14 November 2023

Electricity Authority
Wellington
New Zealand

Email: DDA@ea.govt.nz

Submission - Review of the Consultation and feedback processes

Introduction

1. Thank you for the opportunity to submit on the Consultation Paper *Proposed changes to the default distributor agreement template, consumption data template, and related Part 12A clauses*[1].
2. The proposal would change
   a. the status of the 'recorded' terms in the default distributor agreement (DDA) template in Part 12A of the Code to be either 'core' or 'operational' terms,
   b. the drafting of some of the terms that are currently recorded terms,
   c. Schedule 12A.1 of the Code, to require a party to a distributor agreement to, upon request, provide the Authority with copies of any distributor agreements they have entered into,
   d. Appendix C of Schedule 12A.1 of the Code (the default agreement for the provision of consumption data), to amend the arrangements for the provision of consumption data to distributors,
   e. Schedule 12A.4 of the Code:
      i. to include provisions that provide for what happens to existing distributor agreements based on the DDA template under the proposed change in the status of the recorded terms in the DDA template in Part 12A,
      ii. to clarify the requirements for distributors to update and publish their DDAs, and

[1] See https://www.ea.govt.nz/documents/3851/Part_12A_Code_amendment_proposal_consultation_paper.pdf

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iii. to clarify the effect on existing distributor agreements when the Authority amends core terms or operational terms in the DDA template.

Summary

3. We have reviewed the consultation paper and our general views are summarised in this section.
4. As a general comment, we do not favour the removal of the recorded terms in the DDA and continue to advocate for an individualised approach to certain terms of the DDA.
5. That said, there are some proposed changes which are relatively uncontroversial such as the proposed changes to clauses 4.11, 5.7, 5.8, 9.5, 14.1, and 26.2 of the DDA and we support those amendments. We also support the amendment to clause 11 of Schedule 12A.1 such that EDBs must only provide copies of DDAs on request to the Authority. We are pleased to see the proposed changes to the default agreement for the provision of consumption data, including the clause relating to the combination of consumption data.
6. However, we are concerned that proposed clauses 7.3 and 9.10 of the DDA are outside of the Authority's powers.
7. Proposed clause 14.2 is lacking a materiality threshold and again is likely to prove costly for EDBs.
8. The amendment to clause 24.5 which would require EDBs to trigger the force majeure clause is likely to be unworkable, and we would prefer the clause to allow for bespoke drafting.
9. We do not support prescribing the amount of the use of money adjustment. Implementing this change will come with a significant overhead for EDBs that currently provide for a nil use of money adjustment, and we query the benefit of this change.
10. The proposed operational terms setting out service standards in Schedule 1 require more analysis. Again, we would like to see a materiality threshold in proposed clause S1.3, the deletion of S1.4, and there should be no ability for the trader to deduct costs in proposed clause S1.6.
11. In terms of the proposed changes to clause 12 of Schedule 12A.4, we do not agree with the requirement to consult on new operational terms where the Authority is proposing an amendment. In new clause 12(1A), there is a requirement to amend the operational terms to reflect the Authority's amendment. Consultation with all traders on these terms will prove time consuming and costly and there is little point where the EDB is largely making changes required by the Authority.
12. Orion's specific responses to the 9 questions posed by the Authority as well as other feedback we consider appropriate to the consultation are set out in Annexure A.

Concluding Remarks

13. Thank you for the opportunity to provide feedback. We do not consider any part of this feedback as confidential.
14. If you have any questions or queries or aspects of the submission which you would like to discuss, please contact me on 03 363 9898.

