Code amendment proposal: Default Distributor Agreement

Consultation

Submissions close: 5pm 15 October 2019

20 August 2019

Table of Contents

Executive Summary

We are proposing a default agreement for distribution services

Following an investigation into problems with how distributors and retailers enter into contracts for distribution services, we propose introducing a default agreement.

Retailers and distributors negotiate contracts for distribution services

Retailers use a distributor's network to on-sell electricity to consumers such as households and businesses.

The contract that governs the relationship between the distributor and retailer is called a Use-of-System Agreement (UoSA). UoSAs are formed through negotiation, subject to specific requirements set out in the Electricity Industry Act 2010 (Act) and the Electricity Industry Participation Code (Code).

We propose a default agreement that distributors and retailers may use

We are proposing to change the way participants will contract for distribution services, by introducing a default distributor agreement (DDA).

The DDA will provide a starting point and backstop agreement for negotiations about network access between distributors and retailers.

The proposed amendments to Part 12A will require distributors and retailers to replace their existing UoSAs with distributor agreements. We propose a managed rollout of these changes to minimise disruption to the industry.

We propose introducing a DDA for distribution services that is deemed to apply if:

- parties fail to negotiate their own agreements
- negotiations are taking longer than necessary, or
- one party prefers to contract under the DDA.

Distributors and retailers can mutually agree to replace their default agreement with a negotiated agreement at a future time.

We also propose including a default data sharing agreement (data template) in Part 12A of the Code. Access to data has been an ongoing concern for industry participants. The data template provides the distributor with access to the historical consumption data it needs to fulfil the distribution service, and provides the retailer with assurances regarding how the distributor will store and use the data.

The proposal is forward-looking

The electricity industry is rapidly changing in response to innovation in technology and business models.

We propose making Part 12A of the Code participant-neutral. This will make the Code more forward-looking and future-proofed for innovation.

We recognise that the distribution services will change over time and contracts for distribution services need to adapt to reflect the changing environment. The number and type of participants using distributors' networks will increase and evolve over time too. These network users may need

to contract with the distributor for use of its network, or contract to provide services to, or receive services from, the distributor.

The proposal will deliver net benefits to consumers

We have conducted a cost-benefit analysis of the proposed amendments to Part 12A including the DDA template. We believe the proposal will deliver net benefits to New Zealand's electricity consumers. Specifically:

- **Lower cost and effort required to negotiate contracts.** We estimate that having the DDA template available will reduce the total cost of negotiating contracts by $1.1 million to $1.3 million per year across the industry. It will also reduce cost and effort required to negotiate contracts, which are preventing retailers entering and expanding into new networks.
- **Improved competition in the retail market.** We would require distributors to develop a DDA based on the DDA template provided by the Authority, and ensure that retailers are not required to agree to other collateral terms. These changes create a more equal bargaining position between retailers and distributors. Retailers can compete within and across networks on a level playing field. The proposed changes to Part 12A will also increase transparency in the negotiation process.
- **Improved competition in the emerging related-services markets.** Requiring distributors to develop and offer a DDA will help to provide a level playing field for participants to compete for newly contestable services on equal terms. This allows participants to take advantage of innovation in technology and business models. It also helps to ensure that the most competitive and efficient party can compete to provide the emerging service in the market.

The key is a neutral Part 12A and a default agreement

We are proposing to amend the Code to introduce:

- a *neutral* Part 12A which:
    - will regulate contracts between distributors and retailers operating on an interposed basis[1]
    - provides a neutral framework for regulating arrangements between distributors and network users who are participants
    - provides default terms for some additional services which can be appended to distributor agreements.
- a DDA template for interposed contracts for distribution services, that:
    - regulates the relationship between distributors and retailers
    - includes core terms for distribution services that must be included in a distributor's DDA
    - includes drafting requirements for operational terms that must be included in a distributor's DDA
    - provides for a new category of terms called recorded terms, to avoid regulating matters that may fall within the jurisdiction of the Commerce Commission (Commission) under Part 4 of the Commerce Act 1986 (Commerce Act).

[1] Under interposed arrangements, a consumer contracts with a retailer (trader) for electricity delivered to the consumer's premises. That trader contracts with the local distributor for distribution services. Distribution services deliver electricity to each consumer.

We do not propose to prohibit the inclusion of any terms in the distributor's DDAs and distributor agreements (collateral terms) relating to matters not addressed in the DDA template. However, we propose to introduce safeguards to ensure that any collateral terms included in distributor agreements are agreed by both parties.

We would monitor the terms being included in distributor agreements. If we identify terms that compromise our statutory objective we may take steps to amend the Code to prohibit them at a later stage.

We have also provided some guidance on how distributors develop their DDA, how to enter into a contract based on a DDA and what happens to existing UoSAs.

The DDA is designed to act as a backstop agreement. Distributors would be responsible for developing operational terms for their DDA, based on the drafting requirements set out in the DDA template.

A distributor's DDA (with any recorded terms added by the distributor and without any collateral terms objected to by the retailer) would be the contract deemed to apply between a distributor and a retailer, unless there is an alternative agreement in place.

We have made significant drafting changes to the DDA template and the proposed Part 12A based on submissions on the proposal outlined in the January 2016 DDA consultation paper.

The DDA has been subject to legal challenges

The Authority's ability to introduce the DDA template has been legally challenged and a declaratory judgement was sought. We respect the desire for more clarification on the Authority's jurisdiction.

Ultimately, the rulings have provided greater clarity on the Authority's ability to introduce the DDA.

The current drafts of the DDA template, Part 12A of the Code, and consultation paper have been revised to ensure consistency with these decisions.

We want your input

We are interested in your views on the revised neutral Part 12A of the Code and the DDA template proposal.

Your comments will inform further development on the neutral Part 12A, the DDA template and contracts for distribution services. This may result in one or more matters being developed for further consideration.

Glossary

Term	Definition
Act	Electricity Industry Act 2010
Additional services	Services which are not related to the provision of the distribution services. For example, exchange of consumer information. Through Part 12A, terms and conditions which relate to additional services and are not part of a distributor's DDA, but can be appended to a distributor agreement
Alternative agreement	A mutually agreed contract for distribution services, by the distributor and retailer, which includes terms that are different from those in the distributor's DDA
Authority	Electricity Authority
Code	Electricity Industry Participation Code 2010
Collateral terms	A term in a distributor's DDA that is not a core term, operational term, recorded term, or default term for an additional service
Commerce Act	Commerce Act 1986
Commission	Commerce Commission
Core terms	Terms which are set out in the DDA template and must be included in a distributor's DDA
DDA	A Default Distributor Agreement published by each distributor
DDA template	A template set out in the Code and used by each distributor to develop their own DDA
Distribution	The conveyance of electricity on lines which are not part of the national grid. This is the regulated and primary service a distributor provides
Distributor agreement	Any agreement between a distributor and another participant (a network user)
ICP	Installation Control Point
MUoSA	Model Use-of-System Agreement. This is the benchmark 'model' UoSA which was published by the Authority in 2012
Operational terms	Terms that must be included in a distributor's DDA and must meet requirements specified in the DDA template, but which reflect a distributor's local practices and policies. These must be drafted by the distributor and are subject to consultation and, if requested by a submitter, review by the Rulings Panel
Recorded terms	A placeholder for recording terms which may fall outside of our jurisdiction and that distributors are not required to be included in the published versions of their DDAs, but may be required as part of a whole distributor agreement

Term	Definition
Related services	Services related to and are provided alongside distribution services but which are not, themselves, part of distribution services. Related services include activities that can support the transport of electricity at the transmission or distribution level, such as voltage support, reserve generation, and demand response.
UoSA	A use-of-system agreement. This is the bi-laterally negotiated contract which contains the terms and conditions for the distribution service.

1 We are reviewing regulation relating to contracts for distribution services

Section summary

We are consulting on our revised proposal to amend Part 12A of the Code to require distributors to develop and publish a DDA for distribution services on their network.

We have carefully considered participants' responses to the 2016 DDA consultation paper.

We are seeking your feedback on our revisions.

We are reviewing Code provisions that regulate UoSAs between distributors and retailers for distribution services

1.1 A UoSA is an agreement between an electricity distributor and a retailer that records the terms and conditions on which the distributor provides a distribution service to the retailer.

1.2 The current Part 12A of the Code regulates UoSAs between electricity retailers and distributors. Part 12A requires both parties enter into good faith negotiations to: 1) enable a retailer to access and supply consumers on the distributor's network, and 2) for the distributor to transport electricity to the retailer's consumers (the distribution service).

1.3 We are proposing to change the way participants will contract for distribution services by introducing a more standardised agreement, called the DDA. The DDA will provide a starting point and backstop agreement for negotiations about network access between distributors and retailers.

1.4 The purpose of this paper is to obtain comment on our revised proposal to amend Part 12A of the Code to create a neutral Part 12A and introduce a DDA template.[2] We have made significant drafting changes based on:

(a) submissions to the 2016 DDA consultation

(b) changes to the electricity industry from innovations in technology and business models

(c) recent developments regarding competition concerns we have identified.

1.5 We are consulting on a proposal to:

(a) create a *neutral* Part 12A of the Code that will:

(i) regulate contracts between distributors and retailers operating on an interposed basis by introducing a DDA template

(ii) introduce more transparency into the contract formation and negotiation process

(iii) provide default terms for some additional services which can be appended to a distributor agreement

[2] See *Default agreement for distribution services,* 26 January 2016. Available at: https://www.ea.govt.nz/dmsdocument/20343

(iv) enable retailers to gain access to a distributor's network on the basis of the types of terms contemplated in the DDA template and the default terms for additional services provided for in the Code, without being forced to agree to collateral terms.

(b) update the proposed DDA template:

(i) based on stakeholder feedback

(ii) to introduce a new class of terms called recorded terms.

1.6 We propose to introduce safeguards to ensure that any other collateral terms included in distributor agreements have been agreed by both parties. We will also monitor the types of terms being included in distributor agreements. If we identify terms that compromise our objectives of promoting competition in the electricity industry, the reliable supply of electricity to consumers, or the efficient operation of the electricity industry, we may take steps to amend the Code to prohibit terms of concern at a later stage.

1.7 We have also provided extra guidance on how distributors develop their DDAs, how participants enter into a contract based on a DDA and what happens to existing UoSAs.

1.8 We consider that the revised Part 12A and proposed DDA template will better promote competition in, and efficient operation of the electricity industry, for the long-term benefit of consumers.

How to make a submission

1.9 We prefer to receive submissions in electronic format (Microsoft Word) in the format shown in Appendix A. Submissions in electronic form should be emailed to submissions@ea.govt.nz with 'Consultation Paper – Default Distributor Agreement' in the subject line.

1.10 If you cannot send your submission electronically, post one hard copy of the submission to either of the addresses provided below, or you can fax it to 04 460 8879. You can call 04 460 8860 if you have any questions.

Postal address

Submissions
Electricity Authority
PO Box 10041
Wellington 6143

Physical address

Submissions
Electricity Authority
Level 7, ASB Bank Tower
2 Hunter Street
Wellington

1.11 Submissions should be received by 5pm 15 October 2019. Please note that late submissions may not be considered.

1.12 We will acknowledge receipt of all submissions electronically. Please contact the Submissions' Administrator (email submissions@ea.govt.nz) if you do not receive electronic acknowledgement of your submission within two business days.

1.13 Please note we want to publish all submissions we receive. If you consider that we should not publish any part of your submission, please indicate which part, set out the reasons why you consider we should not publish it. Please also provide a version of your submission that we can publish (if we agree not to publish your full submission).

1.14 If you indicate there is part of your submission that should not be published, we will discuss it with you before deciding whether to not publish that part of your submission.

1.15 However, please note that all submissions we receive, including any parts that we may not publish, can be requested under the Official Information Act 1982. This means we would be required to release them unless good reason existed under the Official Information Act to withhold them. We would normally consult with you before releasing any material that you said should not be published.

2 UoSAs are negotiated contracts for distribution services

Section summary

A UoSA is an agreement between a distributor and a retailer that contains the negotiated terms and conditions for the distribution service. The distribution service allows the retailer to use the distributor's network.

Since 2003, both distributors and retailers have raised concerns with the UoSA negotiation process and poor transparency of contracts.

We published a Model Use-of-System Agreement (MUoSA) in 2012 as a voluntary measure to address problems with contract negotiation. A post-implementation review found that the MUoSA initiative was not successful.

We consulted on several options to address the problems raised by industry participants. We concluded that a DDA-style approach was the best solution. In 2016, we proposed introducing a DDA template through Part 12A of the Code.

A contract between distributors and retailers for distribution services

2.1 The distribution service is the primary service a retailer wants from a distributor. The distribution service transports electricity from one place to another on lines that are not part of the national grid.

2.2 The distribution service is provided to the retailer by the local distributor. Distributors own and/or operate local electricity distribution networks (local networks). It is the distributor's responsibility to build, maintain and operate the lines, cables and substations (the physical infrastructure). These activities are called line function services.

2.3 A retailer who supplies, or wants to supply, electricity to customers must enter into an agreement for distribution services with the local distributor.[3] The agreement is called a UoSA. It sets out the terms and conditions for the exchange of the distribution service and includes each party's rights and obligations.

2.4 Generally, each UoSA contains terms and conditions about:

(a) processes and operational clauses

(b) rights and obligations of each party

(c) standards of services to be delivered

(d) remedies for breaches

(e) how the retailer pays for the services received.

2.5 Distributors sometimes include some non-distribution services in the UoSA. These services may be part of the distribution or line function services. Examples include:

(a) **Related services.** Related services include activities that can support the transport of electricity at the transmission or distribution level, such as voltage support, reserve generation and demand response (see Figure 1).[4] They are services related to and

[3] Trading involves purchasing electricity from suppliers and selling it to customers, including consumers.

[4] Contestable services include services that were part of a distributors' natural monopoly that can now be offered by third parties.

are provided alongside the distribution service but are not, themselves, part of distribution service.

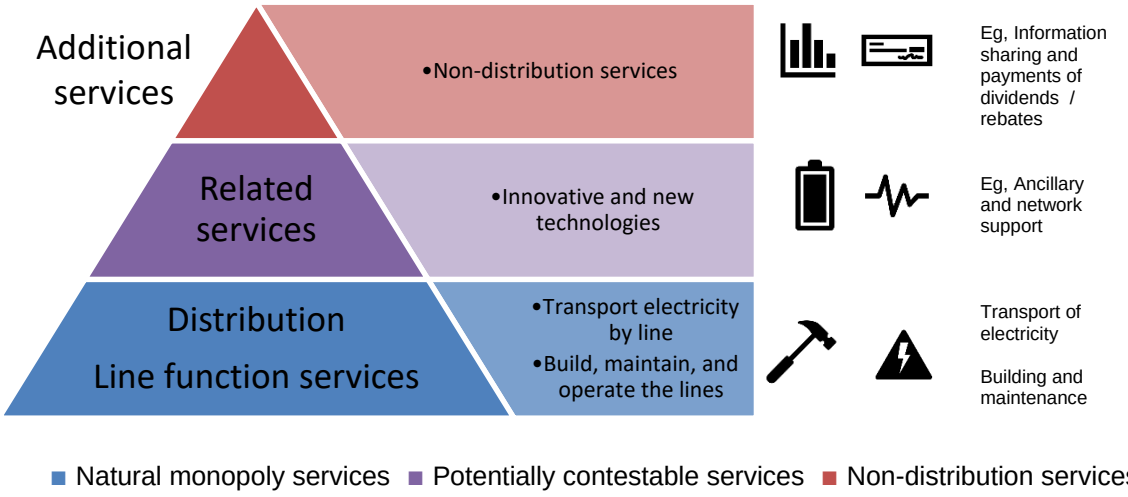
(b) **Additional services.** Services which are not related to the provision of the distribution service. Examples include:

(i) controlling load on the network for non-system emergency events (eg, participating in the wholesale market)

(ii) sharing information (eg, data to assist network investment)

(iii) requiring retailers to pay dividends on behalf of a trust that owns shares in the distributor (eg, dividend rebates).

Figure 1: The three levels of services included in a UoSA



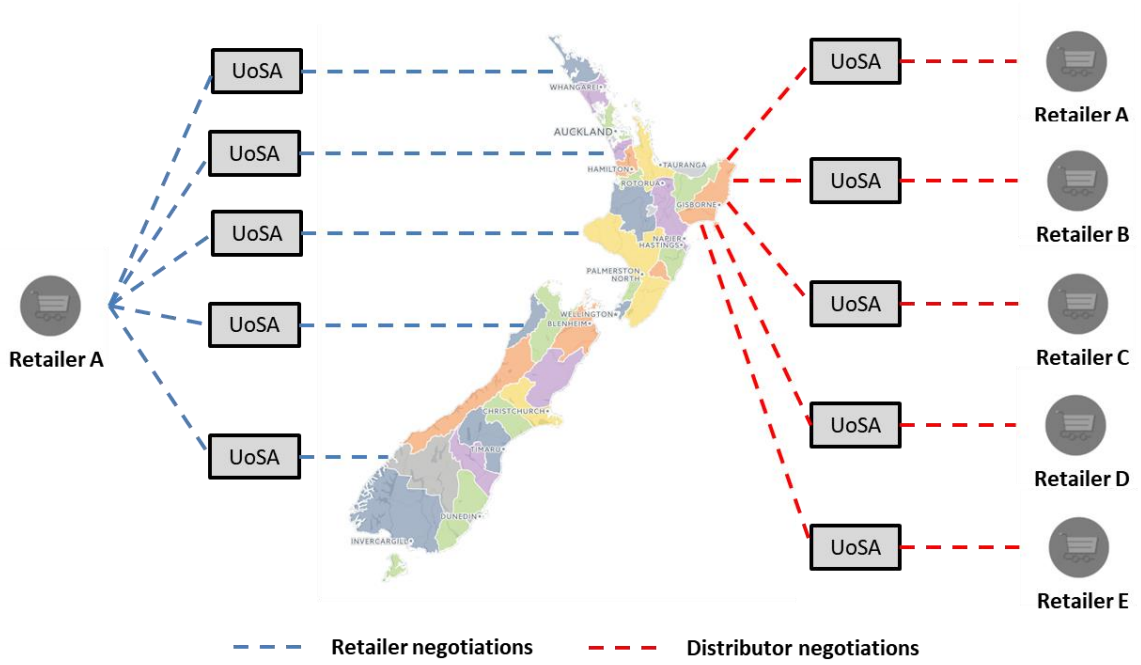
Source: Electricity Authority

2.6 Advancement in technologies and business models means that some of the non-distribution services (related services and additional services) can be competed for and provided by third-party companies. For example, a third party that has installed household batteries can provide network support, and related services, to the local distributor. Equally, a retailer or third party who has obtained the right to control part of the consumer's load could contract with the distributor to reduce load during periods of system stress.

At least 451 UoSAs are in place today

2.7 Our conservative estimate is that there are around 451 UoSAs in existence today (see paragraph 5.23). A retailer must negotiate a UoSA with every distributor on whose network it wants to trade. This means that a retailer who wants to trade on all 29 local networks must negotiate 29 separate UoSAs (see blue lines of Figure 2). Similarly, a distributor must negotiate a UoSA with every retailer on its network (see red lines of Figure 2).

Figure 2: Retailers and distributors must negotiate multiple UoSAs



Source: Electricity Networks Association

Notes:
1. Blue lines represent a retailer's negotiation.
2. Red lines represent a distributor's negotiation.

The solutions we put forward have not been taken up

2.8 Since 2003, distributors and retailers have raised concerns about negotiating UoSAs. Many believed that the process created higher-than-necessary transaction costs. Some were concerned that the terms of the agreements were hindering competition by preventing retailers from entering the market or expanding.

2.9 We published two types of MUoSAs in 2012,[5,6] building on work done by the former Electricity Commission and self-governing industry body since 2003.[7] A detailed development roadmap is provided in Appendix B of this consultation paper.

