18 in the UK serving sixty million and 14 in Australia serving 22 million. A natural side effect of increased competition is a greater probability of failure for those companies who are unable to meet the changing demands of the market. In the electricity industry the failure of a retailer impacts everybody: other retailers who are likely to pick up their customers, generators who may not get paid for energy produced and distributors who may not receive payment for distribution or pass through costs (e.g. transmission). There is little benefit in attracting new entrants to the market who are unable to generate a sufficiently sound financial base to ensure security in the long term. Failure of a retailer, as seen with E-Gas, benefits nobody and least of all the consumer. As such we consider the Authority needs to reassess if the increased competition goal is the outcome it is looking for. We would suggest that ease of retailer entry is not the significant issue that the Authority needs to be looking to address but rather generation profile/target market is more important. Similarly we do not agree that the decision for a new retailer to enter the market, or an existing one to move to a new network area, is based on the ease of gaining access to that network. The business decision will, to a greater extent, be based on the business opportunity, generation profile, likely customers and target market of the retailer. We do not envisage that the changes proposed will have any material effect on the number of new entrants either to the sector or network areas.
4	What are your views on the regulatory statement set out in section 4?	Please refer to the response provided by the ENA in the cost benefit analysis section of section 3 of their paper. We fully support the ENA's views of the regulatory statement is: 1. The problem is not clearly defined (multiple, inconsistent definitions). 2. There is a general lack of empirical evidence especially with respect to the efficiency benefits. The analysis of costs and benefits that are quantified (transaction costs) are not profiled across the analysis period as we would expect in a conventional CBA. 3. The problem definition and the regulatory analysis/CBA are not aligned. 4. Neither the proposal nor the alternative options listed are assessed against the stated

		objectives.
5	What are your views on the detailed drafting of the Code amendment provided in Appendix B and Appendix C?	Please refer to appendices B and C. We have combined Code and DDA drafting comments as they often are directly related. , those issues that must Appendix One focusses on fundamental issues that need to be addressed for the DDA to proceed successfully and Appendix Two focusses on drafting issues that require attention to make the provisions workable.

Appendix B: <u>High priority</u> comments on the detailed drafting of the Part12.A Code amendment and DDA template *(must be amended for DDA to be adoptable*).

#	Ref	Issue	Suggested change
1	Code 12A.5	Clause S7.2 of Schedule 7 of the default distribution agreement provides that the distributor's pricing methodology, price categories, price options and prices are part of the operational terms. This could be read as suggesting that traders are entitled to appeal these matters to the Rulings Panel under clause 12A.5 of the Code. We assume this cannot be the EA's intention, given that it would cut across existing regulatory processes under Part 4 of the Commerce Act, and also the existing price change and consultation provisions of clause 7 of the default distribution agreement.	Add a new clause 12A.5(5) as follows: *Notwithstanding anything to the contrary in this Part 12A, the operational terms contemplated in Schedule 7 of the default distribution agreement template cannot be appealed to the Rulings Panel.*
2	Code 12A.5	The Rulings Panel has the power to amend operational terms in a distributor's default distribution agreement. There is no built-in right of appeal for the distributor (see s65 of the Electricity Industry Act 2010). In other areas of the Code, the Rulings Panel is primarily a forum for resolving disputes about the interpretation or application of the Code, and the selection of Rulings Panel members is clearly centred around qualifications and experience relevant to these functions. A different set of skills and experience may be needed for a body called on to set operational terms for default distributor agreements. The body would need to include members who have direct experience of the day-to-day front line operations of distributors and traders, for example, network planning, management of service interruptions, field service practices, customer communications, etc.	If traders are to retain a right to appeal operational terms, the body for hearing those appeals should be a specially constituted branch of the Rulings Panel, with a substantial portion of its members specially selected for their experience with day-to-day front line operations of distributors and traders.

#	Ref	Issue	Suggested change
3	Code 12A.5	The Rulings Panel has the power to amend operational terms in a distributor's default distribution agreement, where appealed by a trader. However, clause 12A.5 is not clear on what the Rulings Panel is being asked to decide. For example, is the panel being asked to correct identifiable deficiencies in the distributor's proposed operational terms? Or is the panel being asked to substitute the distributor's proposed operational terms with whatever the rulings panel considers "optimal" in the circumstances? And if so, optimised to what? As far as we are aware, there is no specific evidence that the operational terms of existing distribution agreements are causing inefficiencies or other poor outcomes for consumers. That being the case, the operational terms proposed by distributors should only be revised by the Rulings Panel to the extent necessary to correct provisions that are contrary to the principles in s12A.3. The onus should be on the trader to show that this is necessary. This would also address the concern outlined in the paragraph above, by providing a clear question for the Rulings Panel to decide. We also have concerns over whether the Rulings Panel is the best forum for assessments of this kind. Please see our comments below on clause 12A.5 of the Code.	Add a new clause 12A.5(5) as follows: *The Rulings Panel may modify an operational term only to the extent necessary to prevent the term violating the principles set out in clause 12A.3(2). The trader has the onus of showing that this is necessary.*

#	Ref	Issue	Suggested change
4	Code 12A.6(4)	If the Rulings Panel amends an operational term in a default distribution agreement, it is up to the Rulings Panel to decide how the change is propagated through existing agreements, by stipulating one of the following: • only distributor can elect to apply the change • only traders can elect to apply the change, or • either party can elect to apply the change. Where only traders can elect to apply the change, this could put a distributor in a position where different distribution agreements have different operational terms, with no ability for the distributor to ensure consistency, creating significant cost and operational complexity for the distributor. We are concerned that this will quickly become unworkable, and will fundamentally undermine the EA's objectives of standardisation and efficiency.	Amend clause 12A.6(4) so that: • before amending an operational term, the Rulings Panel is expressly required to consider the impact on the distributor of having differences between the operational terms in its distribution agreements, and • if a change to an operational term is mandated by the Rulings Panel in one distribution agreement, the distributor always has the option of applying the same change in each of its other distribution agreements.

#	Ref	Issue	Suggested change
5	Code 12A.11 DDA cl. 22.1	A distributor may update the operational terms of its default distributor agreement, but this will not affect any distribution agreements existing at the time. In addition, the default distribution agreement has removed the provisions of the model agreement that allowed the distributor to: • update certain "Variable Provisions" such as the service standards and service interruption communication policies • use a third party dispute mechanism to break any deadlock over changes to the agreement required by law, and/or • terminate the agreement without cause, on notice, after an initial term. This means that the distribution agreements entered into by the distributor in order to comply with the revised Part 12A will effectively be perpetual, with no ability for the distributor to update the terms for changes in law and/or operational practices. For existing traders, the distributor will be held indefinitely to the operational terms as they stood in 2016, and for new traders the distributor will be unable to offer updated operational terms unless it can live with the burden of having multiple sets of different operational terms with different traders. We are concerned that this will quickly become unworkable, and will fundamentally undermine the EA's objectives of standardisation and efficiency.	Amend clause 12A.11 so that: • when a distributor initiates an update to the operational terms in its default distributor agreement, affected traders have 10 business days to appeal to the Rulings Panel under clause 12A.5, and unless amended by the Rulings Panel, the update applies to all of that distributor's existing distribution agreements; • a party can apply to the Rulings Panel for a change to the terms of a distribution agreement where reasonably necessary to enable that party to comply with law.
6	Code 12A.11	The proposed changes to Part 12A do not provide any built in mechanism for the EA to review and update default core terms, or any indication of how future changes made by the EA to the default core terms would be applied to distribution agreements existing at the time. The transitional provisions for existing agreements apply only where distributors make their default distribution agreements available for the very first time under clause 12A.4(4), and not where distributors update their default distribution agreements to reflect new default core terms mandated by the EA.	We assume the EA would update the default core terms simply by using its usual powers to amend the Code. On that basis, we suggest the addition of a new clause 12A.13, providing that wherever the EA updates the default core terms through an amendment to the Code, then unless specified otherwise in the amendment, each distributor must update its default distribution agreement accordingly and make the resulting terms available on its website, after which a process similar to clause 12A.12 would apply (i.e. either the trader or the distributor could opt in to the new terms).

