

**Electricity Industry Participation (Managing Retailer
Default Situations) Code Amendment 2013**

Pursuant to section 38 of the Electricity Industry Act 2010, I
make the following amendments to the Electricity Industry
Participation Code 2010.

At Wellington on the 4th day of November 2013



Dr Thomas Brent Layton
Chairperson
Electricity Authority

Certified in order for signature:



Barbara Sole
Senior Legal Counsel
Electricity Authority
1 November 2013



Tony Dellow
Partner
Buddle Findlay
1 November 2013

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Amendment

1 Title

This is the Electricity Industry Participation (Managing Retailer Default Situations) Code Amendment 2013.

2 Commencement

This amendment comes into force on 16 December 2013.

3 Code amended

This amendment amends the Electricity Industry Participation Code 2010.

4 Clause 1.1 amended (Interpretation)

In clause 1.1(1), insert in its appropriate alphabetical order:

"serious financial breach—

"(a) means a failure by a retailer—

"(i) to pay to a distributor an amount due and owing that exceeds the greater of \$100,000 or 20% of the actual charges payable by the retailer for the previous month, unless the amount is genuinely disputed by the retailer; or

"(ii) to comply with the prudential requirements under a use-of-system agreement between the retailer and a distributor; but

"(b) does not include a failure by a retailer to comply with prudential requirements to the extent that the prudential requirements exceed what is permitted under clauses 12A.4 and 12A.5".

5 Clause 11.1 amended (Contents of this Part)

After clause 11.1(d), insert:

"(e) prescribes a process for dealing with retailer events of default."

6 New clauses 11.15B and 11.15C inserted

After clause 11.15A, insert:

"11.15B Retailer contracts with customers must permit assignment by Authority

"(1) Each retailer must at all times ensure that the terms of each contract under which a customer of the retailer purchases electricity from the retailer permit—

- "(a) the **Authority** to assign the rights and obligations of the **retailer** under the contract to another **retailer** if the **retailer** commits an **event of default**; and
- "(b) the terms of the assigned contract to be amended on such an assignment to—
 - "(i) the standard terms that the recipient **retailer** would normally have offered to the **customer** immediately before the **event of default** occurred; or
 - "(ii) such other terms that are more advantageous to the **customer** than the standard terms, as the recipient **retailer** and the **Authority** agree; and
- "(c) the terms of the assigned contract to be amended on such an assignment to include a minimum term in respect of which the **customer** must pay an amount for cancelling the contract before the expiry of the minimum term; and
- "(d) the **retailer** to provide information about the **customer** to the **Authority** and for the **Authority** to provide the information to another **retailer** if required under Schedule 11.5; and
- "(e) the **retailer** to assign the rights and obligations of the **retailer** to another **retailer**."
- "(2) The terms specified in subclause (1) must—
 - "(a) be expressed to be for the benefit of the **Authority** for the purposes of the Contracts (Privity) Act 1982; and
 - "(b) not be able to be amended without the consent of the **Authority**."
- "(3) This clause applies—
 - "(a) from 16 January 2014 to every **customer** contract entered into by a **retailer** after this clause comes into force; and
 - "(b) from 16 June 2014 to every **customer** contract entered into by a **retailer** before this clause comes into force."

"11.15C Process for retailer events of default

- "(1) This clause applies if the **Authority** is satisfied that a **retailer** has committed an **event of default** under paragraph (a) or (b) or (f) or (h) of clause 14.55.
- "(2) The **Authority** and each participant must comply with Schedule 11.5."

- 7 **New Schedule 11.5 inserted**
After Schedule 11.4, insert Schedule 11.5, which is set out in the Schedule to this amendment.
- 8 **Clause 14.55 amended (Definition of an event of default)**
After clause 14.55(g), insert:
"(h) termination of a **retailer's use-of-system agreement** with a **distributor** because of a **serious financial breach** if—
 "(i) the **retailer** continues to have a **customer** or **customers** on the **distributor's local network**; and
 "(ii) there are no unresolved disputes between the **retailer** and the **distributor** in relation to the termination; and
 "(iii) the **distributor** has not been able to remedy the situation in a reasonable time; and
 "(iv) the **distributor** gives notice to the **Authority** that this clause applies."
- 9 **Clause 14.57 amended (Procedure upon event of default)**
In clause 14.57(1), after "Upon an **event of default**", insert "under paragraphs (a) to (g) of clause 14.55".