2.10 The MUoSA provided a 'benchmark' agreement for distribution services. The MUoSA was initially designed as a voluntary, industry-led market facilitation measure to address problems with contract negotiation. The MUoSA was developed in tandem with mandatory Code-based measures (ie, the introduction of Part 12A) to address problems with specific aspects and provisions of the contract.

2.11 We expected industry participants to engage with and use the MUoSAs. We said we would monitor voluntary uptake and would undertake further work if necessary. Our expectations included:

---

5 The Authority initially carried out a project on more standardisation of UoSAs as required by section 42(2)(f) of the Electricity Industry Act 2010.

6 We published two versions of the MUoSA. One for conveyance-only agreements, and one for interposed agreements. The DDA template builds on the interposed MUoSA.

7 The industry body was called the Metering and Reconciliation Information Agreement (MARIA). MARIA one of three self-regulating arrangements developed in the 1990s. MARIA was established 1994, the New Zealand Electricity Market (NZEM) in 1996, and the Multilateral Agreement on Common Quality Standards (MACQS) in 1999.

(a) no amendment to core terms and conditions provided in the MUoSA, given the extensive consultation that had occurred in the development process

(b) only some redrafting of operational terms to reflect local practices and policies and clearly highlighting any amendments, if any

(c) significant levels of engagement between existing and new distributor/retailer counterparties

(d) voluntary publication of more information on websites

(e) evidence of developing more standardised UoSAs.

2.12 Our expectations were not met. We conducted a post-implementation review of MUoSA uptake in May 2013. We found that:

(a) distributors were offering significantly amended versions of the MUoSA for negotiation with retailers

(b) retailers refused to negotiate with distributors that offered contracts closely aligned with the MUoSA and

(c) there was relatively little evidence of developing new UoSAs in most distribution networks.

2.13 Based on behaviours we observed, we concluded a voluntary regime is unlikely to be successful in achieving the MUoSA objectives. We consider that these outcomes are likely to have a material adverse impact on efficiency and competition.

2.14 In April 2014, we published a consultation paper which discussed the issues with UoSA formation. We also examined several options to address the problems.[8]

2.15 Some submissions in the 2014 consultation stated that we had not given enough time to implement the MUoSA. However, we reviewed distributors' websites again (in 2018) and found distributors are still offering contracts materially different from the MUoSA. We found:

(a) only two distributors published a contract clearly labelled as "Based on the NZ Electricity Authority's Model UoSA of September 2012" and contained MUoSA terms and conditions

(b) three distributors published an alternative document, such as a connection agreement or distribution agreement

(c) 18 distributors published their own UoSA or standardised agreements.[9]

2.16 In 2016, we proposed the DDA template, a template that provides consistent terms and conditions for distribution services provided on an interposed basis. We proposed that distributors would be required to develop their own DDAs based on our DDA template. Once developed, a distributor's DDA would be deemed to apply as a binding contract between a distributor and a retailer unless they agree to contract under alternative terms and conditions.

2.17 We have now updated the proposed DDA template based on submissions from the 2016 consultation (see Section 4 of this paper).

---

8 See *More standardisation of use-of-system agreements*, 8 April 2014 available at: https://www.ea.govt.nz/dmsdocument/17874

9 See *More standardisation of UoSAs – consultation paper. Summary of submissions*, 14 November 2014. Available at: https://www.ea.govt.nz/dmsdocument/18713

3 UoSAs can and do increase transaction costs and inhibit competition

Section summary

The need for multiple, individually negotiated UoSAs creates three main problems:

- **They generate higher-than-necessary costs.** UoSAs are complex and costly agreements but the underlying distribution service is essentially the same throughout New Zealand. Higher-than-necessary costs and the need to negotiate multiple UoSAs make it harder for retailers to enter the market or expand across local networks. A more efficient UoSA process should mean more long-term benefits for consumers.
- **They limit retail competition.** Distributors can have the stronger bargaining position and shift risks and costs onto retailers. This can prevent retailers from entering networks or competing effectively on them. Conversely, retailers can inhibit competition and innovation on local networks by refusing to renegotiate 'evergreen' legacy UoSAs.
- **They limit competition in contestable services.** Some distributors' terms and conditions favour themselves or their affiliates for contestable services. The presence of the distributor or its affiliates in these markets inhibits workable competition and can prevent other providers from offering innovative products and services.

Higher-than-necessary costs and effort create problems

3.1 The way distributors and retailers currently negotiate and maintain UoSAs produces higher-than-necessary transaction costs. These costs break down into two categories:

(a) incremental costs associated with negotiating, or renegotiating, each UoSA

(b) costs associated with the duplication of effort required to undertake multiple negotiations.

3.2 These costs are borne by the end consumer—the ultimate recipient of the distribution services. We want to ensure the costs of the negotiation process are not higher than necessary.

The cost of negotiating each UoSA is higher than necessary

3.3 Both distributors and retailers incur incremental costs for time spent drafting, reviewing, negotiating, amending, approving and implementing UoSAs.

3.4 Higher-than-necessary costs for negotiating each UoSA is a problem because participants spend more capital than necessary during the negotiation process. This capital could be used to develop products and services that consumers value and deliver more productive capacity for New Zealand.

There is an unnecessary duplication of effort

3.5 We are also concerned that there is an unnecessary duplication of effort, for both distributors and retailers, when retailers seek to expand into new networks.

3.6 The underlying distribution service sought is essentially the same throughout New Zealand. However, under Part 12A of the Code, a retailer and distributor must enter into a good-faith negotiation each time a retailer seeks to trade on a new local network.

3.7 Participants have submitted that the duplication of effort results in higher-than-necessary costs for negotiating UoSAs and that more standardisation could result in significant efficiency gains and cost reductions.[10]

3.8 We call the cost of negotiating each UoSA required to expand into a new network the 'expansion cost'.

3.9 These negotiations can be expensive because:

(a) each party brings a variety of requirements to the negotiation

(b) each distributor may offer materially different contractual terms for the distribution service, which must be reviewed.

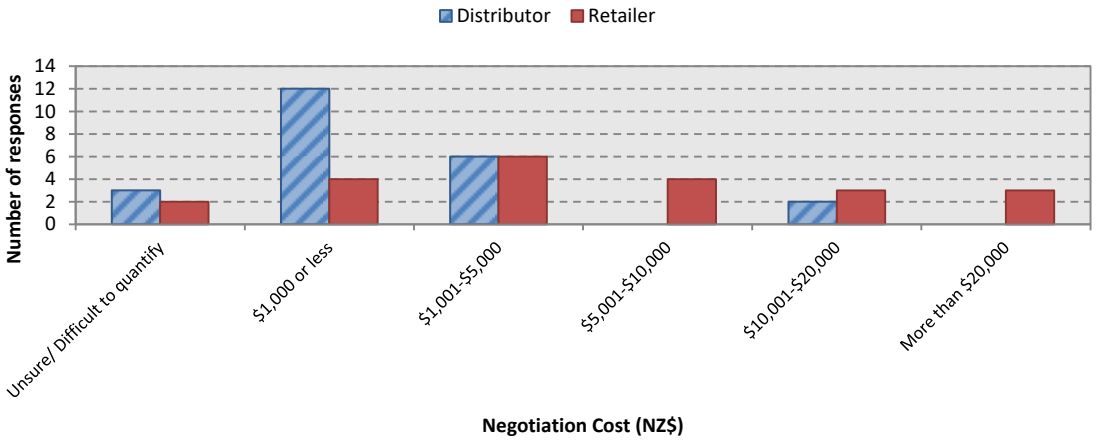
We surveyed the cost of negotiating UoSAs

3.10 In 2018, we surveyed 22 retailers and 23 distributors. We asked questions about the average cost of negotiating each UoSA (see Figure 3). The findings show that the cost of negotiating UoSAs is generally more expensive for retailers:

(a) Almost all distributors (18 of 23) spend less than $5,000 on negotiating each UoSA; 12 of whom spend under $1,000

(b) Almost half the retailers (10 of 22) spend more than $5,000 negotiating each UoSA, with some retailers saying the cost can be up to $150,000.

Figure 3: Retailers typically spend more than distributors negotiating each UoSA



Source: Electricity Authority

Notes: 1. Data taken from DDA survey 2018

3.11 Opinions on both the cost and effort of negotiating UoSAs were very different between distributors and retailers.

The cost of negotiating UoSAs is low for distributors

3.12 Distributors generally consider the cost of negotiating a UoSA to be inexpensive and the effort required to be minimal. Distributors submitted that:

(a) UoSAs can be accepted by distributors and retailers for little to no cost, and any costs are purely administrative (estimated to be about $500)

[10] See *More standardisation of UoSAs – consultation paper. Summary of submissions*, 14 November 2014. Available at: https://www.ea.govt.nz/dmsdocument/18713

(b) they estimate a retailer's cost of negotiating a UoSA is between $1,000 to $2,000. Only some negotiations will exceed $10,000

(c) they already offer a standardised UoSA to retailers

(d) they have not found it difficult to negotiate in good faith with retailers

(e) retailers accept UoSAs offered today.

Retailers generally thought UoSAs were more expensive than necessary

3.13 Retailers submitted that the UoSA process is unnecessarily expensive and time-consuming. Retailers submitted:

(a) negotiations require significant cost, time and effort because negotiations are longer and more expensive than necessary

(b) negotiating a bespoke UoSA can cost up to $150,000

(c) negotiation costs are low only when the retailer chooses not to negotiate UoSAs with the distributor. This occurs when retailers perceive themselves to have little bargaining power so it is fruitless trying to negotiate with the distributor

(d) distributors offer retailers in similar circumstances materially different UoSAs. These bespoke UoSAs require business and legal review and additional rounds of negotiation, which increases the cost of negotiating the UoSA

(e) the negotiation process is slow, dated and cumbersome. One retailer submitted that it took six weeks for a distributor to return a signed agreement. Another retailer went through a two-year negotiation process.

Unequal bargaining positions can inhibit competition and innovation

3.14 Some aspects of UoSA formation remain controversial, especially when one participant is perceived to use their bargaining power to obtain better terms. We call this practice unequal bargaining.

3.15 The use of bargaining power in this way can inhibit competition and the deployment of innovative and new technology and business models. This does not promote long-term benefits of consumers as it limits choice and blocks access to the value these technologies could bring to the industry.

Distributors are adopting a 'take-it-or-leave-it' stance in negotiations

3.16 We have received submissions that distributors are adopting a 'take-it-or-leave-it' stance when it comes to UoSA negotiations. This can inhibit competition and efficiency by limiting the ability of retailers to enter and expand across networks.

3.17 Distributors are said to be including terms and conditions in contracts which favour themselves above retailers. As the sole provider of distribution services on each network, no other party can grant a retailer access to the network to trade.

3.18 Retailers must spend valuable resources trying to negotiate better terms with the distributor or accept most or all of the distributor's terms. For a retailer, the economic cost of trying to renegotiate the contract is disproportionately high, with no guarantee of a successful outcome.

3.19 If the retailer refuses or spends time renegotiating, a more compliant retailer has a better chance of supplying the installation control points (ICPs). As the only option available in the

region, retailers are forced to accept the agreement offered or not trade on the local network.[11]

3.20 We seek to promote competition by improving the terms and conditions in the UoSA and limiting the ability to include unnecessary terms are in the contract for distribution services. We want to make sure that UoSAs allocate costs and risks to the participants who are best placed to handle them.

Distributors are shifting more cost and risk onto retailers through UoSAs

3.21 We received comments in the 2014 MUoSA and 2016 DDA consultations that some distributors include terms in UoSAs which allocate costs and risk in a way that is not fairly balanced. More risk and cost are being shifted to the least appropriate party.[12] Examples of these behaviours include:

(a) **Distributors have introduced prudential requirements beyond those in the Code**. Part 12A of the Code includes a set of UoSA prudential and additional security requirements. Some distributors write UoSAs which include many more onerous requirements on incumbent and entrant retailers. This limits competition by reducing a retailer's ability to seek access to the network and the incentive to do so.

(b) **Distributors are inappropriately limiting their liability.** Distributors limit their obligations and liabilities by applying a liberal interpretation of Good Electricity Industry Practice (GEIP). GEIPs put a lower threshold of responsibility on distributors compared with the Code. GEIP should be used where appropriate and not excessively because shifts unnecessary risk onto the retailer.

(c) **Distributors are applying clauses in ways they were not intended to be applied.** Retailers have raised concerns that distributors are applying force majeure clauses in ways they were not intended to be applied. The clauses were designed to suspend distributors' obligations under the agreement in events that were not reasonably foreseeable, such as a natural disaster. Retailers have raised concerns that distributors invoke these clauses for reasonably foreseeable events, such as common storm events, placing more risk and liability on the retailer.

3.22 Distributors are also creating unequal network access arrangements by offering retailers in similar circumstances materially different terms and conditions.[13] This does not promote competition, because it means retailers are not competing on a level playing field. For example:

(a) **Distributors are placing more onerous terms on entrant retailers.** Clause 12A.5(2) of the Code states that the total value of all security (prudential plus any additional security) must not exceed reasonable estimates of charges over any 2-month period. However, some distributors' UoSAs contain wording which states the value of security must cover the first 6 months of the agreement. One retailer states they have $12,000 tied up for every 100 customers on the network and do not know when this requirement will be lifted.[14]

---

11 See DDA survey 2018 – Retailers. Available at: https://www.ea.govt.nz/dmsdocument/25536-dda-research-report-2018

12 See *More standardisation of UoSAs – consultation paper. Summary of submissions*, 14 November 2014. Available at: https://www.ea.govt.nz/dmsdocument/18713; *Default Agreement for Distribution Services – Summary of Submissions*, 20 December 2016. Available at: https://www.ea.govt.nz/dmsdocument/21611

13 See DDA survey 2018 – Retailers. Available at: [DDA SURVEY WILL BE UPLOADED TO WEBSITE]

14 See DDA survey 2018 – Retailers, Question 23. Available at: [DDA SURVEY WILL BE UPLOADED TO WEBSITE]

(b) **There is poor transparency in the negotiation process.** Poor transparency in the negotiation process means an entrant or expanding retailer cannot see the range of terms and conditions available for negotiation with the distributor. This 'information asymmetry' puts a retailer at a negotiating disadvantage. Entrant retailers, who would normally be competitive, may be placed at an artificial disadvantage because an incumbent retailer may have better terms and conditions. This can lead to poor investment decisions as economic opportunities are misevaluated. Distributors sometimes offer even-handedness provisions to retailers, but these provisions are difficult to enforce or verify.[15]

Retailers with legacy UoSAs can refuse to renegotiate

3.23 In submissions distributors expressed concern that retailers are inhibiting innovation by refusing to renegotiate legacy UoSAs.[16] Legacy UoSAs are 'evergreen' contracts which do not expire.

3.24 The electricity industry is changing rapidly, and UoSAs provide a platform for industry participants to bring to market innovative and new technologies and business models. UoSAs need to reflect the evolving sector.

Legacy UoSAs inhibit distributors operations

3.25 The perpetual nature of these agreements means the distributor cannot update them without the retailer's agreement. Legacy UoSAs can lock in a potentially historical interpretation of distribution and additional services.

3.26 Distributors have provided examples in response to our:

(a) **2014 MUoSA consultation**. A distributor informed us some retailers on its local network refuse to engage in contract renegotiations when the retailers see no individual benefit of moving towards a new UoSA. This includes instances where the distributor has made an effort to move towards a more transparent and open negotiation process. The distributor had also followed our guidance in developing a more competitive and efficient UoSA.

(b) **2018 DDA Survey**. Comments include:

(i) Distributors' wanted a mechanism to encourage retailers on legacy UoSAs to update their contractual arrangements with distributors.

(ii) Thirteen distributors reported trying to renegotiate UoSAs with their retailers. They reported that only two negotiations resulted in an improved UoSA, five negotiations resulted in no deal, five negotiations resulted in no material difference, and one negotiation resulted in a worse deal.[17]

Legacy UoSAs inhibit retail competition

3.27 Legacy UoSAs can negatively impact retail competition because they do not create a level playing field. Advantageous contractual terms give the incumbent retailer a competitive advantage, when they may not be the most competitive or efficient service provider. For

---

15 See DDA survey 2018 – Retailers, Question 23. Available at: https://www.ea.govt.nz/dmsdocument/25536-dda-research-report-2018

16 Legacy UoSAs date from the late 1990s and were originally developed to provide for business separation of network and retail functions during sector reform.

17 See DDA survey 2018 – Distributors. Available at: https://www.ea.govt.nz/dmsdocument/25536-dda-research-report-2018

example, legacy UoSAs allow incumbent retailers access to privileged terms and conditions which are no longer available to entrant retailers. This means that any entrant retailer may be less likely to expand and trade on the same network because they recognise that they will be at a disadvantage.

Unequal bargaining positions can inhibit competition in related-services markets

3.28 Unequal bargaining positions can also inhibit competition and efficiency in other related-services markets. We want to make sure no undue barriers prevent third parties from procuring these contestable services.

3.29 Often, actual anticompetitive conduct is not necessary for there to be a concern. The threat or perception of anticompetitive behaviour can lead to a lack of confidence in the existing access arrangements. This can be enough to discourage a third party from entering into a local network, or the industry, altogether.

Distributors can favour themselves or their affiliates in related-services markets

3.30 We are concerned there are some instances where distributors leverage their monopoly position to favour themselves or their affiliates in related-services markets.

3.31 Distributors gain access to these markets through the UoSA. Distributors can tie distribution services the retailer wants to services the retailer may not want. The retailer is forced to accept all terms and conditions in order to trade on the network (see paragraphs 3.16 to 3.20).

3.32 By favouring themselves or their affiliates, distributors stop participants openly competing to provide products and services such as demand response. This behaviour inhibits workable competition among industry participants for existing and emerging products and services.

Distributors can favour themselves for related services

3.33 Distributors include terms and conditions in their UoSAs that assign them the right to provide related services that would otherwise be contestable. The distributor may not be best placed to provide these services and their presence in the related-services markets can stifle innovation in contestable services.

3.34 We are aware of examples of UoSA where distributors include terms and conditions which favour themselves. Examples include:

(a) requiring retailers to accept and afford priority for network support to the distributor in order to receive distribution services

(b) expecting the retailer to sign over load-control rights to the distributor if the rights are obtained from the consumer

(c) extending Schedule 4 of the MUoSA to change the distributor's rights and indemnity, especially with regards to controlling load and inclusion in third-party retailer contracts

(d) denying the retailer's choice of metering equipment providers by requiring use of the distributor's own (or preferred) metering services.

Distributors favouring their affiliates for related services

3.35 Distributors can favour their affiliates in related-services markets imposing terms and conditions that require a company of the distributor's choice to be used to provide a specific

service. Tying services gives the distributor's affiliate a competitive advantage over competing participants.

3.36 The retailer must accept the distributor's terms and conditions, even if it provides the affiliate with an artificial competitive advantage, to trade on the distributor's network.

3.37 Some distributors are incentivised to behave this way because they have a commercial interest in related-services markets. The distributor, or its affiliates, may be competing in related-services markets against retailers. A lack of transparency in the procurement process means that the product and/or service may not be provided to consumers in the most cost-effective way.

3.38 We want to ensure that the provision of services relating to new technologies, such as distributed generation and batteries, is part of a competitive and contestable market. A distributor's involvement, either directly or indirectly through its affiliates, may affect competition in these markets. This can make it unnecessarily difficult for a third party to enter or compete in the market.

Distributors can link distribution services to the supply of additional services by retailers

3.39 Distributors can write UoSAs which link the distribution service a retailer wants to supply by the retailer of an additional service the retailer may not want to supply, or a service which is not connected to the distribution service.

3.40 The retailer cannot access the distribution service, without agreeing to provide the additional services. For example, the distributor may require the retailer to hand-over detailed consumer consumption data or information (including contact details) at the ICP-level.

Distributors can access and use sensitive information through UoSAs

3.41 Retailers are concerned that distributors could use commercially sensitive information, originally intended for asset and network management purposes, to enter into the related-services market. This is problematic, especially in the future, because these services are becoming increasingly contestable.