#	Ref	Issue	Suggested change
7	DDA cl. 10.23 and 10.25	The distributor cannot draw down on the prudential security to cover unpaid charges if the amount owing is disputed by the trader, and the trader is not obliged to top up the security by the amount in dispute. This means that charges placed in dispute are effectively ignored by the prudential regime in calculating the distributor's overall credit exposure to the trader, even though disputed amounts may ultimately be shown to have been due and payable all along. To date, Distributors have managed this risk largely by taking care as to which traders they allow on their network. However, under the new regime proposed for Part 12A, this will no longer be an option.	Amend clause 10.23 and 10.25, so that the distributor is entitled to increase the Additional Security to include any amounts disputed and withheld by the trader, so that the maximum combined security amount is equal to the distributor's estimate of 2 months' charges *plus* the amounts disputed and withheld. A distributor would be unlikely to use this power except where genuinely concerned by its credit exposure to a trader, given that the distributor would be required to pay a premium for the cost of that security, at the higher rate provided for in clause 10.10.
8	DDA cl. 14.2	Clause 14.2 obliges distributors to install equipment at the Customer's Point of Connection to measure power quality, wherever the Customer or a trader raises concerns about power quality. This may put the distributor in a position where the number of requests far exceeds the number of monitoring devices available. It would not be an efficient use of capital for distributors to purchase excessive numbers of these devices.	We suggest this clause be deleted, as such matters are adequately dealt with by the Consumer Guarantees Act and EGCC requirements.
9	DDA cl. 19	Clause 19 no longer allows either party to terminate on notice after an initial term. This means that the distribution agreement is effectively perpetual in nature. If the Code is subsequently amended or repealed so that it no longer controls the terms of these distribution agreements, traders and distributors could be stuck with perpetual contracts that cannot be terminated other than by agreement – and in some cases it may well suit one party to reject any attempts to agree a termination.	Add a new 19.1(g) that allows either party to terminate the agreement on not less than 180 days' notice, in the event that the Code no longer provides for a default or mandated form of distribution agreement.

#	Ref	Issue	Suggested change
10	DDA cl. 20.1	Clause 20.1 does not make clear that the confidentiality obligations of each party relate solely to *the other party's* Confidential Information. In addition, clause 20.1(b) unnecessarily limits use of Confidential Information to the purposes *expressly permitted* by the agreement, even though the agreement does not include any other provisions explicitly authorising the use of Confidential Information for particular purposes. It would be better to include general authorisations for each party to use Confidential Information for the purpose of performing its obligations and exercising its rights under this Agreement, and any specific purposes for which it was provided.	Amend clause 20.1 as follows: *Commitment to preserve confidentiality: Each party to this Agreement undertakes that it will:* *(a) preserve the confidentiality of, and will not directly or indirectly reveal, report, publish, transfer or disclose the existence of any Confidential Information other the other party except as provided for in clause 20.2; and* *(b) only use the other party's Confidential Information for the purposes for which it was provided, or for the purposes of performing its obligations and exercising its rights under this Agreement, or otherwise for the purposes expressly permitted by this Agreement.*
11	DDA cl. 25	Clause 25 replicates the statutory indemnity found in s46A of the Consumer Guarantees Act. This serves no legal purpose, and creates potential for inconsistency with the CGA if the statutory indemnity is amended or repealed.	Delete clause 25.
12	DDA cl. 26	This clause provides for the control of claims brought under the "Distributor's Indemnity" in clause 25, but fails to provide for claims brought under the identical statutory indemnity in s46A of the CGA, meaning traders could easily avoid this clause altogether by claiming under the CGA instead of clause 25.	The definition of "Distributor's Indemnity" should be amended to include the statutory indemnity in the Consumer Guarantees Act.

#	Ref	Issue	Suggested change
13	DDA cl. 26.1	Clause 26.1 applies only from the time at which the trader "wishes" to be indemnified. This could severely prejudice a distributor's position where a trader simply pays out claims without turning its mind to whether it "wishes" to be indemnified. In that situation the distributor would have had no opportunity to be notified of or consulted on the claim, but this will not prevent the trader then seeking indemnification from the distributor after the fact. This would defeat the entire purpose of clause 26. It is reasonable for the distributor to be notified as soon as the trader is aware that the Claim might be related to an event on the network.	Amend clause 26.1 as follows: *Claim against Trader: If a Customer makes a claim against the Trader in relation to which the Trader seeks (at the time or later) ~~wishes~~ to be indemnified by the Distributor under the Distributor's Indemnity (a "Claim"), the Trader must:* *(a) give written notice of the Claim to the Distributor as soon as reasonably practicable after the Trader has become aware of the Claim and any facts or circumstances indicating that the underlying Failure may be related to an event, circumstance or condition associated with the Network ~~determines that it wishes to be indemnified by the Distributor~~, specifying the nature of the Claim in reasonable detail;* …
14	DDA cl. 26.7	This clause obliges the distributor to pay a trader's costs of managing, defending and settling a "Claim". A "Claim" is defined as any claim against the trader in relation to which the trader *wishes* to be indemnified under the Distributor's Indemnity. This wording effectively makes the distributor liable for the trader's defence costs merely because the trader *wishes* to be indemnified, irrespective of whether the trader is actually entitled to be indemnified. This overrides any checks and balances built into the indemnity itself. Requiring the distributor to pay traders' defence costs also overrides the very deliberate policy decision in the CGA statutory indemnity to limit the distributor's liability to the CGA remedy cost. We have not seen any economic analysis justifying this approach; in fact, it may incentivise traders to drag out claims regardless of their merits.	Delete clause 26.7(a). If the clause is retained, amend so that the distributor is required to pay costs of managing, defending and settling a Claim only where the distributor is actually obliged to indemnify for the associated Remedy Costs under the Distributor's Indemnity.