Yours sincerely

Vivienne Wilson

Policy Lead

Orion

Annexure A

Questions	Comment
Q1. Do you agree Issue 1, summarised in paragraph 2.21 and described in paragraphs 2.21 to 2.32 and Appendix B, is worthy of attention?	We do not favour the removal of the recorded terms. We do not consider that there is an issue with the recorded terms or that the recorded terms in the DDA have worsened the extent to which the recorded terms align with the Authority's objective. We did not agree with the amendment to section 32 of the Electricity Industry Act 2010 in 2022 which has provided for this change. Our view then was that standardisation of service quality (which seems to be one of the main results of the amendment to section 32) across the distribution sector was not a sensible goal. We still hold this view. Differences in historic performance, network topography and consumer preferences mean that network performance of distributors varies significantly across New Zealand. Rather than standardisation, what is required is an individualised approach to service quality, taking into account local preferences. This approach is reflected in the DDAs we enter into with traders. An individualised approach can still align with the Authority's objectives. On this basis, we would prefer for recorded terms to remain within the DDA provisions, and to continue to allow distributors to determine these terms that take into account local preferences.
Q2. Do you have any feedback on the Authority's assessments of changes to recorded terms, as set out in Appendix B and Appendix C?	These comments correspond to the proposed core terms (replacing the recorded terms). We note the change proposed to **clause 4.8** in relation to the scheduling of planned service interruptions. The proposed amendment will likely drive cost increases for EDBs as scheduling planned service interruptions at times that are convenient to Customers (for example, out of usual working hours, overnight) is likely to be more expensive and may create barriers to undertaking work. Our submission is that this clause could be tempered by a reference to have consideration for the disruption to Customers rather than a requirement to schedule planned service interruptions to minimise disruption to customers (albeit as far as is reasonably practicable). We do not agree with the proposed change to **clause 4.12** that provides for an exception to

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Questions	Comment
	clause 9.10. We do not agree with the proposed mandatory inclusion of **clause 9.10** providing for refunds where there is a continuous interruption affecting a customer's ICP for 24 hours or longer. In our view, this will be costly for distributors to administer including adjustments to billing platforms (the benefits will not outweigh the cost), the amounts calculated to each individual customer will be very small, and it is highly unlikely to achieve the aim of providing a refund to the customer for a service they did not receive. For example, a residential customer using 12,000 kWh per year- Orion currently charges 0.45$/day, 0.0928 kW/day, 0.09414 $/kWh weekdays, 0.01844 $/kWh nights and weekends. Assuming the residential customer uses 50% of consumption on weekdays, the total value per day is $2.52 excluding GST. So even if a customer was cut off from electricity for three weeks the value would be $53 excluding GST. The Consultation paper at paragraph B.30 states that **"***Generally speaking, it is not for the long-term benefit of a consumer to pay for a service they do not receive, particularly if they do not receive the service for a material amount of time."* If that is the reasoning behind this change, we query whether an interruption to supply can really be characterised as "not receiving a service". The EDB will be striving to restore the delivery of electricity, and in doing so is still providing a service as such.[2] Further, it is a clear service level expectation that supply is not 100% guaranteed. The Consultation paper goes on to state that "*The choice should reside with the consumer (either directly or via the trader as their agent) to decide whether they want to pay a distributor for distribution services they have not received".* It is not immediately clear what is meant by this, but we note that there is no **requirement that the trader must pass any refund on to the customer.** Is the Authority intending that customers (especially domestic) will be able to negotiate for a refund? We doubt whether customers will be able to negotiate refunds with traders and we see this as a windfall for the traders. We see little benefit if any for the customer

[2] See Current Power Outages Christchurch » Orion (oriongroup.co.nz) which list current outages, reasons and the expected time when electricity delivery will be restored.

Questions	Comment
	in this amendment, and if refunds are required the costs of refunds under this clause will end up being socialized to other customers. We note the proposed changes to **clause 7.3** that limit possible price changes during a year. We query whether the Authority is authorised to prescribe the terms of this clause given that under section 32 of the Electricity Industry Act 2010 the Authority is not permitted to regulate matters relating to the maximum prices that EDBs may charge or maximum revenues that EDBs may make. In any event, if the clause is retained, we would prefer there to be a separate clause allowing for price changes where it is required in order to meet a regulation applicable to the distributor. This is not necessarily covered by proposed paragraph (c). While it may be highly unlikely that a regulatory change during the year might cause the distributor to want to increase prices, the distributor should not be out of pocket for new regulatory costs that are not anticipated at the start of a 12-month period. Therefore, our submission is that if this clause is retained, the Authority includes a clause that allows for a price change where it is required in order to meet a regulation applicable to the Distributor. In terms of proposed **clause 14.2**, in our view the bar is set too low for customers (there is no materiality threshold) and too high for distributors (distributors must investigate every concern raised). Given that the clause requires that distributors must undertake investigations, our submission is that the customer must at least have a **reasonable cause for concern**, and not simply a "concern", and also provide evidence and/or reasons for their concerns. Similarly, our view is that if there is going to be an obligation on distributors to investigate, it must be tempered with a requirement to do so in accordance with good industry practice and not a strict requirement to investigate. We do not agree with the proposed change to **clause 24.5**. Appendix B, para B.47 of the Consultation paper states that amendments that specify other circumstances where the distributor is not liable are not required because the distributor can rely on the force majeure clause. Relying on the force majeure clause will mean that the force majeure clause will need to