3.42 Retailers are concerned that the terms in the UoSA allow excessive freedom on how the distributor can use the data it obtains from the retailer. This data has high commercial value, and it creates potential to use the data for other purposes. Distributors could use the UoSA to obtain data and contact details, and then use the information to offer some of the same services as the retailer in the competitive market.[18]

3.43 Examples of this occurring today include:

(a) one retailer's submission said it had received complaints from customers that the distributor and third-party contractors had contacted the customer on confidential phone numbers[19]

(b) terms in the UoSA give distributors excessive freedom on how they can use customer information

---

18 See DDA survey 2018 – Retailers, Question 23. Available at: https://www.ea.govt.nz/dmsdocument/25536-dda-research-report-2018

19 See *Default Agreement for Distribution Services – Summary of Submissions*, 20 December 2016. Available at: https://www.ea.govt.nz/dmsdocument/21611

(c) retailers' complaints that they should have the right to withhold customer information if the distributor has not demonstrated satisfactory undertakings over the protection of that data.

3.44 Having access to valuable consumer data provides the distributor with a significant advantage over any competitor. The distributor gets a 'bird's-eye' view of the consumers on the network. By collecting data from many retailers, the distributor has a more holistic view of the entire network compared to the view any individual retailer could obtain.

3.45 Access to consumers' data means distributors can better identify investment opportunities ahead of retailers. This allows distributors to 'front-run' investment decisions, enter related markets early, make more informed investment and operational choices, and establish a dominant position. It allows the distributor to 'cherry-pick' the best investment opportunities, and third parties must compete for the less-profitable opportunities.

Requiring retailers to undertake additional activities on behalf of the distributor

3.46 Some terms and conditions included in UoSAs are problematic because they do not relate to the distribution service or are inconsistent with our statutory objective. These terms can affect:

(a) competition by raising inefficient barriers to entry. Some terms and conditions can unduly prevent a retailer from expanding onto new local networks to gain more customers, or unduly prevent an entrant retailer entering the market altogether

(b) efficiency by preventing innovative and new companies entering and expanding in related markets. Some additional terms and conditions mean that third parties cannot bring to market new and cost-effective sources of generation, storage and consumer or demand. These technologies may bring long-term benefits to consumers

(c) retailers who generally have no ability to renegotiate these terms with the distributor, who holds a natural monopoly position. Of all retailers surveyed in 2018, 20 felt disadvantaged compared to the distributor when negotiating – only two retailers felt equal to the distributor. Some retailers have tried to renegotiate, but the cost of trying to negotiate out the one, or more, undesirable terms and conditions may be greater than the benefit sought. Therefore, retailers have little choice but to accept the entire agreement as is.[20]

3.47 Some distributors are also requiring retailers to undertake activities on behalf of companies outside the electricity industry and which ordinarily would not have a contract with the retailer.

3.48 We have seen UoSAs where retailers are explicitly required to undertake activities on behalf of a trust that owns shares in the distributor. Activities include maintaining a register of beneficiaries, dispensing dividends on behalf of the trust, or (by agreement) distributing the trust's promotional material. These activities are outside of the distribution service and only serve to allow the trust to meet its own obligations. Including terms and conditions in the contract with the retailer requiring it to undertake these activities at no benefit to the retailer shifts costs onto the retailer, who may not be the best party to handle the responsibilities. There is no reason why the trust cannot negotiate and hold a side-agreement with the retailer to deliver the related services.

[20] See DDA Survey 2018 – Retailers. Available at:

Q1. What are your views on the problem definition? Specifically:

a. the efficiency problem

b. the competition in retail markets problem

c. the competition in related services problem.

4 We propose amending the Code and DDA template to be forward-looking

We have amended the proposed Part 12A of the Code and the proposed DDA template to take into account submissions on the 2016 consultation, related consultations and the 2018 DDA survey. Major changes include:

- **A neutral Part 12A of the Code**. We have redesigned the proposed Part 12A to be a forward-looking and more future-proofed solution that can handle the constantly changing energy sector. We are currently proposing to regulate the relationship between distributors and retailers operating on an interposed basis. However, the revised neutral Part 12A provides a framework through which we could, in the future, regulate the relationship between distributors and other participants who use distributors' networks. We could do that by amending the Code to add further schedules to Part 12A based on further consultation.
- **Services beyond distribution**. We have amended the proposed Part 12A to provide default terms for some related and additional services, including the distribution of income to beneficiaries of a shareholder trust and the exchange of consumer information, which can be appended to a distributor agreement.
- **Increased transparency**. We want to increase transparency in the negotiation process. We intend to do this by requiring retailers to share their signed distributor agreements, and any other agreements agreed with distributors over the course of negotiations for distributor agreements with the Authority.
- **Revisions to the DDA template proposal.** We have revised the proposed DDA template based on stakeholder feedback. The DDA template's core purpose remains as a default contract for distribution services. We have addressed concerns about matters that may fall within the Commerce Commission's jurisdiction. We also intend to introduce safeguards to ensure that retailers have a genuine choice as to whether collateral terms are included in their agreements with distributors.
- **More clarity on how participants develop and enter into a contract based on a DDA**. We have provided more guidance on how to develop a DDA, the process for contracting based on a DDA, and transitional provisions for existing UoSAs.

4.1 This section (Section 4) of the consultation paper summarises the design of the revised proposal for a new Part 12A of the Code and proposed DDA template. We have provided a more detailed account of the changes, and the motivation or rationale for each change, in Appendix C of this consultation paper.

4.2 Feedback on the 2016 DDA and related consultations raised several key policy and design questions. Concerns focused on who should have access to the data and data inaccuracies.

4.3 Section 5 of this consultation paper will discuss how the Code and DDA template provide a solution to the problems of the current contract negotiation process (Section 3).

We have made changes to the proposed neutral Part 12A of the Code

A modular and flexible neutral Part 12A is a future-proofed solution

4.4 We have made the Code more forward-looking and future-proofed. We have restructured Part 12A so that key provisions are now set out in schedules. The new clause 12A.2 has a table that sets out:

(a) the distributors and participants to whom Part 12A applies

(b) which schedule(s) apply to each distributor/participant.

4.5 The modular approach to Part 12A means that, if it is necessary to regulate other distributor-participant arrangements, we can (following consultation) amend Part 12A to specify that one or more of the Part 12A schedules applies to that arrangement.

4.6 These agreement templates would only be developed, and the Code amended, based on an identified market failure and following consultation, consistent with the requirements under the Act for amending the Code.

4.7 We have considered alternatives, such as creating a contract for each user type or each service required. These approaches were not practicable.

The neutral Part 12A includes default terms for some additional services which can be appended to distributor agreements

4.8 We have provided standardised terms for some common additional services in the neutral Part 12A of the Code.

4.9 These terms are not automatically included in a distributor agreement. However, if one or both participants elects to include terms relating to one of the additional services in the distributor agreement, the standardised terms in the Code will be appended to the parties' distributor agreement unless the parties negotiate and both agree their own alternative terms. Distributors must include in their published DDAs any terms relating to those additional services that they intend to require be included in their distributor agreements.

4.10 Schedule 12A.1 of Part 12A includes standardised default terms for the following additional services:

(a) Income distribution (Schedule 12A.1, Appendix A, Part 12A of the Code)

(b) Provision of trust and co-operative company information (Schedule 12A.1, Appendix B, Part 12A of the Code)

(c) Provision of customer information (Schedule 12A.1, Appendix C, Part 12A of the Code).

4.11 Appendices A and B each allow distributors or their shareholding trusts to pay dividends to shareholding customers or beneficiaries, and to access the information they need about the payment of dividends to assess whether they are consumer-owned under Part 4 of the Commerce Act 1986.

4.12 We have also introduced a default data template for the exchange of consumer information (Appendix C to Schedule 12A.1). The data template is explained in detail from paragraph 4.16 of this consultation paper.

4.13 More additional services can be incorporated in the future, as appendices to Schedule 12A.1, as the industry changes. These new schedules will be included in the Code through the standard Code amendment process.

There are other additional services commonly appended to the distribution agreement

The right to control load

4.14 We have re-categorised the right to control load in Schedule 8 of the proposed DDA template. We have introduced a 'hierarchy of load management', which prioritises control (with the higher levels being given priority). The levels are:

(a) Grid emergency event: As defined in Part 1 of the Electricity Industry Participation Code 2010

(b) Market participation: Any other right to control load.

4.15 The retailer and distributor's rights to control load fall within the market participation category. In system emergency events, as defined in the DDA template and Part 1 of the Code, the distributor may need to take control of all load on its network. Outside of those circumstances, the retailer does not need to assign the right to control load.

We have designed a data template to exchange consumer information

4.16 We have included a data template which contains terms relating to the exchange of consumer consumption data in the proposed Part 12A.

4.17 Appendix C of the proposed Part 12A of the Code is the data template, referred to as 'Appendix C'.

4.18 The data template will apply on a default basis; an opt-in by one or both of the parties. The data template provides the distributor with access to the historical consumption data it needs to fulfil the distribution service, and provides the retailer with assurances regarding how the distributor will store and use the data.

4.19 Appendix C has three functions:

(a) First, it introduces default terms under which a distributor can access some consumer historical consumption data. Access to some historical consumption data held by the retailer is required for a distributor to manage its network, for example to develop distribution pricing structures and to support asset management.

(b) Second, it contains a broad set of provisions which prohibits the distributor from using the data provided for a purpose not agreed with the retailer, including sharing the data with individuals or affiliates involved in the provision of contestable electricity services. The default terms provide a retailer with the right to audit the distributor, and include termination clauses that apply if a distributor breaches the agreement.

(c) Third, it provides for a more standardised process of data exchange between distributors and retailers. Appendix C includes characteristics such as the process for exchanging data, acceptable timeframes, and the data format. More standardised exchange protocols and better access to data enables industry participants to make faster, more informed decisions and also reduces the cost of doing business.

4.20 Industry participants can negotiate alternative terms for the provision of consumer consumption data.

Greater use of EIEPs

4.21 We have not changed the EIEP provisions in Part 12A or the DDA template because the DDA consultation is not the most appropriate place to address EIEP concerns. However, these concerns have been noted.

4.22 Some of the concerns about data and information exchange have been addressed through the new consumer information provisions.

Retailers are concerned about transparency in the negotiation process

4.23 Some retailers are concerned that competition is being inhibited because distributors can offer materially different contracts to different retailers in similar circumstances.

4.24 We have updated Part 12A of the Code to require all retailers to submit to the Authority full contracts for distribution services (contracts entered into on the basis of a DDA, alternative agreements, and any side-agreements agreed over the course of negotiations for a distributor agreement)[21].

4.25 The Authority is considering whether to make all contracts available via our own website.

We can prescribe specific terms pursuant to our objective

4.26 The Court of Appeal has confirmed that the Authority can amend the Code to prescribe standard terms in distributor agreements where necessary or desirable to achieve our statutory objective.

4.27 Prescribing terms in distributor agreements helps the Authority achieve more standardisation of UoSAs. It also reduces harm from terms which are inconsistent with our statutory objective.

4.28 The Authority may update the DDA template in the Code to include more standardised terms. Upon updating the core terms in the DDA, existing distributor DDAs will need to be updated to reflect the new core terms.

We are introducing safeguards to ensure that retailers are not forced to agree to collateral terms

4.29 We propose to introduce safeguards to promote more equal bargaining positions between retailers and distributors. We will do this by ensuring that retailers have a genuine choice as to whether any other terms in a distributor's DDA, which we call 'collateral terms', are included in distributor agreements.

4.30 A distributor will be able to include collateral terms in its DDAs. However, if a retailer objects to the inclusion of a collateral term in this way, that collateral term will not be included in the binding distributor agreement that is based on the distributor's DDA.

4.31 This proposal does not prevent distributors and retailers from mutually agreeing terms not contemplated by the Code. If a distributor and a retailer agree to include any other terms in their distributor agreement that is not in the distributor's DDA, the distributor agreement will be an alternative agreement (even if all other terms are the same as those in the distributor's DDA).

We will monitor the types of terms being included in distributor agreements, and may prohibit specific types of terms in the future

4.32 We will monitor the types of terms that are being included in distributor agreements,[22] through a requirement on retailers to disclose to the Authority contracts entered into on the

---

21 This is to ensure that transparency and oversight by the Authority cannot be avoided by including terms that have been negotiated as part of a UoSA in an agreement that is separate from the main distributor agreement.

22 Whether the agreements are based on our DDA template or are alternative agreements.

basis of a DDA, alternative agreements, and any side-agreements agreed over the course of negotiations for a distributor agreement[23].

4.33 We will consider prohibiting any terms, by amending the Code, that appear to compromise competition in the electricity industry, the reliable supply of electricity to consumers, and the efficient operation of the electricity industry.

4.34 We also ask industry participants to make us aware of any terms and conditions in contracts which are enabling conduct which compromises competition in the electricity industry, the reliable supply of electricity to consumers, and the efficient operation of the electricity industry.

We have made some changes to the DDA template

4.35 We have made changes to the January 2016 DDA template based on submitters' feedback. In this section, we summarise the changes we have revised the DDA template structure.

4.36 The DDA template's fundamental purpose remains the same: to provide a default contract for distribution services. For brevity, we do not revisit the elements of the design of the DDA template in this chapter that remain unchanged. The January 2016 consultation paper provides a detailed overview of the structure.[24]

Key policy decisions considered for the DDA template:

1) Determining what the maximum liability cap under the terms of a DDA will be

2) Establishing prudential requirements

3) Avoiding regulating matters that the Commerce Commission is authorised to regulate under Part 4 of the Commerce Act

4) Including equal access and even-handedness clauses

5) Providing for alternative agreements

Determining the maximum liability cap

4.37 We have decided to leave the liability cap unchanged at $10,000 per ICP or $2,000,000 (whichever is lesser). Capped liability is standard in commercial agreements.

4.38 The liability cap we propose is equal to, or slightly higher than, the majority of contracts available today. We reviewed UoSAs available on distributors' websites. Most liability caps available today fall within $500,000 to $2,000,000. Also, a cap based on affected ICPs ensures that liability limits per customer do not depend on the size, scale or number of industry participants.

Prudential requirements

4.39 Submissions on prudential requirements fell into four categories:

(a) Concern about the duplication of prudential requirements across the DDA template and the Code.

(b) Confusion about which party can elect the prudential requirements.

---

23 This is to ensure that transparency and oversight by the Authority cannot be avoided by including terms that have been negotiated as part of a use-of-system arrangement in an agreement that is separate from the main distributor agreement.

24 See *Default agreement for distribution services – Consultation Paper*, 26 January 2018. Available at: https://www.ea.govt.nz/dmsdocument/20343

(c) Confusion about the annual yield distributors are required to pay on additional security.

(d) Concern about a distributor's ability to draw on prudential requirements.

4.40 We have made the following changes and comments:

(a) The prudential in the DDA apply to (interposed) local network distributors only, while the Code contains separate provisions for embedded networks. Embedded network distributors are not required by Part 12A to develop a DDA template. Instead, Schedule 12A.3 sets out provisions that apply to such distributors, which are carried over from the current Part 12A.

(b) The clause requires traders to comply with one of the prudential requirements provided. We have re-written the clause to make it clear that:

(i) the distributor has the right to require a trader to comply with prudential requirements (the DDA template lists a number of options in clause 10.2)

(ii) the trader elects which of the options they will satisfy to meet the prudential requirements.

(c) the distributor will pay the daily bank bill yield rate, plus 15% on the amount of additional security. This means 15 percentage points above the bank bill yield rate (for example, a bank bill yield rate of 1% + 15% = 16% APR).

(d) The prudential requirement clause has been limited to ensure that, if there is a genuine dispute over an amount of arrears, the dispute should be settled before the distributor has access to prudential security.

Recorded terms avoid regulating matters that the Commerce Commission is authorised to regulate under Part 4 of the Commerce Act

4.41 We have created a new category of terms throughout the DDA template called 'recorded terms'. Recorded terms minimise the risk of any aspect of the DDA template contravening section 32(2)(b) of the Electricity Industry Act.

The DDA template now has three levels of terms: Core, operational, and recorded

4.42 A summary of the terms and conditions, and how they apply, is provided in Table 1 below.

Table 1: Summary of term and condition levels: Core, operational and recorded

	Core terms	Operational terms	Recorded terms
Service(s) covered	Distribution service		
Location of terms	Must be in each distributor's DDA		Placeholders or complete terms in DDA. Must be in executed distributor agreements
Are they default terms?	Apply unless both parties agree to other terms		Not regulated
Source of terms	DDA template in the Code	Distributor's drafting	
Appeal to the Rulings Panel	No	Yes	No
Alternatives available	Yes, by agreement		Not regulated

4.43 Core terms are a standard set of terms governing the provision of distribution services throughout New Zealand. Core terms in the DDA template must be included in each distributor's DDA.

4.44 Distributors are responsible for writing their own operational terms to reflect local practices and policies. The DDA template includes drafting guidelines. A distributor must ensure that an operational term does not change or modify any core term. Each distributor is to consult on its operational terms with retailers trading on its network. A participant that participated in a distributor's consultation process can appeal one or more of the distributor's operational terms to the Rulings Panel.

4.45 Recorded terms allow for distributors to record particular rights or obligations that might be expected to be seen in a complete contract for distribution services, but that relate to matters the Commission may have the jurisdiction to regulate under Part 4 of the Commerce Act and cannot be regulated by the Code.

Equal access and even-handedness clauses

4.46 We have not included equal access or even-handedness treatment clauses in the DDA template, because these outcomes are achieved through two mechanisms:

(a) First, the introduction of the DDA template should ensure more standardisation of distribution services, as it serves as a starting point for negotiation.

(b) Second, any amendment to the operational terms of a distributor's DDA apply to existing distributor agreements that include those terms, which are deemed to be amended accordingly.

Parties may agree an alternative agreement and side-agreements

4.47 If a distributor and retailer do not wish to contract on the terms of the distributor's offered DDA, they may agree an alternative agreement.

4.48 An alternative agreement could be:

(a) an agreement that is identical to the distributor's DDA, except that the parties agree to amend, add one or more terms into, or delete one or more terms (other than collateral terms) from, the contract for distribution services.

(b) at the other extreme, an agreement that replaces all provisions in the distributor's DDA, or

(c) something in between.

4.49 The retailer and distributor can also negotiate other terms, or separate agreements or "side-agreements", for related- and other additional-services.

How to develop and implement a DDA

4.50 Some distributors and retailers requested more clarity about how a DDA will be designed and/or implemented. We have clarified, through drafting changes, some of the processes required to implement the DDA proposal.

Key policy decisions considered for implementing the DDA:

1) the order in which distributors develop DDAs

2) being unable to terminate the DDA without cause

3) clarifying the process for entering into a DDA

4) the Rulings Panel's role in mediation

5) being able to refuse distribution services to a trader who had previously defaulted

6) continuing existing agreements

Five distributors will develop DDAs first

4.51 To make the initial DDA development process more manageable for participants, we proposed assigning distributors to one of two groups:

(a) **Group 1 distributors**: Will have 90 business days after the Code amendment comes into force to develop and consult on their operational terms and then publish a DDA

(b) **Group 2 distributors:** Will have 150 business days after the Code amendment comes into force to develop and consult on their operational terms and then publish a DDA.

4.52 The Authority proposes that the Group 1 distributors are:

(a) Orion

(b) Powerco

(c) Unison

(d) Wellington Electricity

(e) Vector.

4.53 We will also consider volunteer distributors who want to be included in Group 1 to help develop the first DDAs.

4.54 The Authority proposes that the Group 2 distributors are the remaining distributors that adopt interposed arrangements.

The DDA cannot be terminated without cause

4.55 We have not introduced a clause to allow termination without cause. The inability to terminate the DDA without cause recognises that the DDA is not a standard contract – it is an agreement for distribution services given effect through the Code.

4.56 A distributor has the right to terminate its contract with a retailer in certain circumstances set out in the DDA template, including if the retailer commits a breach that is an event of default.