#	Ref	Issue	Suggested change
15	DDA cl. 26.8	This clause requires the distributor to pre-fund consumer payouts by traders, before it is clear whether or not the distributor will be found liable for the payment under the Distributor Indemnity. This means that the distributor assumes all credit risk of a trader being unable to repay these amounts in the event that it is ultimately determined that the trader was not in fact entitled to indemnification from the distributor under the Distributor Indemnity (see also our comments above on the prudential regime). This is effectively asking distributors to take the place of (1) investors and lenders who would normally fund the working capital that traders need to meet their consumer liabilities, and (2) insurers who would normally pay out on legitimate consumer liability claims, and then pursue third parties (such as distributor) from whom the insurer (standing in the shoes of the insured) may (or may not) be able to recover. We have not seen any economic analysis suggesting that it is more economically efficient for distributors to take on these functions. We note that clause 26.8(c) appears to envisage that the trader may also receive insurance proceeds in relation to a claim, but the effect of clause 26.8 is to remove virtually any need or incentive for a trader to obtain liability insurance in the first place.	Delete clause 26.8.
16	DDA cl. 27.2	The indemnity given by the distributor in clause 27.2 is not subject to any **exclusions**, other than a requirement that the loss or damage suffered be "direct". The concept of "direct loss" does not have a single, settled legal meaning, and in the context of clause 27.2 is ambiguous. For example: • If the trader has agreed to indemnify a third party for loss of profits flowing from a network event, does the EA consider that the trader should be able to pass through this liability to the distributor under the indemnity in clause 27.2? On one possible interpretation, this might be argued to be "direct" where the loss suffered by the third party flowed directly from the network event without any other intervening causes.	Insert additional provisions at the end of what is now clause 27.2: *However, the Distributor will not be liable under this indemnity:* *(a) for any liability of the Trader to a third party other than for losses actually suffered or incurred by that third party as a direct, natural and probable consequence of the cause listed in clauses 27.2(a)(i) to 27.2(a)(vi);* *(b) for any liability of the Trader to a third party for Network Event Losses, to the extent those Network Event Losses consist of:* *(i) loss of profits, loss of revenue, loss of use, loss of opportunity, loss of contract, or loss of goodwill of any person;* *(ii) any loss that was not a direct, natural and probable*

#	Ref	Issue	Suggested change
		• Where a trader has assumed contractual liability to pay liquidated damages to a third party, and the liability is triggered by a network event or an act or omission of the distributor, does the EA intend that the trader should be able to pass through that liability to the distributor under the indemnity in clause 27.2, even though the distributor has no control over what liabilities the trader may assume to third parties? In our view, the indemnity for third party claims should cover only the third party's "actual losses" and not liabilities which a trader has voluntarily assumed by way of liquidated damages or similar payments. Otherwise the indemnity potentially provides a "blank cheque" for traders to expose distributors to unlimited liability for breaches of the default distributor agreement. This would not be an efficient outcome, because it would require the distributor to bear a type of risk which other parties are better placed to mitigate, and would even cut across the "Service Guarantee" regime in Schedule 1. Similarly, in the context of Network Events, the indemnity should not allow pass-through of third party claims for commonly excluded types of loss (loss of profits, indirect loss, loss of data, etc.), as both the trader and any downstream claimant will be able to exclude these by contract (subject to the Consumer Guarantees Act, which we deal with separately below). This is an efficient outcome, because the third parties are far better placed than the distributor or trader to assess and mitigate these specific types of losses that may arise from Network Events, whereas if passed through to the distributor they will ultimately be paid for by consumers generally. The concern here is not adequately addressed by the reference to "direct loss or damage" in the opening words of the indemnity, because "direct loss" does not have a single, settled legal meaning, and in any case it is not clear from that wording whether the "directness" is to be assessed vis-à-vis the third party claimant or the retailer. Our proposed wording clarifies this point. Also, distributors are not able to insure for liability which they assume via an indemnity, whereas users of electricity should be able to insure themselves for most of the loss which they might suffer as a result of	*consequence of the Network Event;* *(iii) any loss resulting from the claimant (that is, the person claiming against the Trader) being liable to another person; or* *(iv) any loss resulting from loss or corruption of, or damage to, any electronically-stored or electronically-transmitted data or software; and/or* … Insert new definitions as follows: *"**Network Event**" means any surge, spike or under-frequency event on the Network, and any outage or failure to restore supply on the Network, in each case whether or not attributable to any breach or other default by the Distributor.* *"**Network Event Losses**" means any kind of losses, damages, costs, expenses or other compensation incurred or suffered wholly or partly as a result of a Network Event, by a person claiming against the Trader as contemplated in clause 27.2(a).*

#	Ref	Issue	Suggested change
		a Network Event (e.g. through business interruption insurance). We recognise that the trader cannot limit or exclude its liability to consumers under the Consumer Guarantees Act. However, in that context, the Act also provides retailers with an unlimited right of indemnity against distributors. It is not necessary to cover this again in the general indemnity in the default distribution agreement. Note that our proposed changes do not affect the distributor's liability for Direct Damage under clause 24.2.	
17	DDA cl. 27.2	In a similar vein, the indemnity given by the distributor in clause 27.2 is not subject to any monetary limitations, despite the fact that this renders the limitations in clause 26.7 virtually meaningless. For example, if the trader has entered into a contract assuming unlimited liability to a commercial customer for loss or damage arising from network events, does the EA intend that the trader should be able to pass that liability though to the distributor under the indemnity in clause 27.2, without any limitation? In relation to Network Events, the indemnity should not allow pass-through of third party claims in excess of a defined per event/ICP cap, as the retailer can always limit its liability in its arrangements with its customers (aside from Consumer Guarantees Act liability, mentioned below). This is an efficient outcome because the relevant third parties are far better placed than the distributor to assess and mitigate any significant losses that may arise from Network Events, whereas if passed through to the distributor they will ultimately be paid for by consumers generally. Also, distributors are not able to insure for liability which they assume via an indemnity, whereas users of electricity should be able to insure themselves for most of the loss which they might suffer as a result of a Network Event. We recognise that the retailer cannot limit or exclude its liability to consumers under the Consumer Guarantees Act. However, in that context, the Act also provides retailers with an unlimited right of indemnity against distributors. It is not necessary to cover this again in the general indemnity in the default distribution agreement. Similarly, our proposed changes to this clause do not affect the	Insert additional provisions at the end of what is now clause 27.2: *However, the Distributor will not be liable under this indemnity:* *…* *(c) for more than the first $[10,000] of Network Event Losses arising in connection with any one ICP, from any single event or series of connected events; and/or* *(d) for more than the first $[2,000,000] of aggregate Network Event Losses arising in connection with any single event or series of connected events.* Insert new definitions as follows: *"**Network Event**" means any surge, spike or under-frequency event on the Network, and any outage or failure to restore supply on the Network, in each case whether or not attributable to any breach or other default by the Distributor.* *"**Network Event Losses**" means any kind of losses, damages, costs, expenses or other compensation incurred or suffered wholly or partly as a result of a Network Event, by a person claiming against the Trader as contemplated in clause 27.2(a).* We consider further consultation and economic analysis is required in order to establish an optimal dollar figure for the monetary limitations that should be applied to the indemnity. The figures above simply mirror clause 27.2 of the current draft default distributor agreement.