Questions	Comment
	be triggered in accordance with clause 21.3, and associated actions taken under clauses 21.3 and 21.4. We think in many situations this will be excessive and impractical. In addition, the Courts have traditionally interpreted force majeure clauses narrowly so it is not clear whether a force majeure would apply in a variety of different situations. For all EDBs, the proposed liability exclusions do not go as far as the current DDA liability exclusions, leaving a risk, particularly with respect of: • failures due to extreme weather events, fire and flooding, etc; and • failures due to vegetation, wildlife and animals. In our submission, a better approach is to allow for bespoke drafting in clause 24.5 as is currently the case which can be negotiated with traders. For a number of reasons, we do not agree with the proposed new definition of "**use of money adjustment**" in **clause 33.2**. First, as we said in our comments to the Authority in 2019 on the proposed DDA "*Such adjustments can be small but come with a **significant overhead** – the adjustments are not subject to GST (in an invoice that is otherwise subject to GST), and there is a requirement to deduct resident withholding tax (where the retailer does not hold an exemption certificate).*" [3] Implementing systems to provide for this adjustment may be relatively costly, and it is not clear to us what the immediate benefit will be. Wash-ups in general are usually small beyond month one, so there will be considerable interest calculations that will need to made for potentially very small amounts. Secondly, the proposed amendment and the discussion in the Consultation paper convey the impression that use of money adjustments will become mandatory.[4] However, the Authority is not currently proposing to amend clause 9.3(f) of the DDA which currently provides that "*if the information received by the Distributor in accordance with Schedule 2 includes revised reconciliation information or additional consumption information, the Distributor must provide a*

[3] See Orion-submission-on-DDA-Oct-19.pdf (oriongroup.co.nz)

[4] For example, para B.22 which states that "*Hence, a positive non-zero use of money adjustment is necessary to avoid an incentive on the parties to a distributor agreement to shift costs onto each other by treating each other as a bank*."

Questions	Comment
	separate Credit Note or Debit Note to the Trader in respect of the revised consumption information ("Revision Invoice"), ***and a Use of Money Adjustment (unless the parties agree otherwise)****."* This suggests that the parties can still determine not to include a use of money adjustment as the words in brackets "unless the parties agree otherwise" appear to only relate to use of money adjustments. It is not clear to us what is actually intended, given the proposed change to the definition. Can parties still agree not to apply a use of money adjustment? Thirdly, if the Authority determines that it does wish to proceed with this change, then our submission is that more thought needs to be given to the proposed definition. In our view, the definition only makes sense if the adjustment is applied from the date of payment of the original invoice until the date of payment of the Revision Invoice. We have reviewed the proposed clauses in **Schedule 1**. In terms of proposed **clause S1.3**, where a customer advises the distributor of a breach or suspected breach, there should be a requirement for the customer to give notice of the reasons for the suspicion (as is the case with S1.1). We also submit that **clause S1.4** which requires the Distributor to notify the Trader if the Distributor breaches a service level should be deleted. The Trader is already under an obligation to notify the Distributor if they suspect a breach of a service level. Our view is that **clause S1.6** should be amended so that there is no ability for the trader to deduct its reasonable costs for administering payments. Our view has always been that these payments should be passed on without deduction. We recommend adding an additional clause in **Schedule 1** that payments made under any Service Guarantee Payment are counted towards the distributor's maximum total liability stated in clause 24.7. This removes any doubt as to the relationship between Schedule 1 and clause 24.
Q3. Do you agree Issue 2 is worthy of attention?	We agree with the proposed change to the words at the beginning of clause 11 of Schedule 12A.1. There are efficiencies in not providing copies of DDAs on an ongoing basis.