Both parties are obliged to enter into a DDA if one party opts to use it

4.57 A distributor's DDA, including the distributor's recorded terms, applies:

(a) when a participant gives notice that they want the DDA to apply, on one of:

(i) 5 days after the notice is given, or

(ii) the day the person becomes a registered participant (eg, a new entrant who has not yet begun trading), or

(iii) any other date agreed by the parties.

(b) at the end of 20 business days after notice is received by the distributor that the participant wants to trade on the distributor's network, and the parties have not agreed on an alternative agreement.

The Ruling Panel's involvement is limited to operational terms

4.58 We have not made any changes to the Code or the proposed DDA template regarding the role of the Rulings Panel. The reasons being:

(a) the Rulings Panel is the most appropriate forum to deal with disputes regarding operational terms.

(b) Clause 23 of the DDA template introduces a dispute resolution procedure. This includes: internal dispute resolution, the right to refer to mediation, and arbitration to resolve disputes.

Distribution services cannot be refused to retailers who meet prudential requirements

4.59 Some distributors raised concerns that they cannot refuse to provide distribution services to a retailer who has previously defaulted or a 'phoenix' retailer.[25]

4.60 The distributor is protected because there are obligations an entrant retailer must fulfil before they can trade electricity. Previous defaults are not a factor in being able to trade on a network if the retailer currently meets all its Code obligations and financial obligations under its distributor agreement (prudential requirements).

4.61 When a retailer does not comply with the terms of its distributor agreement with a distributor, it is in breach of that agreement with the distributor and the distributor will have contractual remedies under the distributor agreement.

A transitional process for existing agreements to continue

4.62 If both parties are satisfied with an existing UoSA, the proposed Code provisions allow the parties to enter into a new distributor agreement that carries over the existing terms relating to distribution services.

4.63 The objectives of the proposed transitional provisions are:

(a) to ensure each retailer currently trading on a local network has a distributor agreement with the local distributor

(b) to provide for a retailer and a distributor to:

(i) carry over the terms from an existing agreement into a new distributor agreement, if both parties are satisfied with those terms (this would be an 'alternative agreement') or

(ii) negotiate a new distributor agreement (an 'alternative agreement'), if either party is not satisfied with one or more of the terms of an existing agreement and the parties agree to negotiate, or

(iii) adopt the distributor's published DDA (with or without any collateral terms from the distributors' DDA) and recorded terms, if either party prefers this option to

[25] A new retailer who has emerged from the collapse of an insolvent retailer.

either of the alternatives described above, or if the parties try but fail to negotiate an alternative agreement within 2 months.

4.64 This is to provide clarity about the scope of a distributor agreement under Part 12A, including the effect of the proposed Code amendment on terms in existing UoSAs (or in other agreements) for additional services. In particular, clause 12(5)(b) of Schedule 12A.1 provides that, if a distributor and a trader are unable to negotiate a distributor agreement so that distributor's DDA (with the distributor's recorded terms) applies as a binding contract between them, the terms of those parties' existing agreement that directly or indirectly relate to distribution services or the additional services in the Appendices to Schedule 12A.1 will expire. Under clause 12(5)(a) of Schedule 12A.1, additional services included in the Appendices to Schedule 12A.1 can be added to the new distributor agreement in the usual way. Clause 12(6) of Schedule 12A.1 also allows a trader to exclude a distributor's collateral terms from a new distributor agreement in the usual way.

4.65 We have also considered the possibility that some parties may not be satisfied with one or more aspects of a current UoSA. Retailers' responses to the 2018 DDA survey indicated that many signed up for additional services because negotiations were not workable. In effect, the additional services had to be accepted in order to receive the distribution service. The proposed transitional process would determine whether both the distributor and retailer party to an existing UoSA are genuinely satisfied with its terms, whether in recently agreed or legacy UoSAs.

Q2. What are your views on the revised:

a. Part 12A proposal

b. DDA template proposal

Q3. What are your views on the draft Code, appended to this paper, which would introduce the proposal?

5 Regulatory Statement

We have conducted a cost-benefit analysis of the proposed neutral Part 12A and the DDA template. We believe the proposal will deliver net benefits to New Zealand's electricity consumers. Specifically:

- **Lower cost and effort required to negotiate contracts**. We estimate a standardised contract for distribution services will reduce the total cost of negotiating contracts across the industry by between $1.1 and $1.3 million per year going forward. It will also reduce cost and effort barriers that prevent retailers expanding into new networks.
- **Improved competition in the retail market**. Proposed changes to Part 12A will increase transparency in the negotiation process. The DDA template itself creates a more even bargaining position between retailers and distributors. Retailers can compete within and across networks on more fair terms and conditions.
- **Improved competition in the emerging related-services market.** The proposed DDA template will ensure that participants can compete for newly contestable services on fair terms. This allows participants to take advantage of innovation in technology and business models. It also ensures the most competitive and efficient party can compete for the service.

5.1 Sections 39(1)(b) and (c) of the Act require we prepare and publish a regulatory statement on any proposed amendment to the Code and to consult on the proposed amendment and regulatory statement.[26]

5.2 Section 39(2) of the Act requires the regulatory statement to include:

(a) a statement of the objectives of the proposed amendment

(b) an evaluation of the costs and benefits of the proposed amendment

(c) an evaluation of alternative means for achieving the objectives of the proposed amendment.

5.3 The following sections address each of these requirements.

Objective of the proposed amendment

5.4 The proposed Code amendment seeks to address the problems faced with UoSA formation as described in Section 3. Namely:

(a) higher-than-necessary transaction costs and duplication of effort, and

(b) unequal bargaining positions that inhibit competition in the retail market, and

(c) unequal bargaining positions that inhibit competition in related-services markets.

The proposal is consistent with our statutory objective

5.5 We propose including a neutral Part 12A in the Code that requires each interposed, local network distributor to develop, publish and offer a DDA to each retailer who trades or seeks to trade on their network. The DDA template provided by the Authority:

[26] A regulatory statement is not required to make an urgent Code amendment. Other exceptions are set out in section 39(3) of the Act.

(a) prescribes default core terms that must be included in each distributor DDA

(b) specifies requirements for operational terms included in each DDA

(c) requires each distributor to include in contracts based on their DDA recorded terms drafted by the distributor that address specified matters, and

(d) requires each distributor to clearly identify any extra terms included in a DDA.

5.6 The proposed neutral Part 12A includes new provisions that regulate the way distributor agreements are negotiated and agreed by distributors and traders. Those provisions are explained in Section 4 of this paper.

5.7 We have also introduced some default terms for additional services which are commonly provided alongside the distribution service. These include dispensing dividends on behalf of the distributor's trust, and a protocol for the exchange of consumer information.

5.8 We believe the Code amendment will promote two aspects of our statutory objective. The changes will promote:

(a) efficient operation of the electricity industry by minimising any higher-than-necessary transaction costs of UoSA formation and any duplication of effort for retailers and distributors

(b) competition in:

(i) the retail market, by minimising barriers to accessing a distributor's network and ensuring retailers can compete on fair terms and conditions both on the same network and across networks

(ii) the emerging related-services markets, by making sure the most efficient participant can compete for and provide additional services to any industry participants.

5.9 Enhanced retail competition, including the threat of entrant retailers on local networks, increases competitive pressure on electricity prices and encourages efficient investment in capital goods and innovation. It provides consumers with greater confidence that:

(a) the price of electricity more closely reflects the efficient cost of producing, transporting, and retailing electricity

(b) price movements are driven by underlying supply and demand movements.

5.10 Enhanced retail competition is consistent with our interpretation of the competition aspect of its statutory objective, which is that the Authority will *[exercise] its functions in ways that facilitate or encourage increased competition in the markets for electricity and electricity-related services, taking into account long-term opportunities and incentives for efficient entry, exit, investment and innovation in those markets*.

5.11 The changes will promote the deployment and uptake of new technologies and business models. Industry participants will more easily be able to bring technologies such as batteries, smart appliances, and other forms of automated appliances to the network. Also, retailers with innovative business models will find it easier to expand into new networks. Encouraging innovation will be in the long-term interest of consumers as they will be able to benefit from rapid advancements in technologies and business models.

5.12 The proposal is not expected to directly affect the reliability of supply aspect of the statutory objective. However, minimising undue barriers to accessing the network will allow more participants to trade across more networks. These participants may bring new ways of

doing business; such as home energy management, demand response, and competing in the market for network support services. These new business models may have the effect of reducing demand during times of system stress, which indirectly contributes to maintaining security of electricity supply.

An evaluation of the costs and benefits of the proposed amendment

Broad approach to cost-benefit analysis

5.13 Our cost-benefit analysis builds on the framework set out in our 2016 DDA proposal consultation paper. The consultation retains a similar framework, but we have updated it to:

(a) incorporate more recent or accurate information where it is available

(b) incorporate feedback from the 2018 DDA survey

(c) explain the competition costs and benefits.

5.14 Some values used in the quantitative assessment of efficiency cost and benefits are based on a self-reporting survey of retailers and distributors. The survey was undertaken in 2018. Quantities are given in 2018 dollars and presented in present value terms.

5.15 The qualitative assessment of competition benefits in the retail and related markets are based on economic principles.

5.16 We present these in terms of static and dynamic efficiency benefits. These are defined as:

(a) **Static efficiency:** the refinement of existing products, processes or capabilities

(b) **Dynamic efficiency**: the development of new products, processes, or capabilities.

The DDA will reduce the cost and effort required to enter into a UoSA

5.17 The DDA and neutral Part 12A proposal reduces transaction costs compared to the status quo. We estimate introducing the DDA proposal will reduce the costs of negotiating new UoSAs between $1.1 and $1.3 million per annum across the entire industry. The DDA proposal will also reduce the cost and effort of entering into multiple UoSA negotiations simultaneously.

5.18 Transaction costs are lower because the DDA proposal allows retailers and distributors to enter into contracts for distribution services at little to no cost.

5.19 This may facilitate some dynamic efficiency benefits over time, as distributors and retailers are likely to be more willing to make amendments to their distributor agreements for service innovation and product development, knowing that the cost of doing so is materially less than at present.

5.20 Distributors and retailers will also see significant reductions in effort required to enter into contracts for distribution services. This will allow retailers who want to expand into new networks quickly to do so at little cost.

419 UoSAs exist today and more are anticipated

5.21 The anticipated demand for new UoSAs is a key factor in considering the costs and benefits of the proposed neutral Part 12A. Accordingly, the first step estimates the likely demand for new UoSAs.

5.22 On 31 December 2018, the registry showed 29 distributors, 27 of whom use interposed arrangements when forming agreements for distribution services. At the same date, 29 parent companies (that are retailers) were in the registry. These retailers service at least

one ICP on at least one local network on which the local distributor uses interposed arrangements.[27]

5.23 We estimate that, at the end of 2017:

(a) at least 451 UoSAs were in effect, and

(b) an average of 15 retailers were trading on each interposed network.

5.24 We reached this estimate by counting the number of retailers on each of the 27 local networks.[28] We made the assumption that one UoSA is in place for each retailer-distributor relationship. However, this estimate is conservative because some distributors may require a UoSA for each network region they control.

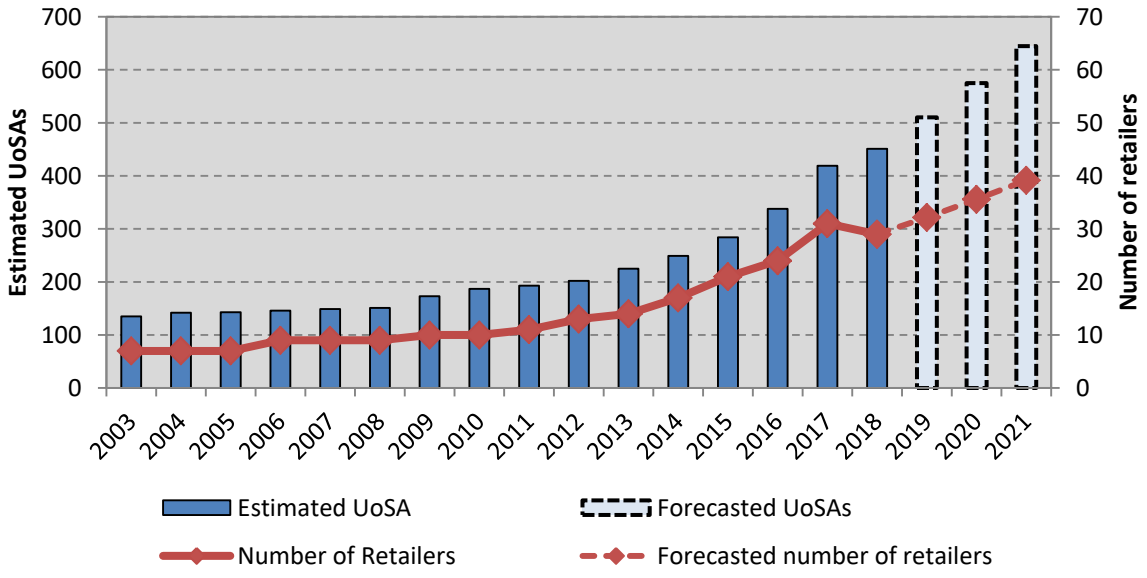
5.25 On average, three new retailers have joined the industry each year since 2011. Data is shown in Figure 4. Note, the growth is not linear and the trend has been towards more retailers joining the industry in recent years. The number of retailers in the industry grew from 7 to 10 between 2003 and 2010. Between 2011 and 2017, the number of retailers grew to 31. In 2018, there were 29 retailer parent companies.

5.26 On average, our estimates suggest 30 new UoSAs are formed each year. We calculate the value between 2009 and 2018 as this was a period of significant growth in UoSAs. Note, this estimate is conservative as:

(a) more growth occurred in UoSAs in 2016 and 2018; the industry added an estimated 54 and 81 UoSAs (respectively).

(b) these estimates do not include any renegotiated or replacement contracts. Our DDA survey results show that existing retailers are seeking to expand into new networks, and have also tried to renegotiate UoSAs with varying success.

Figure 4: Number of retailers and UoSAs in effect. Source: EMI data



[27] Registry data is from the Authority's Electricity Market Information website, which can be accessed at http://www.emi.ea.govt.nz/.

[28] We only use 27 networks in our calculations because one distributor uses conveyance-only arrangements, and one distributor uses a mixture of conveyance and interposed arrangements. Retailers on these networks do not have interposed contracts for distribution services.

Source: Electricity Authority

Notes: 1. Data taken from Electricity Authority – EMI, Market Share trends

5.27 We expect the number of retailers and UoSAs to continue to grow over the next few years. Figure 4 shows the forecasted number of retailers and UoSAs between now and 2020. We selected this time period as it represents a reasonable implementation period and also coincides with the time horizon used in the 2018 DDA survey. The forecast is based on the number of new UoSAs and new retailers observed between 2009 and 2018.[29] We will use the forecast to calculate estimated efficiency and competition gains.

The DDA proposal will reduce the cost of negotiating UoSAs

5.28 The static efficiency benefits are that introducing the DDA proposal will reduce the costs of negotiating all UoSAs between $1.1 and $1.3 million per annum across the entire industry between 2019 and 2021.

5.29 The estimated cost is based on feedback we received on the 2018 DDA survey sent out to distributors and retailers. The survey asked distributors and retailers various questions about the cost of negotiating UoSAs today, and the potential increase or decrease in cost if the proposed DDA were available.

5.30 Based on the survey data, the total cost for negotiating a UoSA was estimated at $17,938 per distributor-retailer relationship. This is calculated as the sum of the distributor and retailer's average cost. The average cost of negotiating a UoSA was $2,883 for a distributor (actual costs ranged from $300 to $15,000, N=20). The average cost for a retailer was $15,055 (actual costs ranged from $0 to $150,000, N=20).[30]

5.31 The true cost of negotiating UoSAs may be even higher because some retailers noted they:

(a) refused to spend money negotiating UoSAs because they did not see the negotiation process as workable,

(b) signed the UoSA provided by the distributor regardless of the terms because they must access the network to trade and generate revenue.

5.32 We estimate the industry spent a maximum of about $1,453,000 negotiating new UoSAs in 2017. This is based on the 81 new UoSAs added in 2017, multiplied by the estimated cost of $17,938 per UoSA. The estimated negotiation cost includes the total cost of negotiating all terms of the UoSA: including contentious topics such as prudential and access to data.

5.33 We estimate introducing the DDA template will reduce costs by $2,971 (17% of total cost) for each negotiation. These savings are estimated from a self-reporting survey sent to distributors and retailers in 2018. We asked distributors and retailers how much increase or decrease in entry costs a DDA template would make. These costs could include time, effort, or sort of people used during negotiations – lawyers either internal or external. The results were:

29 This data is forecasted using the Excel function =FORECAST, using data between 2009 and 2017 only.

30 Note, these values are derived from the answer to Question 3. If a range of costs is provided, we take the upper cost to be conservative.

(a) Ten distributors reported that their average costs would increase by an average of $1,900 per UoSA,[31] while eight distributors reported average costs will decrease by $856.

(b) All retailers reported that costs will decrease. The average cost decrease predicted was $4,015 per UoSA.[32]

5.34 We believe the costs of negotiating UoSAs can be reduced even further. The proposed DDA can remove the need for negotiation altogether.

5.35 Cost reductions from the proposed DDA and neutral Part 12A reflect these factors:

(a) Distributors will not need to develop new and standardised templates. The purpose of the DDA template is that it can be picked up and used ‘as is’. The core terms make up the majority of each distributor's DDA and will be nationally consistent. The operational terms should reflect the distributor's current practice, which are likely reflected in distributors' existing UoSAs. Many recorded terms are also likely to be reflected in distributors' existing UoSAs and may reflect regulation imposed under Part 4 of the Commerce Act 1986. It is simply a case of including the relevant provisions in the relevant schedules and clauses in the DDA template.

(b) Each distributor's DDA will be significantly more standardised compared with the current range of UoSAs and requires fewer commercial and legal resources for development and understanding. For example, any entrant retailer that wants to enter networks and contract on the basis of the distributor's DDA needs only review the operational, recorded, and any collateral terms. Provisions in the core terms will be nationally consistent across distributors. At present, core terms are not standardised between distributors. An entrant trader has to undertake a full legal and commercial review for each network it wishes to trade on.

(c) The DDA can be accepted for little to no cost. If either a distributor or retailer gives notice to contract with the other on the basis of the distributor’s DDA, all contract formation and negotiation costs are eliminated for both parties. Notice can be as simple as an email stating the intent to contract under the DDA. If any costs are incurred, they will be administrative; about $500 per UoSA based on distributor estimates (see paragraph 3.12(a)).

5.36 To calculate the savings, we used forecasted values from Figure 4 as the number of new UoSA added each year between 2019 and 2021 (see Table 2). We multiplied the number of new UoSAs by $17,938. We discounted the total costs to present value using a rate of 6%.

---

[31] Note, we omitted two data points. Two distributors reported costs will increase by $100,000. These were major outliers compared to other distributors. We believe the distributors have reported total costs increase, rather than incremental cost per UoSA.

[32] Note, we omitted two data points. Two retailers reported costs will decrease by $200,000 and $500,000 respectively. These were major outliers compared to other retailers. We believe the retailers have reported total costs increase, rather than incremental cost per UoSA.

Table 2: Estimates of cost savings from implementing the DDA proposal

Year	Estimated new UoSAs	Nominal estimated costs ($17,938 per UoSA)	Present value estimated costs (discount rate at 6%)
2019	59	$1,063,125	$946,178
2020	65	$1,158,577	$972,764
2021	70	$1,254,029	$993,309

5.37 These cost savings will deliver dynamic efficiency benefits. Distributors and retailers can use the capital saved to reinvest in their companies. They can spend the capital to develop better products and services which consumers may value.