#	Ref	Issue	Suggested change
		distributor's liability for Direct Damage under clause 26.2.	
18	DDA Sch.1	Schedule 1 appears to present the Service Standards as strict obligations, meaning that any non-compliance with a Service Standard will put the distributor in breach of the distribution agreement, and may trigger indemnity liability for the distributor under clause 27. This fails to reflect the reality that there are many factors that could affect compliance with the Service Standards, not all of which are within the distributor's control. Making distributors strictly liable for compliance with Service Standards, even for failures beyond their reasonable control, would represent a major policy and operational shift for distributors, and would create liability that is more "absolute" than even the guarantee of acceptable quality (s7A) and the statutory indemnity (s46A) in the Consumer Guarantees Act. It would also cut across the price/quality trade-offs inherent in the regulatory decisions made under Part 4 of the Commerce Act. Accordingly, it is essential to clarify that: • The distributor's contractual obligation is to use reasonable endeavours to meet the Service Standards, applying Good Electricity Industry Practice. • A failure to comply with the Service Standards is not in and of itself a breach of the distribution agreement. • The only consequence for the failure to comply with the Service Standard as such is payment of a Service Guarantee Payment (if any), although further contractual consequences could follow if the distributor breached its "reasonable endeavours" obligation above.	Amend Schedule 1 to include a new clause S1.6 as follows: *The Distributor's obligation is to use reasonable endeavours, consistent with Good Electricity Industry Practice, to meet each Service Standard. A failure to meet a Service Standard is not in and of itself a breach of this Agreement, and the only consequence of such a failure is the applicable Service Guarantee Payment (if any).* Amend Schedule 1 to include a new clause S1.7 as follows: *A failure to comply with a Service Standard will be excused where caused by a Force Majeure Event.*

#	Ref	Issue	Suggested change
19	DDA Sch. 1	In many cases Service Guarantee Payments will overlap with the distributor's liability under the statutory indemnity in s46A of the Consumer Guarantees Act. To ensure that the Service Guarantee Payments are not a penalty, it should be clear that the Retailer will credit them against any liability the distributor may have to the Trader in connection with the events or circumstances that gave rise to the Service Guarantee Payment.	Amend Schedule 1 clause S1.5 by adding the following sentence at the end: *The Trader will credit each Service Guarantee Payment against any other liability the Distributor may have to the Trader (whether under this Agreement, at Law or otherwise) in connection with the events or circumstances that gave rise to the Service Guarantee Payment.*

Appendix C: <u>Tier two comments</u> on the detailed drafting of the Part12.A Code amendment and DDA template *(clauses in need of addressing to be fit for purpose).*

#	Ref	Issue	Suggested change
1	Code 12A.9	The amended Part 12A means that a distributor cannot refuse to allow a trader to trade on its network, regardless of the trader's business practices or track record, and even if the distributor has previously terminated a distribution agreement with that trader for the trader's default.	Amend clause 12A.9 so that, where any distributor has previously terminated a distribution agreement with that trader for the trader's default, the trader cannot give notice initiating the negotiation process under clause 12A.9, and no distributor is obliged to allow that trader to trade on its network.

#	Ref	Issue	Suggested change
2	Code 12A.9(1) and 12A.9(5)	The 20 business day timeframe for negotiation of distribution agreements, the 5 business day timeframe for commencement of trading are extremely tight. Many distributors will have difficulty meeting these timeframes, taking into account the need for setup requirements including: • Accounts receivable and billing system setup, file provision and trial billing run; • Outage management and other network ops setup, retailer training • Connections system setup and retailer training • Prudential security provision • Other sundry system changes i.e. Business Objects reporting routines Many of these requirements are mandated by the Code, so the commencement of trading on the network before those steps are completed may result in a breach of the Code.	Amend period in 12A.9(1) and 12A.9(6) from 20 business days to 90 business days. Amend period in 12A.9(5) from 5th business day to 20th business day.

#	Ref	Issue	Suggested change
3	Code 12A.10	Clause 12A.10 prohibits alternative distribution agreements with traders that address subject matter beyond the terms of the default distributor agreement, or relate to anything other than "distribution services". We are concerned that this may have the effect of outlawing certain types of ancillary arrangements that are commonly entered into by traders and distributors alongside their distribution agreements, namely: • Electricity Connection Agreements (Conveyance or Interposed) – Contract for provision of direct network services usually where significant capital investment in provision of services has been made, or services of specific reliability/security required; • Distribution Price Agreements – contract for application of standard or nn standard pricing under specific terms • Distribution Service Agreements – contract for provision of service but subject to operation terms i.e. approval for peak subject to operational terms	Amend clause 12A.10 to clarify that it does not prevent traders and distributors from entering into Distributor agreements like: • Electricity Connection Agreements (Conveyance or Interposed) • Distribution Price Agreements • Distribution Service Agreements provided the Distributors Agreement foes not interfere with any existing retailer agreement with that Customer
4	DDA cl. 3.1	Clause 3.1 could be read as preventing the distributor from entering into a direct customer agreement wherever the agreement between the customer and trader includes a fixed term, *even* if the fixed term has ended and the agreement is now on a rolling basis. Presumably the EA's intention here was only to prevent a direct customer agreement cutting across a commitment that a customer has made to continue taking line function services from the trader for a particular period. This is best captured by more generic language as suggested opposite.	Amend clause 3.1 as follows: *3.1 Distributor may enter into Direct Customer Agreement with a Customer: The Distributor may enter into a Direct Customer Agreement with a Customer ~~at the Customer's written request~~, provided that the Direct Customer Agreement does not oblige the Customer to take any action that will constitute a breach or repudiation of any existing Customer Agreement ~~between~~ with the Trader ~~and the Customer is not a fixed term agreement~~.*

#	Ref	Issue	Suggested change
5	DDA cl. 3.2(b)(ii)	Clause 3.2(b)(ii) requires the distributor to update the registry to mark an ICP as direct-billed wherever a direct customer agreement is in place. However, in many cases, even where a direct customer agreement is in place, the distributor and the trader will agree that the trader is to remain responsible for billing. This should be recognised as an exception in clause 3.2(b)(ii).	Amend clause 3.2(b)(ii) as follows: *for each relevant ICP, either:* *(i) in accordance with the requirements of the Code relating to information included in the Registry, update the Registry field that indicates that the Distributor is directly billing the Customer in respect of that ICP, except where the Distributor and the Trader have agreed in writing that the Trader will be responsible for billing the Customer; or…*
6	DDA cl. 4.3	This clause has been amended so that the distributor now has an absolute obligation to comply with its System Emergency Event Management Policy, rather than an obligation to use reasonable endeavours in accordance with Good Electricity Industry Practice. Given that nature of system emergencies, we would be concerned at any suggestion that a distributor could give strict contractual guarantees in this area. Good Electricity Industry Practice is an appropriate standard in this case.	Amend clause 4.3 as follows: *Managing load on the Network during a System Emergency Event: The Distributor must manage load on the Network during a System Emergency Event in accordance with the Code, and using reasonable endeavours in accordance with Good Electricity Industry Practice to comply with the Distributor's System Emergency Event management policy set out in Schedule 4~~, and the Code~~.*