Questions	Comment
	We agree with proposed clause 11A being added to Schedule 12A.1.
Q4. Do you agree Issue 3 is worthy of attention?	Yes, we agree that issue 3 needs to be addressed. As we said in our submission to the Authority on "Updating the Regulatory Settings for Distribution Networks" in March 2023, it makes sense to include the ENA (Electricity Networks Association) / ERANZ data template to improve the workability as this has already been consulted on and agreed upon in principle between distributors and retailers. We also ask the Authority to consider the proposed amendment to **clause 3(2) of the Default Agreement – Provision of Consumption Data in Appendix C of Schedule 12A.1**. As amended the clause will provide that consumption data that is supplied must be provided within 10 Working Days of the Distributor's request, and subsequently at monthly intervals if the request is for ongoing supply. Our submission is that this should not be limited to monthly intervals. A more agile approach would be to provide that consumption data that is supplied must be provided within 10 Working Days of the Distributor's request, and subsequently at **specified** intervals if the request is for ongoing supply.
Q5. Do you agree with the objective of the proposed Code amendment? If not, why not?	We agree with the objectives of the proposed Code amendment, apart from the removal of the recorded terms. We refer to our answer to Question 1. We also note that paragraph 5.14 of the Consultation Paper states that "*As noted in Appendix B (paragraphs B.4 to B.11), some distributor agreements have weakened this incentive by changing the DDA template's drafting suggestion for the recorded term*." In our view, this is somewhat unfair. The DDA template is quite clear that the drafting suggestions could be amended as the instructions state "*revise as appropriate*". There was no obligation to use the suggestions provided.
Q6. Do you agree the benefits of the proposed Code amendment outweigh its costs?	We query whether the Authority have properly considered the costs of implementing the changes to the DDA. It seems to us that the Authority have not fully considered the cost of implementing these changes, and in particular the cost of consultation with traders to give effect to new operational terms as required by this amendment. Implementation will be time

Questions	Comment
	consuming and incur staff and legal costs. We query the analysis of dynamic efficiency benefits, especially at paragraph 5.35 when the Consultation paper states that "*First, improved retail competition from changing the status of recorded terms would encourage retailers to develop more innovative products and services for consumers"*. We are not convinced that this change will lead to more innovative products and services and the Authority provides no evidence for this assumption. We agree that there will be benefits in prescribing the amendments to the default agreement, provision of consumption data. It will now correspond with the agreement that has been consulted on and agreed upon in principle between distributors and retailers.
Q7. Do you agree the proposed Code amendment is preferable to other options? If you disagree, please explain your preferred option in terms consistent with the Authority's statutory objectives in section 15 of the Act.	No comment.
Q8. Do you agree the proposed Code amendment complies with section 32 of the Act?	We refer to our comments at question 2 in relation to the changes to clause 7.3. We are concerned that the changes to this clause (which prevent EDBs from making price changes more than once in any 12-month period) are not in accordance with section 32(2)(b) of the Act and will have the effect of regulating the maximum prices that EDBs may charge. A similar argument can also be made with respect to the proposed amendments to clause 9.2. In essence the clause will prevent EDBs from charging for their services where service is interrupted. In our view this goes beyond the regulation of quality which the Authority is permitted to regulate.
Q9. Do you have any comments on the drafting of the proposed Code amendment?	We refer to our comments under question 2 and question 4 which reflects drafting concerns about various clauses.

Questions	Comment
	We note that proposed clause 12(1A) of Schedule 12A.1 requires EDBs to amend operational terms to reflect amendments made by the Authority. An EDB has up to 15 business days (or such longer period as the Authority may allow) after the date of amendment to the default distributor agreement template to attend to these amendments and post them on its website. However, existing clause 12(2) requires an EDB to undertake consultation with each participant whom the EDB considers is likely to be affected by the amendment before the operational terms take effect. Our view is that it is extremely unlikely that consultation could be completed within 15 business days and if the Authority is of the mind that EDBs must undertake consultation for these changes, the Authority will need to allow at least 3 months for this consultation process to be completed. Consultees will need a reasonable opportunity to consider any proposed changes and EDBs will need sufficient time to give the consultation responses due consideration. There are two minor spelling mistakes in proposed new clause 3(1) of the Schedule 12A.1, Appendix C. The two references to "clause" should be to "subclause". There is one final issue that we would like to raise and that relates to the current wording of Schedule 8 of the DDA which deals with Local Management. We have been further considering this Schedule in light of the recent "Addendum to dynamic load control service memo". It is not clear to us under clause S8.2 who is the party entitled to control load … with the higher priority rank as specified in clause S8.1. Clause S8.1 does not rank the parties, rather it ranks functions. Our submission is that this Schedule needs to be revisited. It is important that the DDA recognises distributors' use of hot water control to prevent an emergency at distribution level in addition to its use by distributors in a grid emergency. To this end, distributors need to maintain adequate visibility and management of hot water.