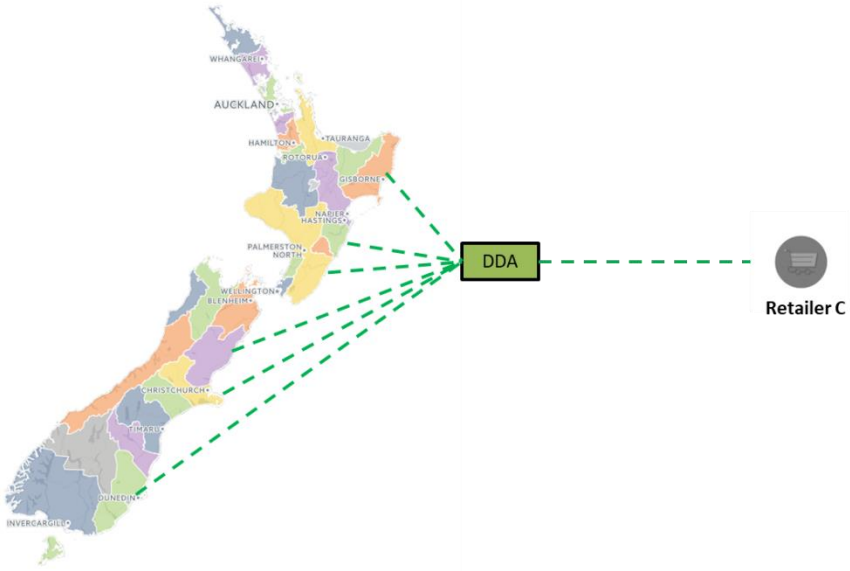
The DDA proposal will reduce the effort required to enter into UoSAs and allow faster expansion

5.38 Introducing the DDA template as part of the neutral Part 12A will allow retailers to expand across more networks by reducing the duplication of effort of negotiating multiple UoSAs.

5.39 The duplication of effort is lower under the proposal than at present because if either a distributor or retailer gives notice to contract with the other on the basis of the distributor's DDA, all contract formation and negotiation costs are eliminated. A retailer can expand across all networks using the DDA by giving notice. Alternatively, a distributor can give notice to contract with all new and existing retailers under the DDA.

5.40 The DDA proposal also allows a retailer and distributor to build systems around one standardised contract for distribution services, if desired. The core terms contained in every DDA mean that a retailer can expand into all networks in New Zealand using essentially one set of terms and conditions, with some minor regional variation for operational and recorded, and collateral terms (See Figure 5).

Figure 5: The DDA allows retailers to expand across networks using one contract



Source: Adapted from Electricity Networks Association

5.41 We believe demand exists for the DDA proposal. The responses to the 2018 survey shows that many industry participants intend to use the DDA as their contract for distribution services:

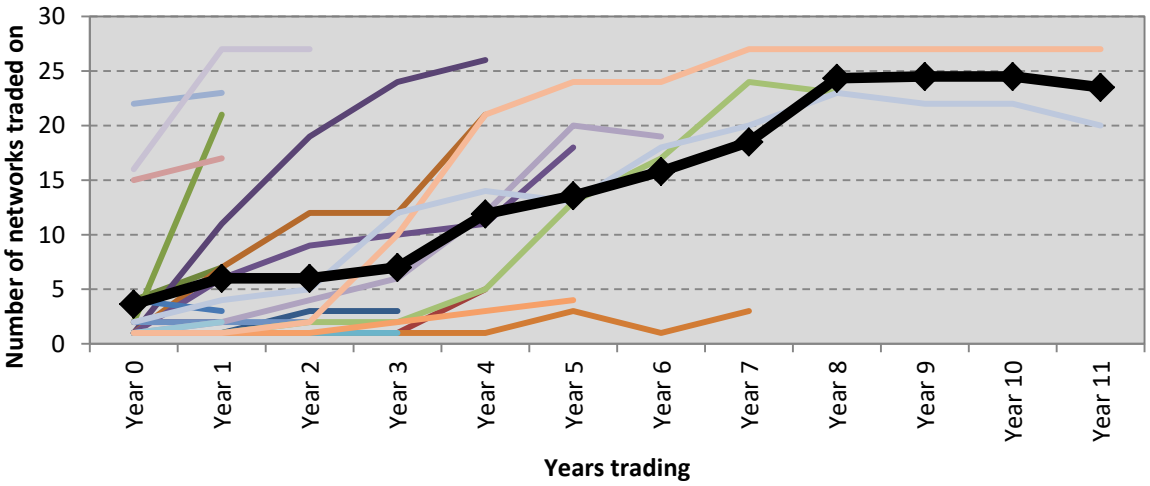
(a) Nine distributors submitted they would consider moving retailers onto the DDA. The number of retailers moved onto the DDA varied between two and all retailers on their network.

(b) Eight retailers submitted that a lack of DDA was a barrier to expansion in the retail market.

(c) Retailers planned to expand into more networks by using the DDA compared to the UoSA. On average, retailers planned to expand into three networks within 6 months, and six networks within 2 years under the current UoSA process. Under the DDA, retailers plan to expand into four networks within 6 months, and eight networks within 2 years.

5.42 Increasing the speed at which retailers can expand across networks is a significant improvement over the status quo. At present, retailers typically expand into four to five networks within 2 years. At 7 years, the average retailer has expanded onto nearly all networks and stabilises (See Figure 6). We calculated this by measuring the historical expansion of retailers between 2003 and 2018 using EMI data. We tracked the expansion of each entrant retailer across networks since they began trading (Year 0).[33] The black line with markers shows the expansion of the average retailer. The coloured lines show real retailer expansion data.

Figure 6: New retailer expansion across networks. Source: EMI data



Source: Electricity Authority

Notes: 1. Data taken from Electricity Authority – EMI

There are static efficiency benefits

5.43 The static efficiency benefit is that the DDA proposal will make it easier for retailers to expand across networks. It reduces the effort required to enter into a UoSA. And retailers can avoid negotiation altogether if they are satisfied with the terms and conditions in a distributor's DDA.

[33] An entrant retailer is defined as a retailer who began trading after 2003 – the starting date of our time series.

5.44 Also, each distributor's DDA acts as a backstop agreement. This provides a consistent starting point for distributor-retailer negotiation on one or more terms. It means the distributor and retailer are aware what terms and conditions are available as a default. Any negotiation will focus on trading or improving provisions in a distributor agreement to suit the unique relationship between the parties.

There are dynamic efficiency benefits

5.45 There are also dynamic efficiency benefits from introducing the DDA. The DDA proposal will allow distributors to develop more standardised systems to make contract management easier. Also, distributors can streamline operations by building systems and processes mainly around one more-standardised contract for distribution services. This in turn makes it easier to accept new retailers on the distributor's network in the future.

5.46 The DDA proposal will enable the entry of new retailers into the industry and the expansion of existing retailers across networks. Retailers seeking to enter or expand into new networks are able to do so easier because they will have already developed system and protocols around the DDA (if this is their preferred contract). This will increase competition in the retail market as there are fewer barriers to retailers entering local networks. It also allows retailers to invest their funds in developing more products and services consumers may want. More competition may mean better products and services for end consumers, from fewer barriers to retailers competing on value and price.

The DDA proposal and Part 12A will promote competition in the retail market

5.47 We believe introducing the DDA proposal will improve competition in the retail market. The DDA proposal will:

(a) promote more equal bargaining positions between distributors and retailers, and between retailers in similar circumstances

(b) provide a more balanced contract for distribution services between participants

(c) remove the ability to impose additional costs through UoSAs

(d) provide an opportunity to update legacy UoSAs.

Concerns around unequal bargaining positions have been raised by retailer submissions in prior consultations. The DDA proposal and Part 12A creates more equal bargaining positions

5.48 We asked distributors and retailers about the terms in their UoSAs. Distributors and retailers raised concerns about the terms their UoSA, and the process for negotiating the UoSA.

Bargaining positions between distributors and retailers are unequal

5.49 We received comments that the bargaining positions between distributors and retailers are unequal. This means that distributors are able to have UoSAs which mainly incorporated the distributor's preferred terms and conditions.

5.50 Updating the Code and DDA template provides an opportunity to lock in significant value by standardising the non-controversial terms and to resolve terms that have at times been difficult to agree between the parties.

5.51 The proposed neutral Part 12A will ensure that operational terms included in each distributor's DDA are developed within a transparent, consultative process, coordinated by the distributor. This provides the opportunity to engage all traders trading, or intending to

trade, on a distributor's network in a coordinated consultation. Whether traders choose to engage or not, a published DDA will result from the process. The proposed neutral Part 12A also requires that the distributor apply a regulated set of principles when setting its operational terms, which include our statutory objective, and meet the requirements specified in the DDA template for operational terms.

5.52 The DDA proposal will ensure that retailers are not placed in a position where they must sign unfavourable UoSAs to trade on a network. Retailers told us that they had been given no option but to accept the distributor's proposed UoSA or trade elsewhere. We also asked retailers whether they had ever signed an agreement despite the terms and conditions not being fair or favourable because they needed to trade on the network. The results show 18 retailers signed UoSAs; on the other hand, only two retailers refused to sign the contract.

Bargaining positions between retailers were unequal

5.53 A second problem identified was bargaining positions were not equal between retailers in similar circumstances. The DDA proposal will address concerns that distributors can offer retailers in similar circumstances materially different UoSAs.

5.54 Unequal bargaining between retailers in similar circumstances is problematic, because the distributor may favour one or more retailers, who are likely to have access to better contractual terms. For example, large retailers could be favoured because:

(a) the distributor controls the ICP, regardless of who the retailer is

(b) the distributor can minimise cost by having fewer retailers on the network

(c) the distributor faces lower coordination risk among a few large retailers, than several smaller retailers

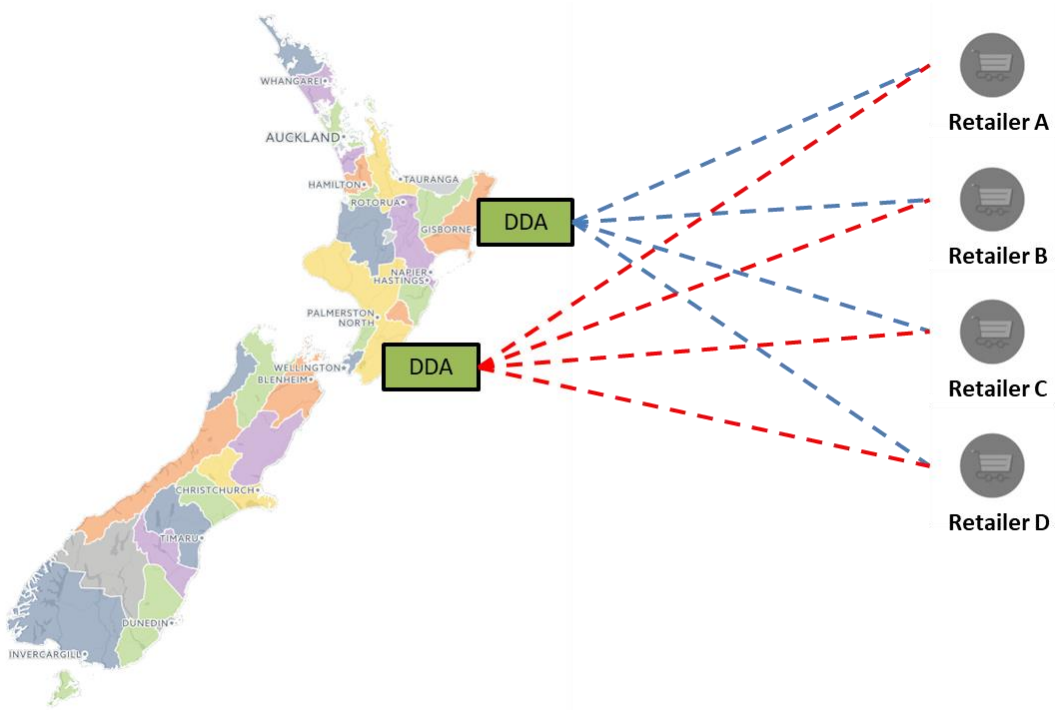
(d) the large retailers can offer more value to the distributor, in the form of consumer information the distributor wants.

5.55 Retailers can compete on a more level playing field. Retailers in similar circumstances can access equal terms and conditions for the distribution service. Figure 7 shows that retailers can competing with similar terms and conditions both:

(a) on the *same* network (see blue lines) and

(b) across *different* networks (see red lines).

Figure 7: Retailers in similar circumstances can compete on a level playing field



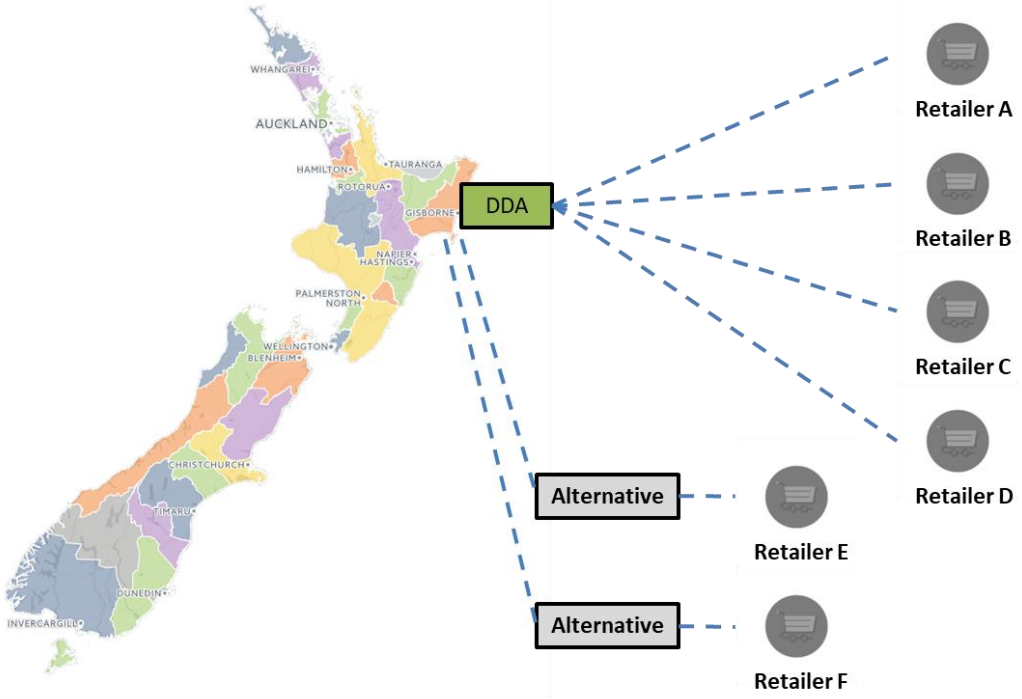
5.56 Retailers are keen to transition towards more standardised UoSAs. Retailers raised concerns that the UoSA could differ materially for retailers in similar circumstances, trading on the same network. We surveyed retailers to ask how they felt their UoSA compared to other retailers on the same network. Most retailers (15) felt their terms and conditions were no different to other retailers on the same network; six felt their terms were worse; only one thought their terms were better than other retailers.

The DDA proposal and Part 12A will promote more pro-competitive terms and conditions

5.57 We believe distributors and retailers' contracts for distribution services will trend towards the distributors' DDAs over time, particularly as either party can elect to contract on the basis of a distributor's DDA.

5.58 The DDA proposal secures access to the network for any retailer seeking to supply households with electricity but does not restrict the ability for the distributor and the retailer(s) to negotiate an alternative agreement (see Figure 8).

Figure 8: Retailers can access the network using the DDA or negotiate an alternative



5.59 The competition benefits expected from adopting the proposal are particularly relevant to entrant traders and to consumers. Compared with the current largely voluntary arrangements for MUoSAs, prospective entrant traders should benefit from the proposed Code amendments and DDA template. Provisions specify requirements for developing, negotiating, and agreeing distributor agreements, including a requirement that each distributor have a DDA. The Code will also allow parties to develop and agree alternative terms, which can be assessed against the terms included in the distributor's DDA.

5.60 Key benefits to participants and consumers lie in:

(a) the regulatory certainty provided by the provisions in the Code that govern the development, negotiation, and agreement of distributor agreements

(b) the efficiency and competition benefits inherent in each distributor having a published DDA that includes default core terms and operational terms that meet specified requirements

(c) the flexibility to innovate and negotiate alternative terms.

5.61 The greatest gains in dynamic efficiency arise from strong competition between the traders on the local network, as they seek to innovate and offer new and/or more cost-effective products or services to consumers over time. In this way dynamic efficiency is enhanced by uniform standards.

Separating distribution from additional services can bring significant dynamic efficiency benefits

5.62 We expect the long-term benefits from promoting competition in the related-services market will be greater than the costs of establishing this pro-competitive environment.

5.63 The DDA proposal will promote competition in the related-services market because third parties will have more confidence that they will be competing on fair and equal terms and conditions.

5.64 The DDA proposal will help address the concerns that distributors:

(a) are able to leverage their monopoly position to enter into related-services markets, and

(b) can impose UoSAs which provide terms and conditions favourable to them.

5.65 This will promote dynamic efficiency benefits for numerous reasons:

(a) The most efficient and appropriate provider will be able to compete for and provide related services.

(b) Industry participants and consumers will be given more choice regarding who they procure the services from.

(c) Third parties who specialise in providing a particular service will develop.

The DDA proposal will create conditions for an emerging related-services market by removing real or perceived barriers

5.66 The DDA proposal will promote dynamic efficiency benefits by allowing third parties to compete for and provide additional services.

5.67 At present, distributors can impose terms and conditions which inhibit workable competition for existing and emerging products and services. Distributors can tie or link additional services to distribution services through terms and conditions in the UoSA. Alternatively, distributors can require the retailer to hand over commercially sensitive information which enables the distributor to offer the same service in the competitive market. These behaviours stifle competition and inhibit third parties from providing the products and services.

5.68 The DDA proposal and Part 12A address this concern by separating distribution from additional services. Creating a framework for DDAs that primarily focuses on only distribution services ensures retailers can access the service they want (distribution), without having to assign rights for additional services.

5.69 The DDA proposal will remove real or perceived barriers, allowing innovative and new agents enter the market and compete to provide additional services. Entering and existing industry participants will have greater confidence that they can access the network on terms and conditions equivalent to other participants on the same network. This will promote competition between traders on the local network for existing and emerging products and services.

5.70 Enhancing competition in the related-services market, including the treatment of entrant traders on local networks, increases competitive pressure on electricity prices and encourages efficient investment in capital goods and innovation. Traders will seek and have incentives to innovate and offer new and/or more cost-effective products and services to consumers.

5.71 Consumers and retailers will also have a wider pool of agents to choose from who can provide these services. This will be particularly beneficial for services such as demand response, where the service can be provided by a variety of technologies. Consumers will have greater confidence that the price of electricity more closely reflects the efficient cost of producing, transporting and retailing electricity, and that price movements are driven by underlying supply and demand movements.

We have included cost-effective access provisions for distributors and distributors' trusts

5.72 We are aware that some consumer information regarding additional services can only be accessed through the retailer. We do not want to unduly increase the cost of doing business for distributors and shareholding trusts.

5.73 We propose including the following two changes with the DDA template and proposal:

(a) **Providing a robust protocol to exchange consumer information for non-distribution purposes (optional).** We have provided a thorough and robust protocol for exchanging consumer information for additional services as an optional appendix in Part 12A of the Code. Distributors are concerned about collecting and exchanging consumer information for non-distribution purposes, such as asset management. These concerns were raised in the 2016 DDA consultation and related consultations. The protocol in the Code will allow the distributor to access data they need, while providing the retailer with more confidence that the data will be handled in accordance with the protocol. A distributor and retailer are free to offer or negotiate an alternative.

(b) **Provide terms and conditions for a distributor to dispense dividends on behalf of the distributor's trust (optional)**. Distributors and shareholder trusts are concerned about the removal of provisions relating to the distribution of trust rebates. We have now re-introduced some standardised terms for trust rebates into proposed Part 12A of the Code. The standardised terms are balanced terms and conditions that ensure the distributor can continue to dispense dividends to the eligible consumers on the local network without interruption. A distributor is free to offer their own contracts for trust rebates to the retailer.

5.74 The proposed amendments to Part 12A of the Code improve static efficiency over the 2016 DDA proposal. The reason is the 2016 proposal would require distributors to negotiate consumer information access arrangements and protocols with each retailer. This could increase the distributor's cost of doing business. The proposed protocol is a cost-effective method to achieve access to information.