#	Ref	Issue	Suggested change
7	DDA cl. 3	Although clause 3 does contemplate that some ICPs may be supplied on a conveyance-only basis, the default distribution agreement is not clear on which provisions drop away while a particular ICP or customer is conveyance-only, and which ones continue to apply. This may result in the default distribution agreement cutting across or doubling up on the arrangements agreed by the distributor and the customer under a Direct Customer Agreement. In particular: • There is no clear statement that the obligation to provide "Distribution Services" does not apply at conveyance-only ICPs. • There is no clear statement that the Service Standards and Service Guarantee Payments do not apply to conveyance-only customers/ICPs. • There is no clear statement that the pricing consultation provisions in clause 7.4 do not apply to conveyance-only customers/ICPs (this is inconsistent with clause 12A.19(1) of the Code).	Add a new clause 3.8 as follows: *At all times while an ICP is subject to a valid Direct Customer Agreement, or for any other reason is not being supplied on an Interposed basis, the Distributor has no obligation to the Trader under this Agreement:* *(a) to supply Distribution Services in respect of that ICP;* *(b) to meet the Service Standards in respect of that ICP, and will not be liable for any Service Guarantee Payments in respect of that ICP; or* *(c) to comply with clause 14.2 in respect of that ICP.*
8	DDA cl. 5.1	Clause 5.1 allows the distributor to control load "where the Consumer elects to take up the Trader's corresponding price option that incorporates the Controlled Load Option". However, the distributor does not have visibility of whether or not the consumer has taken up the trader's controlled load price option. All the distributor can see is whether the trader has identified the relevant ICP in the registry as being subject to a controlled network tariff option.	Amend clause 5.1 as follows: *Distributor may control load: Subject to clause 4.3, if the Distributor provides a Price Category or Price Option that provides for a non-continuous level of service by allowing the Distributor to control part or all of the Customer's load (a "Controlled Load Option"), and the Customer's ICP is allocated to the Price Category ~~elects to take up the Trader's corresponding price option that incorporates~~ for the Controlled Load Option, the Distributor may control the relevant part of the Customer's load in accordance with this clause 5, Schedule 1 and Schedule 8.*

#	Ref	Issue	Suggested change
9	DDA cl. 5.3	Clause 5.3 provides a default rule specifying what part of a customer's load an entrant may control, where the incumbent already controls a portion of the customer's load. On the current wording, because of the default distribution agreement mechanism, the entrant and incumbent will be unable to vary this rule except by entering into an alternative agreement. It would be preferable if the parties were able to agree alternative load control arrangements *as part of* a default distribution agreement.	Amend clause 5.3 as follows: *Control of load by an Entrant if some load is controlled by an Incumbent: If either party (the "Entrant") seeks to control part of a Customer's load at a Customer's ICP, but the other party (the "Incumbent") has obtained the right to control part of the load at the same ICP in accordance with clause 5.1 or 5.2 (as the case may be), then except to the extent that the Incumbent agrees otherwise in writing, the Entrant may only control the part of the Customer's load that: …*
10	DDA cl.5.3	If the trader offers a pricing plan that incorporates a Controlled Load Option from the distributor, then where a consumer takes up that pricing plan and the ICP is allocated accordingly to the Controlled Load Option, the distributor should be entitled to control the relevant load, regardless of whether the trader is the "incumbent" holder of load control rights at that ICP. Ultimately this is within the control of the trader, because it is up to the trader to decide whether or not to offer its customers a pricing plan incorporating the Controlled Load Option, and it is the trader who updates the registry to indicate to the distributor that the ICP should be allocated to a Controlled Load Option. We have included a requirement that in these circumstances the trader must ensure it has the rights necessary to enable the distributor to control load. Only the trader is in a position to ensure that it has obtained the necessary load control rights from the consumer by way of price offering and customer election, and the functionality of the controllable load.	Add a new paragraph to the end of clause 5.3 as follows: *Notwithstanding the foregoing, the eligibility criteria specified by the Distributor for a Controlled Load Option may include a requirement that the Trader agree to the Distributor controlling the relevant part of the Customer's load in accordance with this clause 5 and Schedule 8, in which case, while the relevant ICP is allocated to that Controlled Load Option, the Trader will be deemed to have agreed to the Distributor controlling that load accordingly, and the Trader will ensure that it holds the rights necessary to enable the Distributor to do so.*
11	DDA cl. 5.4	Since signalling for ripple relays and pilot wires cannot discriminate between individual ICPs and their tariff option allocation, the distributor is reliant on the trader to ensure that these items of load control equipment are enabled or disabled to reflect whether or not the ICP is allocated to a controlled network tariff option. For example, where a trader fails to disable a ripple relay after a customer switches to an uncontrolled tariff, the distributor should not be held responsible for the fact that the	Insert new clause 5.4 as follows, while retaining and renumbering the subsequent clauses accordingly: *Responsibility for enabling and disabling Network Load Control Equipment: If the Distributor provides a Controlled Load Option utilising Network Load Control Equipment, then without limiting clause 5.8, the Trader will ensure that the Network Load Control Equipment is enabled for each ICP allocated to a Controlled Load*

#	Ref	Issue	Suggested change
		ripple relay continues to respond to load control signals injected into the network by the distributor.	*Option, and disabled for each ICP allocated to a Price Category that is not a Controlled Load Option. The Trader acknowledges that, until it is disabled, the Network Load Control Equipment will control the relevant part of the Consumer's load in response to signals from the Distributor's Load Signalling Equipment, and the Distributor will not be taken to be in breach of this agreement by reason of controlling that load accordingly.* Insert new definition in clause 33.1: *"Network Load Control Equipment" means Load Control Equipment that is installed at a Customer's Premises and designed to respond to load control signals injected into the Network. Examples include ripple relay receivers and pilot wire (cascade) systems.*
12	DDA cl. 5.9	The reference in clause 5.9 to assigning load control rights to "another party" could be more clearly expressed to encompass a third party.	Amend clause 5.9 as follows: *Assignment of load control rights: A party that has obtained the right to control a Customer's load in accordance with clauses 5.1 or 5.2 may assign that right to the ~~an~~other party or a third party, provided that the rights holder has obtained the right to make such an assignment from the Customer.*
13	DDA cl. 6.8	Clause 6.8 provides for a dispute over loss factors to be referred to dispute resolution via mediation and (if necessary) final arbitration. However, the clause does not make clear what it is that the arbitrator would be asked to decide, i.e. what criteria will be used to decide which party is in the right and which party is in the wrong.	Amend clause 6.8 to clarify that if a dispute over loss factors is referred to arbitration, the arbitrator will only change the loss factor notified by the distributor to the extent necessary to correct an error in methodology (i.e. an aspect of the methodology that does not conform with Good Industry Practice) or an error in input information.