New Schedule 11.5 inserted

"Schedule 11.5

cl 11.15C

"Process for retailer event of default**"1 Purpose**

The purpose of this Schedule is to set out the process that the **Authority** and each **participant** must comply with when a **retailer** commits an **event of default** under paragraph (a) or (b) or (f) or (h) of clause 14.55.

"2 Notice to retailer who has committed event of default

"(1) If a **retailer** ("defaulting **retailer**") commits an **event of default** under paragraph (a) or (b) or (f) or (h) of clause 14.55 the **Authority** must give notice to the defaulting **retailer** that—

"(a) the defaulting **retailer** must—

"(i) remedy the **event of default**; or

"(ii) assign its rights and obligations under every contract under which a **customer** of the defaulting **retailer** purchases **electricity** from the defaulting **retailer** to another **retailer**, and assign to another **retailer** all **ICPs** for which the defaulting **retailer** is recorded in the **registry** as being responsible; and

"(b) if the defaulting **retailer** does not comply with the requirements set out in paragraph (a) within 7 days of the notice, clause 4 will apply.

"(2) The **Authority** may require the defaulting **retailer** to provide to the **Authority**, within a time specified by the **Authority**, information about the defaulting **retailer's customers**.

"(3) The defaulting **retailer** must provide the information requested by the **Authority** under subclause (2) within the time specified by the **Authority**.

"3 Authority may require distributor and registry to provide information

"(1) The **Authority** may, by notice in writing to a **distributor** on whose **network** a defaulting **retailer** trades **electricity**, require the **distributor** to provide to the **Authority** the information about the defaulting **retailer's customers** specified in the notice (if the **distributor** holds the information), within the period specified in the notice.

- "(2) If the **distributor** holds the information, the **distributor** must provide the information requested by the **Authority** under subclause (1) within the time specified by the **Authority**.
- "(3) The **Authority** may, by notice in writing to the **registry**, require the **registry** to provide to the **Authority** information about **ICPs** for which the defaulting **retailer** is recorded in the **registry** as being responsible, within the period specified in the notice.
- "(4) The **registry** must provide the information requested by the **Authority** under subclause (3) within the time specified by the **Authority**.

"4 Failure to remedy event of default

- "(1) This clause applies if—
 - "(a) 7 days have elapsed since the defaulting **retailer** was given notice under clause 2(1); and
 - "(b) the **Authority** considers that—
 - "(i) the defaulting **retailer** has not remedied the **event of default** or, in the case of an **event of default** under clause 14.55(b) in respect of which there is an unresolved invoice dispute under clause 14.64, has not reached an agreement with the **Authority** to resolve the **event of default**; and
 - "(ii) the defaulting **retailer** still has 1 or more contracts under which a **customer** of the defaulting **retailer** purchases **electricity** from the defaulting **retailer** or is still recorded in the **registry** as being responsible for 1 or more **ICPs**.
- "(2) The **Authority** must—
 - "(a) give notice to the defaulting **retailer** that the **Authority** considers that this clause applies; and
 - "(b) attempt to advise **customers** of the defaulting **retailer** that—
 - "(i) the defaulting **retailer** has committed an **event of default**; and
 - (ii) the **customer** should enter into a contract for the purchase of **electricity** with another **retailer** within 7 days; and
 - (iii) if the **customer** fails to enter into a contract with another **retailer**, the **Authority** may assign the defaulting **retailer's** rights and obligations under the **customer's** contract with the defaulting **retailer** to another **retailer** under clause 5.