An evaluation of alternative means of achieving the objectives

5.75 We consulted on alternative means of achieving the efficiency and competition benefits sought from more standardisation of UoSAs (see Figure 9).

5.76 We have already consulted on a status quo (do nothing) option in 2014; so, this option has not been revisited.[34]

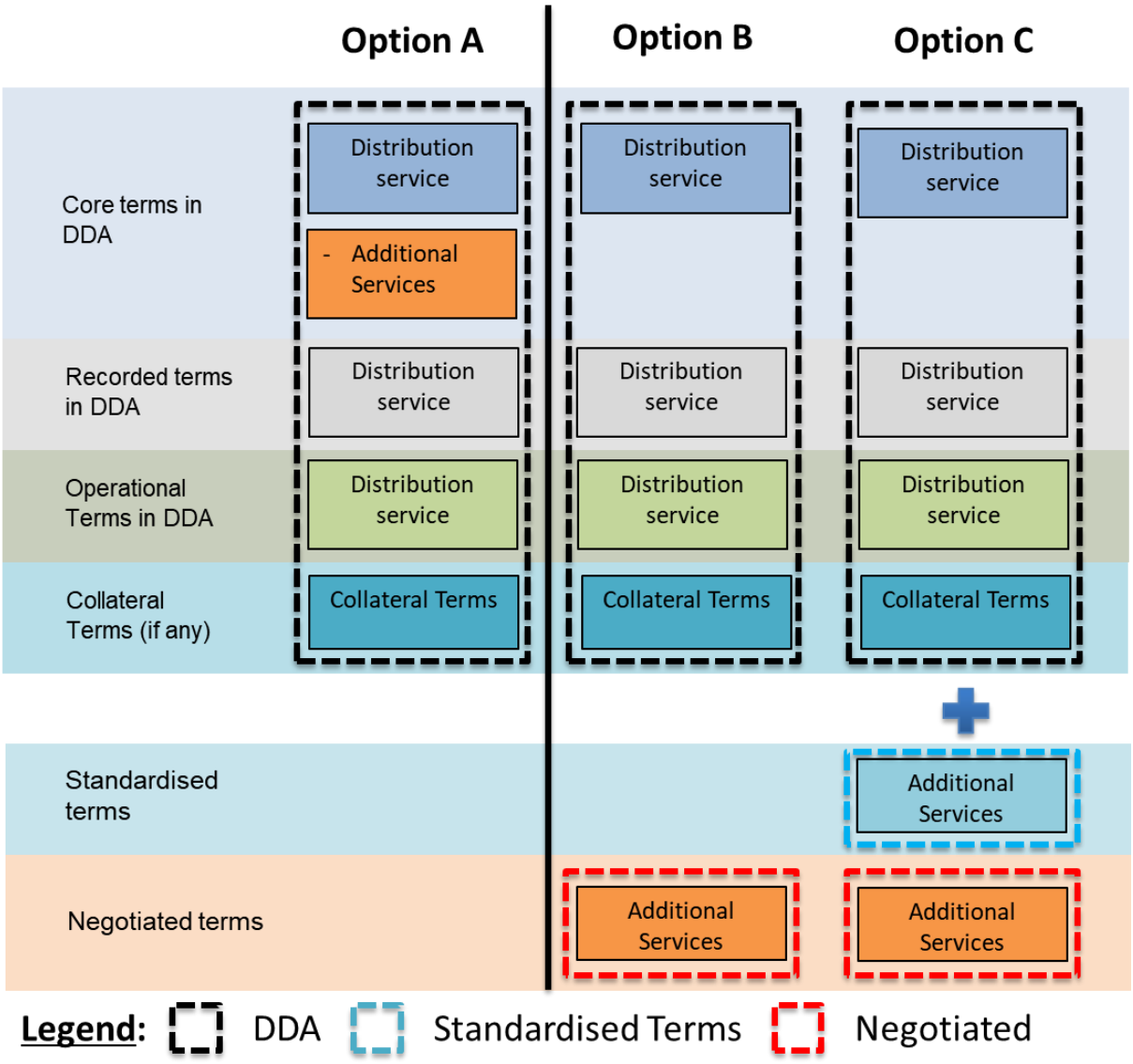
5.77 We concluded that the status quo option has not met the Authority's objectives and is unlikely to meet them. The Authority's view was the status quo option is unlikely to significantly impact on recently observed behaviours since, under voluntary conditions, there is little or no incentive for the participants to change their adopted approach.

5.78 The options considered are briefly introduced here and explained in more detail in the following sections.

---

[34] See *More standardisation of use-of-system agreements* project, 8 April 2014. Available at http://www.ea.govt.nz/development/work-programme/retail/more-standardisation-of-use-of-system-agreements/consultation/#c12201

Figure 9: Summary of DDA options considered



Source: Electricity Authority

Common provisions shared across all options

5.79 A distributor agreement based on a DDA will have three or four different levels of terms and conditions: core term, operational terms, and recorded terms (see Table 1), and possibly collateral terms.

5.80 In all options, the DDA (but excluding any collateral terms to which the retailer has objected) is a contract that is deemed to apply if:

(a) a 20 working day negotiation period elapses, or

(b) one of the parties elect to use the DDA as the contract for distribution services.

5.81 Participants have the option to agree to contract under an alternative agreement.

Option A – Revising the January 2016 template

Overview of Option A – all services

5.82 Option A involves making minor amendments to the DDA template we proposed in the January 2016 consultation paper.

5.83 Option A will provide a default *whole agreement.* The distributor's DDA represents a whole agreement for all services between a distributor and a retailer. A distributor agreement based on a DDA will include core terms, operational terms and recorded terms, and any collateral terms in a distributor's DDA to which the retailer has not objected, in the body of the agreement. The DDA will include terms and conditions for related- and additional-services in the main DDA template.

5.84 Option A is effective at achieving more standardisation as it leaves nothing unspecified in the relationship between the two parties.

Shortcomings of option A

Efficiency	Competition (Retail market)	Competition (Related services)
Promotes ✔	**Partially promotes ✔**	**Does not promote ✗**

5.85 We expect Option A will make a significant contribution to addressing efficiency and some retail competition concerns.

5.86 However, Option A is deficient because it does not adequately address the concerns around competition in the related-services markets, and there are structural issues with the contract.

5.87 Option A achieves efficiency benefits by providing a default contract for distribution services which can be deemed to apply or enacted via notice from one participant.

5.88 Option A partially addresses concerns about competition in the retail market. By including the additional services within the DDA template, we will be adding unnecessary terms and conditions into the DDA template and would also be requiring retailers to accept these terms and conditions even if they did not apply. This is a major inefficiency of the contractual terms and conditions. For example, there are two different methods of dispensing dividends on behalf of the trust (either through the retailer, or by the distributor). We would need to include terms around both styles to accommodate the two methods. There are many distributors who are not trust-owned – making the provision(s) entirely unnecessary.

5.89 Option A does not achieve competition in related-services markets. Implementing Option A would mean the additional services were still tied to the distribution service via the contract.

5.90 Also, Option A is not as future-proofed as other options. Option A lacks flexibility in the services which can be provided in the DDA. This approach will struggle to accommodate any innovation in the electricity sector from evolving technologies and business models. The only options available to both the distributor and retailer are to accept the entire DDA, as is, or not.

Option B – A DDA for distribution services only

Overview of Option B

5.91 Option B involves creating a default agreement for distribution services only. Any services which are identified as related or additional services are removed from the DDA template. Participants can freely negotiate terms and conditions for these services.

5.92 Under Option B, we will provide terms and conditions for distribution services only. These terms will be nationally consistent. Each distributor will be required to have a DDA for distribution services (which excludes non-distribution services) for any retailer to use.

5.93 Option B contains fewer operational terms which directly relate to distribution services only. Operational terms must meet the requirements specified in the DDA template but can be drafted by a distributor using our drafting guidance to suit local practises and policies.

5.94 Option B provides for recorded terms and collateral terms in the same way as Option A.

5.95 The distributor and the retailer have the option to independently negotiate these related and additional services. Alternatively, the distribution service could continue to exist without the additional service, or a third party could provide the additional service on behalf of the distributor. One example would be the dispensing of trust dividends on behalf of a trust.

Shortcomings of Option B

Efficiency	Competition (Retail market)	Competition (Related services)
Does not promote ✗	**Promotes ✔**	**Partially promotes ✔**

5.96 We decided to not proceed with Option B because it does not address all elements of the problem definition. Specifically, Option B does not provide a complete solution to the efficiency concern as high transaction costs remain. Also, Option B only partially promotes the competition in related services concern. Option B unbundles the distribution and additional services, but does not provide a mechanism for any standardised terms and conditions (if required at all).

5.97 The separation of additional services may also have unintended consequences:

(a) it does not achieve the efficiency benefits. Separating the non-distribution services, with no standardised terms available, means that retailers and distributors must enter into negotiations for each of these services. This means the cost of negotiation remains and there may continue to be a significant duplication of effort. The situation may be even worse than today's negotiation process, as the parties may need to negotiate an individual contract for each service (rather than one entire DDA)

(b) it may lead to competition problems when only one party wants the related or additional services. In instances where only the distributor wants the additional services, distributors may offer suboptimal distribution services for access to the related-services market. This is because distributors can value the entire relationship with the retailer as a 'basket of services'. They will prefer to do business with retailers who hold more of the assets the distributor 'wants' (eg, detailed consumer information). Distributors will be incentivised to offer the most compliant (information sharing) retailers better terms and conditions. This may be at the expense of the

distribution service, because the costs are regulated and can be reimbursed (limited downside risk). Distributors may also place more weighting on these relationships because the revenue in the distribution service is capped (low upside benefit), while the growth opportunities in the related-services market are uncapped (high upside benefit). Smaller or less compliant retailers may find themselves unable to negotiate better terms and conditions. This is not in the long-term interest of consumers.

Option C – The distribution plus additional services DDA

5.98 Option C is the proposal described in this paper.

5.99 Option C is our preferred option because it combines the benefits of Options A and B. Option C achieves the optimal balance of standardisation and certainty on the one hand, with flexibility and incentives to mutually agree value-adding service terms on the other.

Assessment under section 32(1)

5.100 Section 32(1) of the Act provides that Code provisions must be consistent with our objective and be necessary or desirable to promote any or all of the following:

(a) competition in the electricity industry

(b) the reliable supply of electricity to consumers

(c) the efficient operation of the electricity industry

(d) the performance by the Authority of its functions

(e) any other matters specifically referred to in this Act as a matter for inclusion in the Code.

5.101 Table 3 sets out an assessment of the proposed amendment against the requirements of section 32(1) of the Act.

Table 3 - Assessment under section 32(1) of the Act

Section 32(1) requirements:	Response
The proposed amendment is consistent with the Authority's objective under section 15 of the Act, which is as follows:	
(a) to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers	The proposal is expected to promote competition in, and the efficient operation of, the electricity industry for the long-term benefit of consumers. The reasons for this are summarised below. The proposal is not expected to have an effect on the reliable supply of electricity to consumers.
The proposed amendment is necessary or desirable to promote any or all of the following:	
(b) competition in the electricity industry;	The proposal is expected to promote competition in the electricity industry by: (a) reducing the transaction costs and duplication of effort associated with traders entering local distribution networks (b) promoting even-handed treatment of traders and providing equal access to distribution services

	(c) promote increased competition markets for electricity-related services by providing opportunities and incentives for efficient entry, exit, investment and innovation.
(d) the reliable supply of electricity to consumers;	The proposal is not expected to materially affect the reliable supply of electricity to consumers.
(e) the efficient operation of the electricity industry;	The proposal is expected to promote the efficient operation of the electricity industry by reducing the transaction costs and duplication of effort associated with traders and distributors developing, negotiating, agreeing and maintaining distributor agreements.
(f) the performance by the Authority of its functions;	The proposal will not materially affect the Authority's performance of its statutory functions.
(g) any other matter specifically referred to in this Act as a matter for inclusion in the Code.	The proposal will not materially affect any other matter specifically referred to in the Act for inclusion in the Code.

Assessment against the code amendment principles

5.102 When considering amendments to the Code, we are required by our Consultation Charter to follow these Code amendment principles, to the extent that we consider that they apply.

5.103 *Principle 1 – Lawfulness:* The Authority and its advisory groups will only consider amendments to the Code that are lawful and that are consistent with the Act (and therefore consistent with the Authority's statutory objective and its obligations under the Act).

5.104 We consider that the proposal is lawful.

5.105 *Principle 2 – Clearly Identified Efficiency Gain or Market or Regulatory Failure:* Within the legal framework specified in Principle 1, the Authority and its advisory groups will only consider using the Code to regulate market activity when:

(a) it can be demonstrated that amendments to the Code will improve the efficiency of the electricity industry for the long-term benefit of consumers[35]

(b) market failure is clearly identified, such as may arise from market power, externalities, asymmetric information and prohibitive transaction costs

(c) a problem is created by the existing Code, which either requires an amendment to the Code, or an amendment to the way in which the Code is applied.

5.106 If all distributors have distributor agreements with standardised terms, and if those terms are made available to all current and potential future traders competing on a local network, that underpins equal access to distribution services. That in turn can assist retail competition. Expanding retail competition is in the long-term interests of consumers.

[35] Where efficiency refers to allocative, productive and dynamic efficiency, and improvements to efficiency include, for example, a reduction in transaction costs or a reduction in the scope for disputes between industry participants.

5.107 The extent to which the MUoSA terms have been adopted varies among the 27 local distributors that currently use interposed arrangements. In some cases, particularly for legacy UoSAs, there is little voluntary transparency of the terms included in the UoSAs. However, widespread voluntary adoption of the MUoSA terms has not occurred. Distributors have presented UoSAs which contain significant and material deviations from the MUoSA.

5.108 If all distributors had distributor agreements with standardised terms, and if those terms were made available to all current and potential future traders competing on a local network, transaction costs would fall. That is because drafting and negotiating agreements would require fewer technical, commercial and legal resources. This is particularly the case for prospective entrant traders. Lower transaction costs benefit both traders and distributors and are therefore in the long-term interests of consumers.

5.109 Each of the estimated 311 UoSAs in place at September 2015 is a bespoke agreement that has been drafted and negotiated using technical, commercial and legal resources. We consider there is scope for further retail expansion, so new UoSAs will need to be negotiated.

5.110 Neither the voluntary MUoSA, nor any of the UoSAs negotiated since publication of the MUoSA, have provided a durable 'benchmark' UoSA. We consider that largely voluntary arrangements provide considerable scope for ongoing fragmentation of the terms of distribution services.

5.111 We consider that amending the Code to require each distributor that adopts interposed arrangements to develop and publish a DDA, which includes prescribed default core terms and operational terms that meet requirements specified in the Code, will resolve these problems for the long term. It will provide efficiency and competition gains that support our statutory objective.

5.112 *Principle 3 – Quantitative Assessment:* When considering possible amendments to the Code, the Authority and its advisory groups will ensure disclosure of key assumptions and sensitivities, and use quantitative cost-benefit analysis to assess long-term net benefits for consumers, although the Authority recognises that quantitative analysis will not always be possible. This approach means that competition and reliability are assessed solely for their economic efficiency effects. Particular care will be taken to include dynamic efficiency effects in the assessment, and the assessment will include sensitivity analysis when key parameters are uncertain.

5.113 We consider that, on balance, the proposal's estimated benefit would be larger than its estimated cost. This is based on the results of the qualitative and quantitative cost-benefit analysis set out earlier in this section 5.

Q4. What are your views on the Regulatory Statement? Specifically:

a. the efficiency costs and benefits

b. the costs and benefits in the retail market

c. the costs and benefits in the related-services market.

Appendix A Format for Submission

Submitter	

Question	Comment
Q1. What are your views on the problem definition? Specifically: a. the efficiency problem b. the competition in retail markets problem c. the competition in related services problem.	
Q2. What are your views on the revised: a. Part 12A proposal b. DDA template proposal	
Q3. What are your views on the draft Code, appended to this paper, which would introduce the proposal?	
Q4. What are your views on the Regulatory Statement? Specifically: a. the efficiency costs and benefits b. the costs and benefits in the retail market c. the costs and benefits in the related-services market.	

Appendix B Development Roadmap

Development roadmap to help understand the revisions

B.1 Industry participants recognised these problems in the early 2000s, when industry restructuring separated retail and network functions, and retail competition expanded. At that time, many distributors and retailers considered that developing a model UoSA could reduce transaction costs and enhance retail competition. A model UoSA would contain terms for distribution services that reflected a fair and reasonable balance between the legitimate interests of distributors and retailers.

We published a model UoSA as a voluntary solution to the efficiency and competition problems

B.2 In 2003, the Authority's predecessors proposed introducing a model UoSA (MUoSA). The MUoSA was a voluntary solution to the problems with negotiating UoSAs.

B.3 The industry proposed a standard or model UoSA (MUoSA) in the early 2000s as an industry initiative to minimise inefficient duplication of effort and achieve more balanced, efficient (for example, appropriate risk allocation) and standardised terms and conditions in UoSAs across different network areas. This was expected to result in the replacement of existing legacy UoSAs with contracts containing more efficient and pro-competitive terms, and to make it less costly and time-consuming for entrant retailers to expand operations to trade in new network areas.

B.4 The MUoSA represented an industry benchmark for UoSAs and a starting-place for contract negotiations. Distributors and retailers were expected to enter into meaningful negotiations as both agreed that problems with UoSA negotiations exist.

B.5 The MUoSA was originally developed by industry working groups made up of representatives from distributors, retailers and consumers. The Authority revised the MUoSA through extensive consultations with industry participants. The purpose was to address any ongoing concerns or new developments in the industry.

B.6 The Authority and its predecessors published four versions of the MUoSA between 2003 and 2012. Throughout the process, each revision included extensive stakeholder input, including through working groups with interested parties, and several rounds of consultation over many years of development. Briefly:

(a) **The first MUoSAs was completed in 2003.** The 2003 MUoSAs was a set of model distribution arrangements that were initially developed under the Metering and Reconciliation Information Agreement (MARIA) by the Model Distribution Arrangements Project (MDAP) in 2002.

(b) **The second MUoSA was completed in 2005.** The 2005 MUoSAs was proposed as a voluntary industry initiative to minimise inefficient duplication of effort and achieve more balanced, efficient (for example, appropriate risk allocation) and standardised terms and conditions in UoSAs across different network areas.

(c) **The third MUoSA was completed in 2008.** The 2008 MUoSAs was based on a review to check the MUoSAs' alignment with the anticipated new transmission benchmark agreement that was being developed at the time.[36]

[36] Note, this transmission benchmark agreement is, in principle, similar to the DDA we have proposed today.

(d) **The fourth and final MUoSA was completed in 2012.** The 2012 MUoSAs included a comprehensively review of the document based on stakeholder feedback. There were concerns that the 2008 (conveyance) MUoSA was not finalised to the same standard as the 2008 (interposed) MUoSA. The 2012 MUoSAs also included a set of drafting guidelines for developing UoSAs suitable for use with embedded networks.

B.7 In 2012, the Authority published two versions of the MUoSA: the interposed and conveyance MUoSAs to cover a variety of distribution arrangements. The two 2012 MUoSAs were designed to:

(a) contain core terms and conditions for distribution services that reflected a fair and reasonable balance between the legitimate interests of distributors and retailers

(b) provide a robust starting point for parties to negotiate or revise their own UoSA if they chose not to adopt the MUoSA

(c) replace existing legacy UoSAs with contracts containing more efficient and pro-competitive terms, and to make it less costly and time-consuming for entrant retailers to expand operations to trade in new network areas.

We outlined our expectations but they were not met

B.8 When publishing the 2012 MUoSAs, the Authority signalled that the MUoSA package represented a point of transition where we would begin monitoring the activity of distributors and retailers as they engage on negotiations.