#	Ref	Issue	Suggested change
14	DDA cl. 7.1	Clause 7.1 refers to material "set out" in Schedule 7. This reads as if this material will be static and "locked in" by the default distribution agreement. In fact, Schedule 7 will cross-refer to other material published elsewhere, that will be replaced and updated periodically. It is important that the language of this clause leaves absolutely no doubt that distributors are free to change pricing methodology, price categories, price options and prices, subject only to the constraints set out in the other provisions of clause 7, as well as the Code and the Commerce Act.	Amend clause 7.1 as follows: *Distribution Services pricing information: The Distributor's Pricing Methodology, and a schedule of Price Categories, Price Options (if any), and Prices, are set out in Schedule 7. The Distributor may amend the Pricing Methodology, Price Categories, Price Options and Prices from time, in accordance with this clause 7, and subject to the Code and any other applicable law.*
15	DDA cl. 7.2	Clause 7.2 allows certain types of pricing changes to be made outside the annual pricing review cycle, but expressly limits this to "a material increase in one or more existing Prices". This means that even where the other criteria in clause 7.2 are satisfied (e.g. a change in law), the distributor can only change the existing tariff rates, and cannot introduce a new tariff or change the criteria for a price category.	Amend clause 7.2 as follows: *Price changes: Unless otherwise agreed with the Trader, the Distributor may not change its Prices, Price Categories or Price Options more than once in any period of 12 consecutive months, unless a change is a material increase to one or more existing Prices and results from a change in:* *(a)… (b)… (c)…* *To avoid doubt, this does not prevent the Distributor from introducing a new Price Category or Price Option at any time.*
16	DDA cl. 7.4(a)	Clause 7.4(a) obliges the distributor to comply with the Distribution Pricing Methodology Consultation Guidelines issued by the EA. This creates a quasi-regulation-making power for the EA (because the EA can change the guidelines from time to time as it sees fit, and distributors will be obliged to comply), without any of the process safeguards for making amendments to the Code.	Delete clause 7.4(a)
17	DDA cl. 7.5	Clause 7.5 doubles up on the pricing consultation provisions of clause 12A.19 of the Code, but uses language that is slightly inconsistent. For example, clause 12A.19(1) excludes conveyance-only customers, but clause 7.5 does not.	Delete clause 7.5, and rely on clause 12A.19 of the Code instead.

#	Ref	Issue	Suggested change
18	DDA cl. 7.5	Clause 7.5 states that the distributor will give the trader 40 Working Days' notice of each Price change. This leaves open arguments about the validity of notification where the distributor gives more than 40 Working Days' notice.	Amend clause 7.5(a) as follows: *give the Trader at least 40 Working Days' notice of the Price change, unless…*
19	DDA cl. 7.6	Clause 7.6 states that a trader may only dispute a change to pricing or pricing methodology "if the trader considers that the Distributor has not complied with clause 7.3 or 7.4". We assume the intention here is that traders should only be permitted to dispute pricing or pricing methodology on procedural grounds, rather than challenging the substance of the pricing or pricing methodology. But the current wording of clause 7.6 does explicitly say this, and could be read as leaving the door open for substantive challenge.	Amend clause 7.6 as follows: *7.6 Pricing Methodology change and Price change disputes: Once a change to a Pricing Methodology has been finalised in accordance with clause 7.4, or a Price change is notified in accordance with clause 7.5, the Trader may raise a Dispute under clause 23 in respect of the Pricing Methodology or the Price change (as the case may be) only on the grounds of non-compliance ~~if the Trader considers that the Distributor has not complied~~ with clause 7.3 or 7.4. If a Dispute is raised, the Trader must continue to pay the Distributor's Tax Invoices until the Dispute is resolved.*
20	DDA cl. 7.7	Clause 7.7 allows the distributor to correct errors in its notified pricing, but only where the correction does not have a material impact on a trader. There is little purpose in correcting immaterial errors. The distributor should be able to correct material errors, given that this would merely bring the charges into line with the distributor's regulated pricing. This should not be controversial so long as the errors are obvious, meaning they should not come as a surprise to traders.	Amend clause 7.7 as follows: *Changes containing an error: If the Trader identifies an error in the Pricing Methodology finalised and Published in accordance with clause 7.4, and the error is obvious on its face (either from the Pricing Methodology itself or by reference to previous versions circulated by the Distributor for the purposes of consultation), or an error in a Price change notified in accordance with clause 7.5 that arises from an obvious error in applying the Pricing Methodology, the Trader must bring that error to the Distributor's attention as soon as possible after becoming aware of the error. The Distributor may correct such an error, including an error that it identifies itself, without following the process under clause 7.4 or giving notice under clause 7.5(a) (as the case may be)~~, provided that the correction of the error must not have a material effect on the Trader~~.*

#	Ref	Issue	Suggested change
21	DDA cl. 8.1	Where an ICP is eligible for two or more price categories, clause 8.1 sets out a range of factors to which the distributor must have regard when allocating the ICP between those price categories. However, clause 8.1(c)(ii) reads as if the meter register configurations of the metering equipment and load control equipment will be determinative in every case – which contradicts the remainder of clause 8.1.	Amend clause 8.1(c)(ii) as follows: *(ii) the meter register configuration(s) of the Metering Equipment and any Load Control Equipment installed for the ICP~~, which must determine the Price Option or Price Options that apply if more than 1 Price Option is defined for the relevant Price Category~~;*
22	DDA cl. 8.3	Clause 8.3 reads as if meter register configuration is the only relevant detail for selecting a Price Option. It is important to clarify that the trader must only select a price option where all eligibility criteria, including the meter register configuration, are satisfied. Distributors rely on traders to maintain correct information about each site as necessary to select the correct Price Option.	Amend clause 8.3 as follows: *Trader to select Price Option to match meter register configuration: If the Distributor provides options within a Price Category that correspond to alternative eligible meter register configurations ("Price Options"), the Trader must select the Price Option that corresponds to the configuration of each meter register installed at the relevant ICP, and is otherwise available for the relevant ICP based on the eligibility criteria for that Pricing Option, and notify the Distributor of that selection within 10 Working Days after its selection using the appropriate EIEP. If the meter register configuration at an ICP is changed at any time, the Trader must change the Price Option to match the new configuration and notify the Distributor of the change using the appropriate EIEP within 10 Working Days after the change.*
23	DDA cl. 8.5	If an ICP has been incorrectly allocated to a Price Category as a result of a trader providing the distributor with incorrect or incomplete information about the ICP, then when the position is corrected, the distributor should be entitled to charge the trader for any undercharging that occurred as a result. Otherwise traders have little incentive to ensure the accuracy of the information provided to distributors, and in fact may even have a perverse incentive in the other direction. The reference to "15 months" should also be amended to "14 months" to match market practice on revision periods, and remove the need for out-of-cycle (manual) wash-ups.	Insert a new clause 8.7 as follows, and renumber other clauses accordingly: *Trader's obligations:* *(a) Within 20 Working Days of the Trader becoming responsible for a particular ICP, the Trader will provide the Distributor with any information and/or evidence requested by the Distributor and required by Schedule 2 to enable the Distributor to allocate that ICP to the correct Price Category. Within 20 Working Days of the Trader becoming aware of any change to that information which would entitle the Distributor to allocate the corresponding ICP to a different Price Category, the Trader will promptly notify the Distributor and provide any information or evidence requested by the*