- "(3) The **Authority** may, by notice to the **registry**, direct the **registry** not to—
 - "(a) complete the switch of any **ICP** to the defaulting **retailer**; or
 - "(b) accept a request from the defaulting **retailer** to withdraw a switch under clauses 17 and 18 of Schedule 11.3.
 - "(4) If the **Authority** gives notice under subclause (3), the **registry** must not—
 - "(a) complete the switch of any **ICP** to the defaulting **retailer**; or
 - "(b) accept a request from the defaulting **retailer** to withdraw a switch under clauses 17 and 18 of Schedule 11.3.
- "5 Authority may assign contracts**
- "(1) This clause applies if, by the end of the 17th day after the defaulting **retailer** was given notice under clause 2(1),—
 - "(a) the defaulting **retailer** has not remedied the **event of default** or, in the case of an **event of default** under clause 14.55(b) in respect of which there is an unresolved invoice dispute under clause 14.64, has not reached an agreement with the **Authority** to resolve the **event of default**; and
 - "(b) the defaulting **retailer** continues to have 1 or more contracts under which a **customer** of the defaulting **retailer** purchases **electricity** from the defaulting **retailer** or is still recorded in the **registry** as being responsible for 1 or more **ICPs**.
 - "(2) The **Authority** may—
 - "(a) exercise its right under a contract under which a **customer** purchases **electricity** from the defaulting **retailer** to assign the rights and obligations of the defaulting **retailer** under the contract to a recipient **retailer** in accordance with the contract;
 - "(b) assign an **ICP** to a recipient **retailer** and direct the **registry** to amend the record in the **registry** so that the recipient **retailer** is recorded as being responsible for the **ICP**; and
 - "(c) specify the recipient **retailer** to whom the rights and obligations under the contract or the **ICP** will be assigned.
 - "(3) The **Authority** must, by notice in writing to each recipient **retailer**, direct the recipient **retailer** to accept an assignment under subclause (2).
 - "(4) Before the **Authority** gives notice to a recipient **retailer** under subclause (3), the **Authority** may

decide not to assign rights and obligations of the defaulting **retailer** under a contract or an **ICP** to a recipient **retailer** if the recipient **retailer** satisfies the **Authority** that the assignment would pose a serious threat to the financial viability of the recipient **retailer**.

- "(5) A recipient **retailer** must comply with a direction given to it under subclause (3).
- "(6) The **registry** must comply with a direction given to it under subclause (2).
- "(7) Before the **Authority** exercises its right to assign rights and obligations or an **ICP** under subclause (2), the **Authority** must, if the **Authority** considers it is practicable, consult with the defaulting **retailer** as to the need for the notice.
- "(8) Nothing in this clause prevents the **Authority** from deciding to give a notice under subclause (3) to 1 or more recipient **retailers** by undertaking a tender or other competitive process.

"6 Authority must provide information to recipient retailer

If the **Authority** exercises its right to assign rights and obligations or an **ICP** under clause 5(2), the **Authority** must provide the following information to each recipient **retailer**:

- "(a) the number of **customer** contracts (to the extent that the **Authority** has the information) and **ICPs** assigned to the **retailer**; and
- "(b) any information that the **Authority** holds about the **customers** and **ICPs** assigned to the **retailer**.

"7 Registry may complete switch without required information

If the **Authority** gives notice under clause 2, the **registry** may complete the switch of any **ICP** for which the defaulting **retailer** is recorded in the **registry** as being responsible even if the defaulting **retailer** has not complied with its obligations under Schedule 11.3.

"8 Terms of assigned contract

- "(1) If the **Authority** exercises its right to assign rights and obligations under clause 5(2), the **Authority** must attempt to advise the **customer** that the terms of the contract may be amended on assignment.
- "(2) The recipient **retailer** must use reasonable endeavours to advise the **customer** of those terms."

Explanatory Note

This note is not part of the Code amendment, but is intended to indicate its general effect.

This amendment to the Electricity Industry Participation Code 2010 comes into effect on 16 December 2013. This amendment enables the Authority to resolve a default situation when a retailer becomes insolvent or otherwise rapidly exits the market and is unable to supply its customers.

Date of notification in the *Gazette*: 7 November 2013