B.9 The Authority established a feedback channel and undertook a post-implementation review of the MUoSA in 2013. We found our expectations above were not being met. There was significant divergence between the MUoSA and UoSAs being offered, low levels of engagement to update existing UoSAs, low levels of engagement and low-levels of voluntary disclosure.[37]

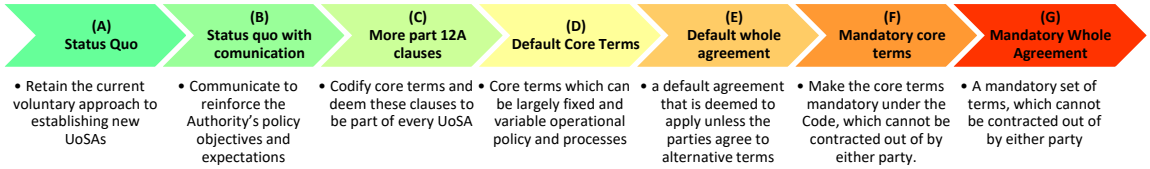
We proposed a default UoSA template as an alternative option

B.10 In 2014, the Authority published a further consultation paper that discussed evolving issues related to the formation of UoSAs between distributors and retailers.[38] We consulted on a range of alternative options of achieving efficiency and competition benefits from more standardised UoSAs. The alternatives are summarised in Figure 10. In general, we ranked the options from the most flexible (Option A) to the most standardised (Option G).

[37] See *Model use of system agreement* letter, 17 May 2013. Available at: https://www.ea.govt.nz/dmsdocument/16001

[38] See *More standardisation of use-of-system agreements* project, 8 April 2014. Available at http://www.ea.govt.nz/development/work-programme/retail/more-standardisation-of-use-of-system-agreements/consultation/#c12201

Figure 10: Alternative means of achieving efficiency and competition benefits



B.11 In 2015, and in response to submissions, the Authority concluded that the best balance between complete flexibility and absolute standardisation was Option (E): introducing a default UoSA.[39]

B.12 We called the default UoSA a *default distributor agreement* (DDA). The DDA approach was preferred for the following reasons:

(a) **The DDA approach retained flexibility.** Either party could opt to contract under the DDA at any time. However, by agreement, distributors and trader could continue the existing UoSA negotiation process. The parties would remain free to agree to alternative terms (which could be as simple as varying a single term from the default agreement).

(b) **We have implemented agreements like the DDA in other situations**. This approach was consistent with the approach taken in connection of distributed generation (under Part 6 of the Code) and in establishing transmission benchmark agreements (under Part 12 of the Code).

(c) **It contained all terms necessary for a whole agreement.** A whole agreement provided a more comprehensive, more standardised set of terms of service, policies, inter-business processes and standards relating to distribution service in New Zealand. The terms would reflect a reasonable balance of the commercial interests of both parties. Entrant retailers could unilaterally access the entire (default) agreement when considering retail expansion. A complete agreement also establishes a baseline for negotiation. A complete set of terms could also more easily be updated to incorporate future Code amendments and innovative new approaches.

39 See *More standardisation of UoSAs - consultation paper: Response to submissions*, 24 February 2015. Available at: https://www.ea.govt.nz/dmsdocument/19114

Appendix C Detailed amendments to the Code and DDA template

A modular and flexible neutral Part 12A is a future-proofed solution

C.1 Distributors are concerned that introducing requirements for a DDA through the Code would hinder future innovation in the distribution service. We have made Part 12A modular and flexible to respond to a rapidly changing industry.

C.2 We have made the Code more forward-looking and future-proofed. A forward-looking and future-proofed solution recognises that the distribution service will change over time. The number and type of participants using the distributors' networks will also increase and evolve over time. These network users may need to contract with the distributor for use of its network, or for particular services the distributor can provide. These network users can also contract to provide services to, or receive services from, the distributor.

C.3 Specifically, we have restructured Part 12A so that key provisions are now set out in schedules. The new clause 12A.2 has a table that sets out:

(a) the distributors and participants to whom Part 12A applies

(b) which schedule(s) apply to each distributor/participant.

C.4 We are currently proposing to regulate the relationships between distributors that operate on an interposed basis and the retailers trading on their networks. Specifically:

(a) each local network distributor that operates on an interposed basis will be required to develop a DDA based on the DDA template in accordance with Schedule 12A.4

(b) each local network distributor and any retailer wanting to trade on its network must negotiate and enter into a distributor agreement as set out in Schedule 12A.1

(c) each local network distributor, embedded network distributor, and any retailer wanting to trade on a local or embedded network must comply with the general provisions set out in Schedule 12A.2

(d) each embedded network distributor, and any retailer wanting to trade on an embedded network, must comply with the additional requirements set out in Schedule 12A.3.

C.5 The modular approach to Part 12A means that, if it is necessary to regulate other distributor-participant arrangements, we can (following consultation) amend Part 12A to specify that one or more of the Part 12A schedules applies to that arrangement. For example, if it is necessary to develop an agreement template for another type of distributor-participant arrangement, we could:

(a) amend Schedule 12A.4 to include a DDA template for that arrangement (as an appendix)

(b) amend the tables in clause 12A.2, clause 1 of Schedule 12A.4, and clause 3 of Schedule 12A.4 to specify that the distributor is required to develop a DDA template for that arrangement in accordance with Schedule 12A.4

(c) amend the tables in clause 12A.2 and clause 1 of Schedule 12A.1 to specify that the distributor and participant must negotiate and enter into a distributor agreement as set out in Schedule 12A.1.

C.6 These agreement templates would only be developed, and the Code amended, based on an identified market failure and following consultation, consistent with the requirements under the Act for amending the Code.

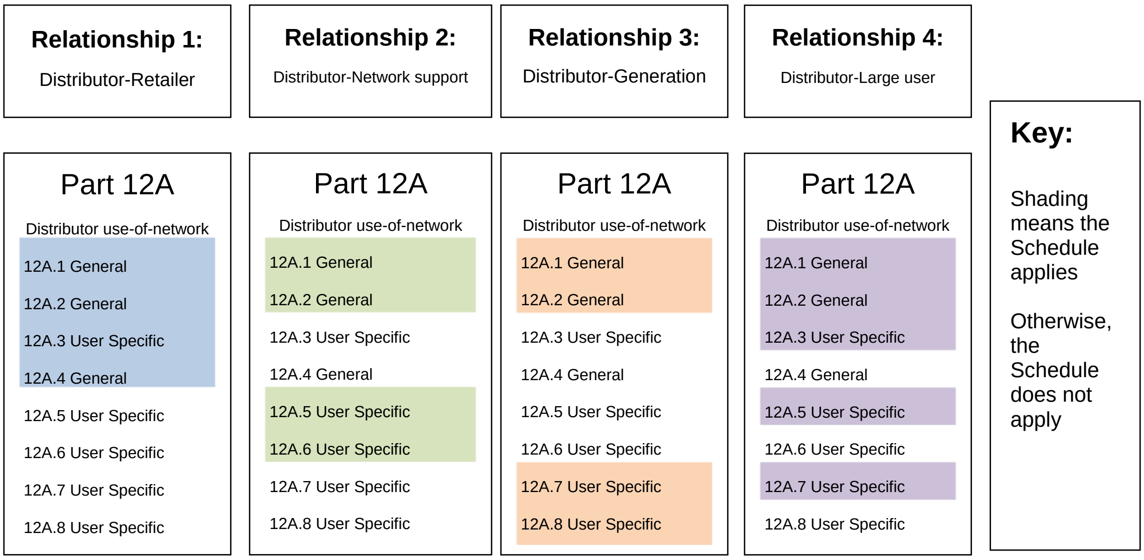
C.7 See Table 4 for a simplified and illustrative example of how we might regulate a range of distributor-participant arrangements in the future. The type of distributor is listed in column 1, the network user participant is listed in in column 2, and column 3 displays the existing schedules that could apply (ie, Schedules 12A.1 to 12A.4), and the new schedules that could be created to apply (ie, Schedules 12A.5 to 12A.7) to the distributor and participant.

Table 4: An illustrative example of how the proposed Neutral Part 12A could regulate distributor-participant relationships in the future

Row	Column 1 – Distributor owns or operates:	Column 2 – Participant is:	Column 3 – Schedules that apply
1	a **local network**	a **retailer**	Schedule 12A.1 Schedule 12A.2 Schedule 12A.4
2	a **local network**	A **large user**	Schedule 12A.1 Schedule 12A.2 Schedule 12A.3 Schedule 12A.5 Schedule 12A.7
3	an **embedded network**	a **retailer**	Schedule 12A.2 Schedule 12A.3 Schedule 12A.6

C.8 Figure 11 shows an example of how this approach may, in the future, work for different distributor-participant relationships.

Figure 11: Example of how the modular Part 12A could apply



Source: Electricity Authority

C.9 Having a mix of general and user-specific schedules in the Code, and tables specifying which schedules apply to different distributor-participant arrangements (in clause 12A.2 and

at the beginning of each schedule), is innovative for the Code. It also allows flexibility for the Code to be amended to add more schedules, or change existing schedules, as more network users (and new roles) enter the industry. The approach also accommodates companies that may fulfil one or more participant roles on the network; for example: a third party who wants to retail *and* provide network support services. We have drafted the neutral Part 12A so that participants, including 'multi-service' network users, can easily identify the relevant provisions of the Code with which they must comply. The neutral Part 12A will also benefit distributors by standardising and streamlining retailer's requests to access the network.

C.10 We have considered alternatives, such as creating a contract for each user type or each service required. These approaches were not practicable. The modular approach is the most appropriate solution, as:

(a) its flexibility means it recognises the diversity of users and services that can be provided, both today and in the future

(b) it can provide a platform for both a network user who wants to contract for one service with the distributor, or multiple services

(c) it can be amended more easily in the future as the sector evolves.

C.11 The benefit of this structure is that the Code can be amended to enable us to respond to changes in the operating environment of distributors and retailers, without having to substantially rework the structure and layout of the Code. This means we can more easily:

(a) amend the Code to regulate distributor-participant arrangements that are not currently regulated, including when new types of network users who are participants enter and expand in the electricity sector

(b) amend the Code when the nature of additional services changes

(c) consolidate other areas of the Code. For example, the neutral Part 12A means we could one day more easily relocate Part 6 of the Code (Connection of distributed generation) into the neutral Part 12A.

The neutral Part 12A includes default terms for some additional services which can be appended to distributor agreements

C.12 The DDA template, and each distributor's DDA, will remain a contract for distribution services. However, we have amended the neutral Part 12A to include default terms relating to some types of additional services, which can be appended to distributor agreements.

C.13 The DDA template we proposed in 2016 removed all references to additional services. We received mixed responses from submitters. Some distributor submissions on the 2016 consultation stated that restricting distributor agreements to only distribution services will severely limit the ability of parties to adapt in the rapidly evolving electricity sector. Some distributors and retailers wanted to keep existing UoSAs that include additional services within the terms and conditions, such as information exchange and the distribution by retailers of income or rebates from a trust that holds shares in a distributor to customers. Other distributor and retailer submissions wanted distributor agreements limited to only terms relating to distribution service, removing all additional services.[40] The Court of Appeal

[40] *See DDA survey 2018 – Distributors*, Question 16; *DDA survey 2018 – Retailers*, Question 23.

has also clarified that Part 12A must allow flexibility for terms additional to those contemplated in Part 12A to be included in distributor agreements.

C.14 We considered these factors carefully and have made changes to Part 12A to include default terms for some additional services, which may be appended to a distributor agreement between a distributor and a retailer (see clause 7 of Schedule 12A.1). Providing standardised default terms and conditions for some common types of additional services, which are available on an opt-in basis as described in clause 7(2) of Schedule 12A.1, addresses both:

(a) transaction costs from negotiation

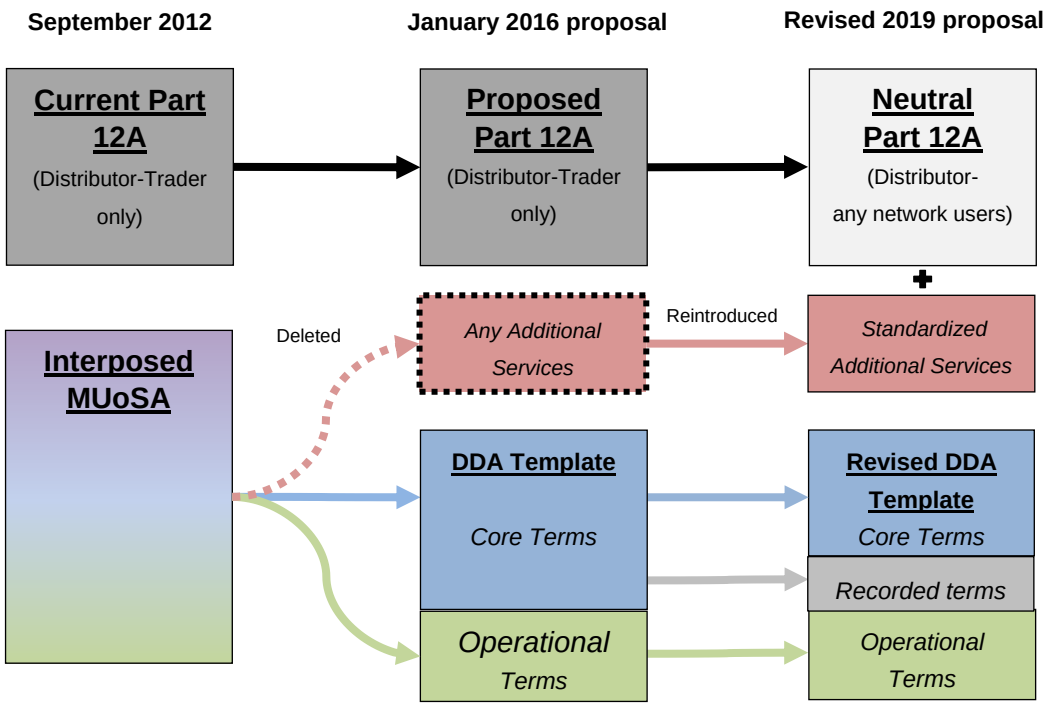
(b) competition concerns associated with:

(i) the distributor using their bargaining power to obtain better terms which favour themselves or their affiliates in contestable services

(ii) linking the provision of distribution services by the distributor to the provision of additional services by the retailer.

C.15 We have provided some standardised terms and conditions for some common additional services in the neutral Part 12A of the Code. These terms are not automatically included in a distributor agreement. However, if the party specified in clause 7(2) of Schedule 12A.1 elects to include terms relating to one of the additional services in the distributor agreement, the standardised terms and conditions in the Code will be appended to the parties' distributor agreement unless the parties negotiate and both agree their own alternative terms. Clause 3(1)(d) of Schedule 12A.4 also requires distributors to include in their published DDAs any terms relating to those additional services that they intend to require be included in their distributor agreements.

Figure 12: The development roadmap for the revised DDA template



Source: Electricity Authority

C.16 Schedule 12A.1 of Part 12A includes standardised default terms and conditions for the following additional services:

(a) Income distribution (Schedule 12A.1, Appendix A, Part 12A of the Code)

(b) Provision of trust and co-operative company information (Schedule 12A.1, Appendix B, Part 12A of the Code)

(c) Provision of customer information (Schedule 12A.1, Appendix C, Part 12A of the Code).

C.17 The standardised default terms for the additional services in Appendices A and B to Schedule 12A.1 are designed to allow:

(a) distributors that are co-operatives to meet their obligations to their shareholding customers

(b) a trust that is a shareholder of a distributor to meet its obligations to beneficiaries of the trust who are connected to the distributor's network.

C.18 Appendices A and B each allow distributors or their shareholding trusts to pay dividends to shareholding customers or beneficiaries, and to access the information they need about the payment of dividends to assess whether they are consumer-owned under Part 4 of the Commerce Act 1986. The differences between Appendices A and B are that:

(a) Appendix A relates only to the payment of dividends to shareholding customers or beneficiaries through the retailer. This includes giving the distributor information about the dividends that have been paid, and allowing that information to be shared with the Commerce Commission

(b) Appendix B enables the distributor and its shareholding trust to obtain the information they need to pay dividends to shareholding customers or beneficiaries directly, as well as to access other information they might need to meet their obligations as a trust or co-operative. This includes, for example, information they might need to maintain a register of beneficiaries or shareholders.

C.19 We used the 2012 MUoSA as the starting point for Appendices A and B, because the wording in the 2012 MUoSA was based on extensive stakeholder feedback. We have further developed the 2012 MUoSA to ensure that distributors and their shareholding trusts are able to meet their obligations as co-operatives or trusts.

C.20 The Provision of customer information service, Appendix C to Schedule 12A.1, is explained shortly.

C.21 Clause 7(2) of Schedule 12A.1 of the Code sets out which party to a distributor agreement may elect to append the additional terms to the agreement. It is proposed that, in relation to the additional services above, the distributor have the option of electing to append those terms in its distributor agreements with retailers. Both the distributor and retailer party to a distributor agreement have the option of opting into the terms relating to the additional services.

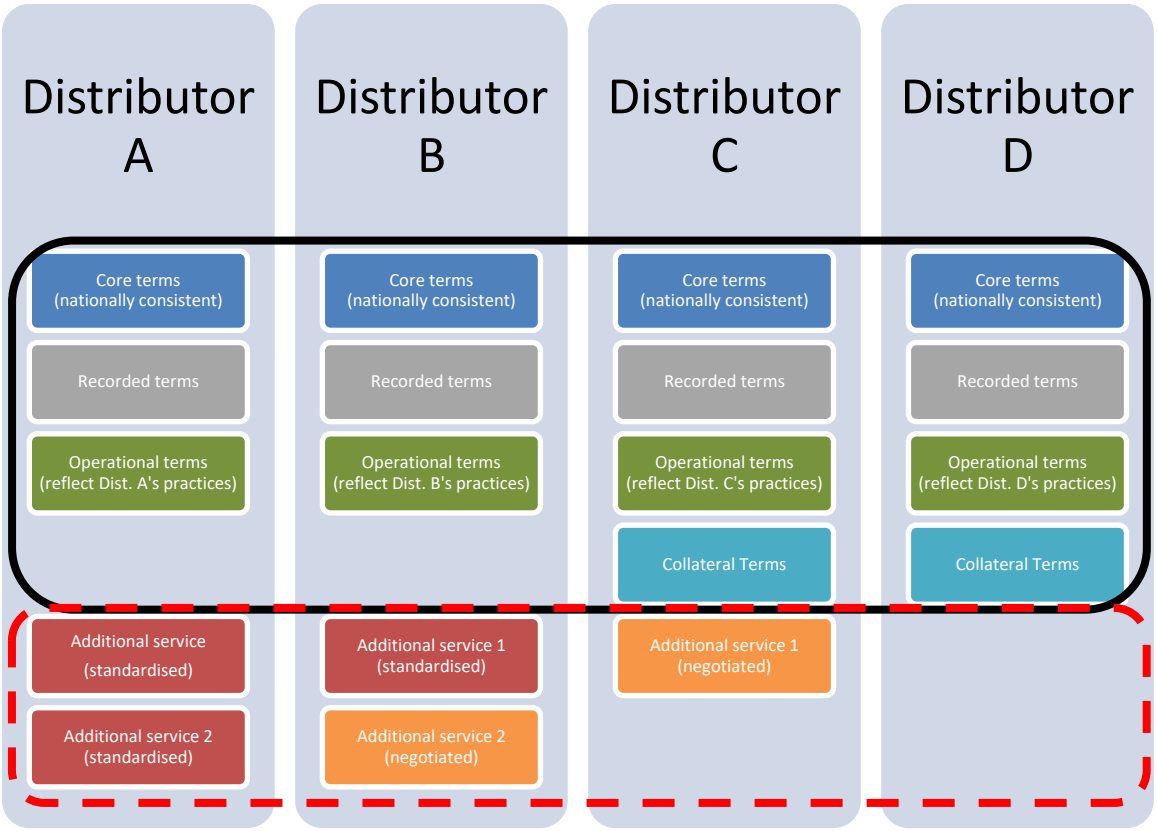
C.22 However, if the participant with the option to "opt in" wants to include terms other than the standardised terms set out in an appendix to Part 12A, it must seek the other party's agreement to the alternative terms and conditions for additional services.