#	Ref	Issue	Suggested change
			Distributor and required by Schedule 2 to enable the Distributor to allocate that ICP to the correct Price Category. The Trader will ensure that any information and/or evidence provided under this clause is accurate and complete. *(b) If as a result of a breach of sub-clause (a) an ICP is allocated to a Price Category for which it is not eligible, or remains allocated to a Price Category for which it is no longer eligible, ("Misallocation"), then when the Distributor becomes aware of the Misallocation, the Distributor will be entitled to revise the Distribution Service charges applied in respect of that ICP for the period of the Misallocation, to reflect any higher charges that the Distributor would have been entitled to apply for that same period but for the Misallocation. However, the Distributor cannot revise charges under this clause 8.7 for any period earlier than 14 months prior, unless agreed otherwise in writing.*
24	DDA cl. 8.7(b)	Clause 8.7(b) provides the distributor with a degree of discretion in re-allocating an ICP that was previously allocated to the wrong price category. However, the discretion is worded differently from the similar discretion in clause 8.1 relating to initial allocation. There does not seem to be any particular reason to take two different approaches depending on whether the distributor is carrying out an initial allocation or carrying out a re-allocation to correct a mistake.	Amend clause 8.7(b) as follows: *(b) unless the Trader is able to provide evidence to the Distributor's reasonable satisfaction within 10 Working Days of the Distributor's notice that the current Price Category has not been Incorrectly Allocated, the Distributor may allocate the Price Category that it considers appropriate to that ICP (acting consistently with clause 8.1 ~~reasonably and, if the Distributor identified more than one eligible Price Category in its notice, taking into account the Trader's or the Customer's preferred Price Category as communicated to the Distributor by the Trader~~), and may commence charging the Trader for Distribution Services in accordance with that Price Category after a further 40 Working Days*
25	DDA cl. 9.3	Clause 9.3(c) provides for the distributor to issue a credit note or debit note as a wash-up against previously estimated charges, taking into account additional or revised consumption information received by the distributor. The clause does not include any provision for a Use of Money Adjustment.	Amend clause 9.3 as follows: *Issuing of Tax Invoices: The Distributor must issue Tax Invoices for Distribution Services as follows:* *(a) the Distributor must invoice the Trader within 10 Working Days after the last day of the month to which the Tax Invoice*

#	Ref	Issue	Suggested change
		This appears to overlap with but also contradict clause 9.3(d), (e) and (f), which provide for the distributor to issue a credit note or debit note as a wash-up against previous charges, taking into account additional or revised consumption information received by the distributor, but in this case applying a Use of Money Adjustment. It is not clear what the dividing line is between the situations covered by 9.3(c) and those covered by 9.3(d), (e) and (f). It is also unclear why there should be different terms for (1) wash-up against estimated charges (on the one hand) and (2) wash-up against charges that were based on information that is subsequently revised. To add to the confusion, clauses 9.2 and 9.3(c) envisage that charges may be estimated where billing information is "materially incorrect", but correction of earlier information is also covered in clauses 9.3(d), (e) and (f), which provides for initial billing on one set of information and then wash-up billing in subsequent months as more accurate information is received.	*relates ("Billing Month");* *(b) at the same time as it provides a Tax Invoice, the Distributor must provide to the Trader, in accordance with the relevant EIEP, sufficiently detailed information to enable the Trader to verify the accuracy of the Tax Invoice;* *~~(c) if late, incomplete, or incorrect information is provided and the Tax Invoice is estimated in accordance with clause 9.2 on the basis of that information, the Distributor must issue a Credit Note or Debit Note in the month after it receives additional or revised consumption information, at the same time as the Distributor issues a Tax Invoice to the Trader for its Distribution Services charges for that month;~~* *(cd) if the information received by the Distributor during a particular Billing Month in accordance with Schedule 2 includes revised reconciliation information or additional or revised consumption information ("Updated Billing Information") for previous months ("Consumption Months"), then when it issues a Tax Invoice for the Billing Month, the Distributor must also revise the charges for the other affected Consumption Months and provide a separate Credit Note or Debit Note to the Trader reflecting those revisions ~~in respect of the revised consumption information~~ ("Revision Invoice"), and a Use of Money Adjustment; and* *~~(e) if a Revision Invoice is required, the Distributor must issue the Revision Invoice in the month after the Distributor receives the revised reconciliation information or additional consumption information, at the same time as the Distributor issues a Tax Invoice to the Trader for its Distribution Services charges for that month; and~~* *(df) at the same time it provides a Revision Invoice, the Distributor must provide to the Trader, in accordance with the relevant EIEP, sufficiently detailed information to enable the Trader to verify the accuracy of the Revision Invoice.*
26	DDA cl. 9.7	Clauses 9.7 and 9.8 are unclear, overlapping and contradictory.	Replace clauses 9.7 and 9.8 with the following (we note that almost

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	and 9.8	Also, because they deal with "undercharging", "overcharging" and "invoice disputes", it is also unclear how they interact with the provisions in clause 8 for adjusting charges where an ICP has been allocated to an incorrect Price Category. The equivalent clauses in the Model UoSA have been the subject of a number of payment disputes between traders and distributors. Examples of overlap and confusion include the following: • Clause 9.8 requires that if a party has been overcharged or undercharged, the party that has benefitted from the mistake must pay the shortfall or refund the excess (as applicable) within 20 Working Days of the error being discovered and the amount being agreed between the parties. On the other hand, clause 9.7 states that if a party disputes an invoice, and the other party agrees with the dispute, it has 6 Working Days to correct the error. Note that such a dispute could relate to overcharging, which is also covered by clause 9.8, but with different time periods for payment. • Clause 9.8 requires a Use of Money Adjustment to be added to any amount paid to correct an undercharge or refunded to correct an overcharge, but in the case of payment to correct an undercharge, the clause does not make clear whether the Use of Money Adjustment is backdated to the due date for the original invoice, or the date on which the invoicing party gave notice that it had undercharged. On the other hand, clause 9.7 provides that: o if the other party agrees with an invoice dispute raised by the first party, a Use of Money Adjustment is backdated to the due date of the original invoice, but o if the other party disagrees with the invoice dispute, then whichever party is successful in the dispute is entitled to Default Interest backdated to "the date the disputed amount would have been due for payment under this clause 9" – without making clear whether that means the original due date under clause 9.1 or the due date for a corrective payment under clause 9.7 (or perhaps clause	identical wording has been accepted by a significant number of electricity traders in the context of their Gas Use of System Agreements with Powerco): *9.7* ***Disputing or correcting invoices*** *(a) At any time within 18 months following the date of an invoice issued under this Agreement, the party to which that invoice was issued ("Recipient") may dispute the invoice by giving notice to the other party ("Issuer") setting out reasonable details of the dispute (in each case, an "Invoice Dispute Notice").* *(b) Where the Recipient issues an Invoice Dispute Notice before the due date for payment, it may withhold payment of the disputed portion of the invoice until the dispute has been resolved, so long as it has given the Invoice Dispute Notice in good faith, and pays any undisputed portion of the invoice by the applicable due date.* *(c) When the correct amount of the disputed invoice is finally agreed by the parties or determined by an arbitrator, court or other tribunal of competent jurisdiction ("Resolution Date"), except to the extent the parties agree otherwise:* *(i) where the Recipient has withheld payment of an amount that was correctly included in the disputed invoice, the Recipient will pay the amount within 10 Working Days of the Resolution Date, together with Default Interest applied from the original due date up to but excluding the date of payment;* *(ii) where the Issuer has undercharged the Recipient, the Issuer may issue a debit note for the amount of the undercharge, together with a Use of Money Adjustment applied to that amount from the due date of the original invoice up to but excluding the date of the new invoice, and the Recipient will pay that invoice within 10 Working Days of receipt, so long as that invoice is accompanied by reasonably detailed supporting information;*

#	Ref	Issue	Suggested change
		9.8?). In short, clauses 9.7 and 9.8 fail to properly distinguish between the following situations: • Party A issues a correct invoice, but Party B wrongly disputes and withholds payment • Party A issues an incorrect invoice that overcharges Party B, but Party B pays in a timely manner and only later discovers the error, at which point it requests a refund, and Party A promptly obliges • Party A issues an incorrect invoice that overcharges Party B, Party B pays in a timely manner and only later discovers the error, at which point it requests a refund; Party A wrongly disputes and refuses to pay the refund, but the dispute is eventually decided against it • Party A issues an incorrect invoice that undercharges Party B, where Party B pays and Party A discovers the error at a later date, at which point Party A requests extra payment to correct the error, and Party B promptly obliges • Party A issues an incorrect invoice that undercharges Party B, where Party B pays and Party A discovers the error at a later date, at which point Party A requests extra payment to correct the error; Party B wrongly disputes and refuses to pay the extra, but the dispute is eventually decided against Party B and in favour of Party A	*(iii) where an amount has been incorrectly included in the disputed invoice, the Issuer will promptly issue a corresponding credit note to the Recipient, and if the Recipient has already paid some or all of that amount, then within 10 Working Days of the Resolution Date, the Issuer will refund the overpayment to the Recipient, together with:* *(A) a Use of Money Adjustment, applied from the date of overpayment up to but excluding the date of the refund, or (if earlier) the date 15 Working Days after receipt of the Invoice Dispute Notice; and* *(B) unless the overpayment is refunded to the Recipient within 15 Working Days after receipt of the Invoice Dispute Notice, Default Interest, applied from the date 15 Working Days after receipt of the Invoice Dispute Notice up to but excluding the date of the refund.* (d) Notwithstanding the other provisions of this clause 9.7, the incorrect allocation of an ICP to a Pricing Category will give rise to an adjustment to the Distribution Service charges only in accordance with clause 8, and not under this clause 9.7.
27	DDA cl. 10.4	Includes an incorrect cross-reference to clause 10.1	Amend to refer to clause 10.2
28	DDA cl. 10.10	Clause 10.10 refers to “the sum of the Bank Bill Yield Rate plus 15%”, which could be ready as adding 15 percentage points to the Bank Bill Yield Rate (e.g. 5% + 15% = 20%).	It would be clearer to say “1.15 times the Bank Bill Yield Rate”.

#	Ref	Issue	Suggested change
29	DDA cl. 10.12	Clause 10.12 allows the trader to require a review of the security amount at any time. This would be administratively unworkable for distributors if exercised frequently.	Limit trader-initiated reviews to no more than one per six months, except where trader can provide evidence reasonably satisfactory to the distributor that the aggregate distribution charges payable by the trader have dropped more than say, 20% from the level last used to determine the security amount.
30	DDA cl. 10.15	Clause 10.15 allows the trader to withhold information about its financial position from the distributor wherever that information is considered "inside information" under the FMCA, or "material information" under the NZX Listing Rules. However, this ignores the various exceptions in the FMCA and Listing Rules that would allow this kind of information to be disclosed to a distributor on a confidential basis. It is crucial for the distributor to have access to this kind of financial information to allow it to manage its exposure to the trader. The information should not be withheld unless the FMCA or Listing Rules do in fact prohibit disclosure, even on a confidential basis.	Replace clause 10.15 with the following (we note that virtually identical language has been accepted by many electricity retailers in the context of their Gas Use of System Agreements with Powerco): *For the purposes of clause 10.13:* *(a) If the Trader (or its ultimate parent company) is a "listed issuer" for the purposes of the Financial Markets Conduct Act 1988, the Trader may require the Distributor to enter into a confidentiality and/or security trading prohibition agreement on terms reasonably satisfactory to the Trader prior to the giving of notice and disclosure of any information under clause 10.13, if and for so long as, the Retailer reasonably considers any such information to be "inside information" as defined in that Act.* *(b) If the Trader (or its ultimate parent company) is listed on the NZX Main Board or the NZX Debt Market, the Trader may withhold any notice or information to the extent that the Trader reasonably considers such information is material information under the applicable Listing Rules, except to the extent that the notice and accompanying disclosure under clause 10.13 can be brought within one or more exceptions under the applicable Listing Rules so as to allow disclosure to the Distributor without those Listing Rules requiring the Trader to disclose that information to any third party.*

#	Ref	Issue	Suggested change
31	DDA cl. 17.4	Clause 17.4 imposes broadly worded and vaguely defined obligations on the distributor to co-operate with traders in relation to vulnerable and medically dependent customers. The wording applies wherever the trader "identifies" a customer as being medially dependent, but the wording is unclear on how the distributor would be notified. For example, would distributors be required to maintain their own databases recording which customers have been notified by the trader as vulnerable or medically dependent? What obligations will traders have to keep distributors updated on the identity and status of occupiers at a particular property? Traders are the only party in a position to manage the obligations arising under the guidelines, given that they hold the customer relationship, and (unlike distributors) already have the systems needed to track information about vulnerable and medically dependent customers. In addition, disconnection for non-payment is not a question for the distributor: customer credit risk is fundamentally for traders to manage. The only intersection with the distributor is where the distributor initiates a Temporary Disconnection not requested by the trader. The only co-operation that should be needed from the distributor is to provide the trader with advance notice of Temporary Disconnection (except where not reasonably practicable, e.g. safety disconnects), and provide the trader with a clearly delineated right to delay that Temporary Disconnection where the customer is vulnerable or medically dependent. We would prefer that a process of this kind was clearly set out in the DDA itself.	Delete clause 17.4. Operational procedures for notifying planned works are well established and adhered to.
32	DDA cl.23.7 and 23.10	Clause 23 provides for final resolution by arbitration in clause 23.7, and by court proceedings in clause 23.10. These two clauses are fundamentally incompatible – the purpose of allowing either party to refer a dispute to arbitration is to remove court proceedings as an option.	Remove arbitration provisions. Disputes over the interpretation and application of the default distribution agreement should be resolved in court, so that the industry as a whole can benefit from precedents set by such decisions. Private arbitration would deprive the industry of meaningful precedents in this area.

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33	DDA cl. 26.5	This clause requires a party conducting a Claim to consult not just the other party but the other party's legal counsel. In many cases this will not be practicable, as most claims are dealt with by non-legal personnel. It should be up to the other party to involve its own legal counsel as it deems necessary.	Delete the reference to legal counsel in clause 26.5(b).
34	DDA cl. 33.1 Definition of "Distribution Services"	Where a default distribution agreement applies, the regulated nature of the core terms removes distributors' flexibility to define the precise scope of the services governed by the agreement. The new definition of "Distribution Services" should be more clearly limited to those aspects essential for conveyance. Otherwise the default distribution agreement may inadvertently regulate other services commonly agreed between distributors and traders.	Amend the definition of "Distribution Services" as follows: "Distribution Services" means the provision, maintenance and operation of the Network for the conveyance of electricity to Customers, including all services and activity undertaken by the Distributor on or in connection with the Network to comply with the requirements of this Agreement, but excluding any additional service or activity that is not a necessary part of improving or maintaining the reliability or quality of conveyance on the Network and is not otherwise required in order to meet the Distributor's obligations this Agreement;