C.23 This allows the distributor to require a retailer to provide the additional services the distributor requires, but only on the terms set out in the relevant appendix, or terms that are acceptable to the other party. An illustrative example of how four different distributors may

contract for additional services is shown below in Figure 13. The black line outlines the boundary of a distributor agreement based on a DDA. The red dashed line contains the additional services which can be appended to the distributor agreement.

C.24 More additional services can be incorporated in the future, as appendices to Schedule 12A.1, as the industry changes. These new schedules will come from industry demand for standardised terms and conditions but will be included in the Code through the standard Code amendment process.

Figure 13: Illustrative example of distributors with different DDA structures



Source: Electricity Authority

C.25 The distribution + additional services structure means the industry can achieve more standardisation of agreements for distribution services, while allowing flexibility for innovation and more participation in the related-services market. Part 12A will provide retailers with access to the distributor's network, and also allow third parties to enter into the related-services market to provide additional services.

Right to control load

C.26 In the DDA template, we have separated load management into distinct categories. There are many reasons to control load, and both distributors and retailers have views about the right to control load.

C.27 Some distributor submissions stated that contracts for distribution services should provide for load management. However, we are concerned this may hinder competition and innovation in the related-services markets. Conversely, the retailers are concerned about the distributor's ability to control load which the retailer had the right to control.

C.28 The overarching principle of the revision is that the party who gains the right to control part of the consumer's load should be able to do so uninhibited. However, it must also be

recognised that there are instances where the distributor must control load during system emergency events.

C.29 We recognise that the nature of the relationships surrounding load management and control will change. Technology exists that means load control services, such as those provided by distributed generation or batteries, or hot-water cylinders, can be provided by any participant.

C.30 As a solution, we have re-categorised the right to control load in Schedule 8 of the proposed DDA template. We have introduced a 'hierarchy of load management', which prioritises control (with the higher levels being given priority). The levels are:

(a) Grid emergency event: As defined in Part 1 of the Electricity Industry Participation Code 2010

(b) Market participation: Any other right to control load.

C.31 The retailer's rights to control load fall within the market participation category. Many of the distributor's rights to control load are also within the market participation category, placing them on equal footing with the retailer. This includes activities such as avoiding transmission charges, to optimise network investment or managing peak loadings, as there are alternative methods for a distributor to achieve such outcomes.

C.32 In system emergency events, as defined in the DDA template and Part 1 of the Code, the distributor may need to take control of all load on its network. The DDA template provides provisions which allow the distributor to control load in some circumstances. Outside of those circumstances, the retailer does not need to assign the right to control load.

C.33 Part 12A does not prohibit distributors and retailers from negotiating other terms or separate agreements for services beyond distribution, including load management, where both parties agree. Part 12A also allows parties to contract under an alternative agreement, where they can write different provisions to control load.

Appendix C is a default data template to exchange consumers' historical consumption data

C.34 We propose introducing a default data template for the exchange of consumers' historical consumption data between retailers and distributors. This proposed data template is contained in Appendix C of Part 12A of the Code (Appendix C).

C.35 Appendix C will apply as a default contract for data exchange if one or both participants opt to use Appendix C. For the avoidance of doubt, participants can agree to contract under alternative terms.

C.36 We propose introducing Appendix C because industry participants and submitters to the 2016 DDA consultation raised concerns about the exchange of consumers' consumption data between distributors and retailers. There was little consensus on what data should be provided, at what level of detail, and within what timeframe. Submitters also raised data-related concerns in other Authority consultations, including: the *Data and Data Exchange*[41] and *Multiple Trading Relationships*[42]. Concerns focused on:

---

41 See our ongoing work programme: *Data and data exchanges for market transactions*, 26 September 2017. Available at: https://www.ea.govt.nz/development/work-programme/evolving-tech-business/data-and-data-exchanges/consultations/

42 See our ongoing work programme: *Multiple Trading Relationships*, 28 November 2017. Available at: https://www.ea.govt.nz/development/work-programme/evolving-tech-business/multiple-trading-relationships/

(a) who should be allowed to access consumers' historical consumption data

(b) inaccuracies and errors in data being exchanged.

C.37 As a solution, we propose introducing an new Appendix C to Part 12A of the Code, which focuses on the exchange of consumers' historical consumption data. The new Appendix C is intended to support the exchange of consumption data as a service, while giving retailers a tool to ensure that there are safeguards as to how and for what purposes the information can be used by a distributor. It is a default additional service that one or both participants can opt to use. However, the new appendix does not cover data exchanges for invoicing, which is addressed through EIEP1, 2 and 3.[43]

C.38 We created Appendix C by combining:

(a) a distributor's standardised consumer information exchange protocol

(b) a retailer's proposed consumer information exchange protocol

(c) ERANZ's suggestions from the first consultation paper, and

(d) input from industry participants.

C.39 Appendix C sets out standard default terms for the provision of consumers' consumption data, and includes provisions intended to assure that such data is used appropriately. We propose to include standardised default terms because:

(a) Some historical consumption data held by retailers is required for a distributor to manage its network, for example to develop distribution pricing structures and for asset management. Therefore, there is some value to consumers by allowing distributors to access some historical consumption data. This value is likely to be a more efficient distribution charges and a better quality of distribution service.

(b) Retailers are concerned current consumer data exchange protocols don't provide assurance on how distributors can use data. Retailers are concerned consumer data could be used to enter into contestable electricity markets, such as the related-services market. The threat of entry from the distributor can inhibit competition in the related-services market. The standardised terms in the consumer data template should provide the retailer with more confidence as to how the data will be used by providing a fall-back option if the retailer and distributor cannot negotiate their own terms that give the retailer satisfactory assurances as to how the data will be used.

(c) A standardised set of terms ensures consumers' historical consumption data is exchanged in a consistent and efficient manner. It also provides more standardised terms across retailers and different local networks. Appendix C includes characteristics such as the process for exchanging data, acceptable timeframes, and the data format. More standardised exchange protocols and better access to data enables industry participants to make faster, more informed decisions and also reduces the cost of doing business.

Appendix C will provide default access to consumers' historical consumption data

C.40 The intent of Appendix C is to give the distributor access, under standardised terms written by the Authority, to consumption data held by the retailer and is required for the provision of

[43] Information on EIEP 1, 2 and 3 is available here: https://www.ea.govt.nz/operations/retail/eiep/regulated-electricity-information-exchange-protocols/.

the distribution service. The trader is also given the ability to terminate the data agreement in extreme cases.

C.41 Appendix C aims to provide a level of data security and assurity under which a retailer would be comfortable providing data to the distributor. Industry participants should advise the Authority if these measures provide sufficient confidence and assurance regarding management and use of the data.

C.42 We have strengthened clauses which prevent the distributor (or their affiliates) using any data to compete in contestable services or against the retailer. We have provided some permitted purposes for the data, along with space for retailers to explicitly list any other permitted uses for the data.

C.43 The permitted purposes are intended to clearly set out the uses for the data, and the distributor may not use the data for any purpose not explicitly mentioned in the data agreement. For the avoidance of doubt, the retailer should be precise when listing any other permitted purpose(s).

C.44 With regards to any data exchanges, retailers must comply with the Privacy Act 1993. Retailers are concerned about their consumer's privacy, so they must have an ability to sanitise the data of any information which could identify one or more natural persons.

C.45 We have introduced terms which require the distributor indemnify the retailer against any costs as a result of, or in relation to, a variety of cases, including: breaches and in relationship to the distributor's promotional material.

C.46 We have also introduced the ability for the retailer to terminate the data agreement. The retailer may terminate the agreement in the case(s) of:

(a) the second of two or more breaches in a twelve-month period, or

(b) an event which directly affects 10% or more of the Trader's ICPs simultaneously.

Greater use of EIEPs

C.47 Some distributors and retailers submitted that greater use of EIEPs should be required by the Code, and that such EIEPs should be more precisely defined.

C.48 We have not changed the EIEP provisions in Part 12A or the DDA template because the DDA consultation is not the most appropriate place to address EIEP concerns. However, these concerns have been noted.

C.49 Some of the concerns about data and information exchange have been addressed through the new consumer information provisions (Schedule 12A.1, Appendix C, Part 12A of the Code). For example, the new Appendix C should promote agreement on the format of data files being exchanged.

Retailer are concerned about transparency in the negotiation process

C.50 Some retailers are concerned that competition is being inhibited because distributors can offer materially different contracts to different retailers in similar circumstances.

C.51 We have considered multiple options to increase transparency in the negotiation process. The options we considered were:

(a) requiring distributors to submit full contracts to the Authority

(b) requiring retailers to submit full contracts to the Authority.

C.52 We have updated Part 12A of the Code to require all retailers to submit to the Authority full contracts for distribution services (contracts entered into on the basis of a DDA, alternative agreements, and any side-agreements agreed over the course of negotiations for a distributor agreement)[44]. At present, we have not placed any obligations on distributors to share information with the Authority but we are still considering this as an option.

C.53 The Authority is considering whether to make all contracts available via our own website.

C.54 Public disclosure by the Authority could enable any expanding retailer seeking to access the distributor's local network to view the terms and conditions before requesting network access.

C.55 Increased transparency has multiple benefits:

(a) Retailers will have better insight into the terms and conditions available on all networks. Retailers are expected to be attracted first to the distribution networks offering the most beneficial terms and conditions. This may strengthen incentives for distributors to improve the quality of service they provide to retailers to retain their customers, or increase the number of entrant retailers.

(b) Distributors will benefit in two ways. First, they will improve their existing processes and provide a better-quality distribution service to attract entrant retailers. Second, these entrant retailers bring innovative and new technology to the industry. Some of these technological advancements, such as batteries and spot price plans, can also provide some beneficial services for the distributor (such as demand response). This means distributors can avoid some congestion on their lines and therefore better utilise their existing line capacity.

(c) Consumers will also benefit from increased transparency. Consumers are increasingly demanding more control over their electricity supply. Increased transparency promotes more competition on a local network. A number of entrant retailers which provide innovative and new retailer tariffs, such as a spot price plans, have entered the industry. By improving conditions for retailer competition through a better distribution service, consumers gain greater access to the range of products and services a retailer currently do, or could provide, in the market.

C.56 Industry suggested we consider implementing a Most Favoured Nation clause but are not pursuing this option. Such clause would allow a retailer to adopt a more preferred contract (in full) that a distributor is offering to another retailer. However, retailer submissions to the 2018 DDA survey that these clauses are difficult to implement in practice.

Prescribing specific terms pursuant to our objective

C.57 The Court of Appeal has confirmed that the Authority can amend the Code to prescribe standard terms in distributor agreements where necessary or desirable to achieve our statutory objective.

C.58 Prescribing terms in distributor agreements helps achieve more standardisation of UoSAs. It also reduces harm from terms which are inconsistent with our statutory objective.

---

[44] This is to ensure that transparency and oversight by the Authority cannot be avoided by including terms that have been negotiated as part of a UoSA in an agreement that is separate from the main distributor agreement.

C.59 In practice, the Authority may update the DDA template in the Code to include more standardised terms. The Authority may consult on the need to update the DDA template and Code.

C.60 Upon updating the core terms in the DDA, existing distributor DDAs will need to be updated to reflect the new core terms. The reason being, the new terms are included in the Code, and failure to adhere to the terms is a breach of the Code. The changes will not be retroactive; meaning, the new terms would only need to be reflected in DDAs after the Code is updated.

We are introducing safeguards to ensure that retailers are not forced to agree to collateral terms

C.61 The Authority no longer proposes to prohibit the inclusion of any collateral terms relating to subject matter not addressed in the DDA template in distributors' DDAs, or any other terms in distributor agreements.

C.62 We now propose to introduce new safeguards to promote more equal bargaining positions between retailers and distributors. We will do this by ensuring that retailers have a genuine choice as to whether any other terms in a distributor's DDA, which we call 'collateral terms', are included in distributor agreements.

C.63 A distributor will be able to include collateral terms in their DDAs. However, they must be clearly identifiable as such, and must not be inconsistent with, or modify the effect of, core or operational terms in the distributor's DDA. A retailer will have the ability to give notice to the distributor that it objects to one or more of those collateral terms being included in its agreement with the distributor. If a retailer objects to the inclusion of a collateral term in this way, that collateral term will not be included in the binding distributor agreement that is based on the distributor's DDA.

C.64 A distributor and retailer will also be able to agree to include other terms in alternative agreements. If a distributor and a retailer agree to include any other terms in their distributor agreement that is not in the distributor's DDA, the distributor agreement will be an alternative agreement (even if all other terms are the same as those in the distributor's DDA).

C.65 This proposal:

(a) helps address competition concerns that arise from distribution services being tied to other services

(b) helps address competition concerns associated with the provision of the distribution service by a distributor to the provision of an additional service by a retailer.

C.66 This proposal does not prevent distributors and retailers from agreeing terms not contemplated by the Code. However, it means that retailers will always have the option of contracting with a distributor based only on the types of terms contemplated in the DDA template. It therefore helps to ensure that any collateral terms have been agreed by both parties, and are not the result of the retailer being put in a "take it or leave it" position. This is consistent with the Court of Appeal's finding that distributors and retailers should be able to agree collateral terms.

We will monitor the types of terms being included in distributor agreements, and may prohibit specific types of terms in the future

C.67 The Court of Appeal has confirmed that we may:

(a) prohibit terms that are inconsistent with terms we have prescribed, as we originally proposed

(b) prohibit specific types of terms that we can demonstrate are necessary or desirable to prohibit to achieve our statutory objective and the objects of the Code. In other words, we may prohibit terms that are inconsistent with the objective of promoting competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.

C.68 At this stage, we propose to only prohibit the inclusion of terms in:

(a) DDAs and distributor agreements based on DDAs that are inconsistent with, or modify the effect of, the core terms prescribed in the Code or operational terms regulated by the Code; and

(b) appendices relating to additional services based on the standardised default terms in the Code that are inconsistent with, or modify the effect of, those standardised default terms.

C.69 Those prohibitions would not extend to alternative agreements.

C.70 However, we will monitor the types of terms that are being included in distributor agreements (whether the agreements are based on our DDA template or are alternative agreements), through the requirement on retailers to disclose contracts entered into on the basis of a DDA, alternative agreements, and any side-agreements agreed over the course of negotiations for a distributor agreement[45] to the Authority.

C.71 If we identify any terms that appear to compromise competition in the electricity industry, the reliable supply of electricity to consumers, and the efficient operation of the electricity industry, we will consider prohibiting these terms by amending the Code.

C.72 We also ask industry participants to make us aware of any terms and conditions in contracts which are enabling conduct which compromises competition in the electricity industry, the reliable supply of electricity to consumers, and the efficient operation of the electricity industry.

We have made some changes to the DDA template

C.73 We have made changes to the January 2016 DDA template based on submitters' feedback.

C.74 In this section, we explain how we have revised the DDA template structure, and more closely applied the principles discussed in the January 2016 consultation and 2018 DDA survey. We have updated the DDA template to ensure the terms and conditions better reflect today's practices and policies for distribution services.

C.75 The DDA template's fundamental purpose remains the same: to provide a default contract for distribution services. For brevity, we do not revisit the elements of the design of the DDA template in this chapter that remain unchanged. The January 2016 consultation paper provides a detailed overview of the structure.[46]

---

45 This is to ensure that transparency and oversight by the Authority cannot be avoided by including terms that have been negotiated as part of a use-of-system arrangement in an agreement that is separate from the main distributor agreement.

46 See *Default agreement for distribution services – Consultation Paper*, 26 January 2018. Available at: https://www.ea.govt.nz/dmsdocument/20343

Key policy decisions considered for the DDA template:

1) Determining what the maximum liability cap under the terms of a DDA will be

2) Establishing prudential requirements

3) Avoiding regulating matters that the Commerce Commission is authorised to regulate under Part 4 of the Commerce Act

4) Including equal access and even-handedness clauses

5) Providing for alternative agreements

Determining the maximum liability cap

C.76 The DDA template calculates the liability cap based on the number of ICPs affected. Specifically, clause 24.7 calculates the maximum liability for any single event to be the lesser of $10,000 per ICP affected, or $2,000,000. This method was originally proposed in the MUoSA, and it will remain in the DDA template.

C.77 Some distributor submissions stated that calculating liability based on ICPs was inappropriate as it did not relate to total damage suffered by customers. The distributors used either:

(a) a different method to calculate liability cap, or

(b) had a different maximum liability cap.

C.78 We have decided to leave the liability cap unchanged at $10,000 per ICP or $2,000,000 (whichever is lesser). Capped liability is standard in commercial agreements. The liability cap we propose is equal to, or slightly higher than, the majority of contracts available today. Also, a cap based on affected ICPs ensures that liability limits per customer do not depend on the size, scale or number of industry participants.

C.79 We reviewed UoSAs available on distributors' websites. For contracts that state a limitation of liability (liability cap), we found:

(a) twelve distributors already use the ICP-based calculation method we expected in the MUoSA

(b) four distributors use a similar method, but calculate share of ICPs in bands (eg, between 5–7.5% of network ICPs)

(c) three distributors use a fixed liability cap lower than the $2,000,000 cap proposed

(d) one distributor negotiates the liability cap with each retailer

(e) two distributors use an alternative indexing method, such as benchmarking liability against a proportion of annual line functions charges.

C.80 Most liability caps available today fall within $500,000 to $2,000,000. Some liability caps are calculated annually, others are calculated using a rolling 12-month window. We found only one distributor with a liability cap higher than $2,000,000.

Prudential requirements

C.81 The DDA template and the Code impose prudential requirements on each participant that has incurred or will incur financial obligations. The prudential requirements ensure the participant can meet those financial obligations.

C.82 Submissions on prudential requirements fell into four categories. We list these below then address them in the following paragraphs:

(a) Concern about the duplication of prudential requirements across the DDA template and the Code.

(b) Confusion about which party can elect the prudential requirements.

(c) Confusion about the annual yield distributors are required to pay on additional security.

(d) Concern about a distributor's ability to draw on prudential requirements.

C.83 In addition, we have made some minor changes to improve clarity of some terms regarding prudential requirements.

Duplication of prudential requirements across the DDA template and the Code

C.84 Submitters stated that the prudential requirements are duplicated across the Code and the DDA template, and that one document could cross-reference the other.

C.85 For local network interposed distributors, prudential requirements are included in the DDA template as core terms, meaning that they must be included in each such distributor's DDA. Accordingly, it is not necessary for the Code to include separate prudential requirements relating to local network interposed distributors.

C.86 However, embedded network distributors are not required by Part 12A to develop a DDA template. Instead, Schedule 12A.3 sets out provisions that apply to such distributors, which are carried over from the current Part 12A. Prudential requirements are included in clauses 3 to 8.

Parties which can elect prudential requirements

C.87 Some submitters requested more clarity about clause 10.2 of the DDA template, relating to the election of a prudential requirement.

C.88 The clause requires traders to comply with one of the prudential requirements provided. We have re-written the clause to make it clear that:

(a) the distributor has the right to require a trader to comply with prudential requirements (the DDA template lists a number of options in clause 10.2)

(b) the trader elects which of the options they will satisfy to meet the prudential requirements.

The annual yield distributors are required to pay on additional security

C.89 Some distributors requested more clarity about, or disagreed with, the payment they are required to make on additional security.

(a) Distributors requested clarification as to how the charge for additional security should be calculated. This charge has been carried over from the current Part 12A and we have been clear and consistent on the clause's meaning.47 In short, the distributor will pay the daily bank bill yield rate, plus 15% on the amount of additional security. This means 15 percentage points above the bank bill yield rate (for example, a bank bill yield rate of 1% + 15% = 16%). This charge represents the cost of debt for a new

47 See clause 2.2.3 and 2.2.4 of "Standardisation: Clarifications to prudential proposal and proposed changes to distributor indemnity proposal" http://www.ea.govt.nz/dmsdocument/11630

entrant retailer and therefore reflects an appropriate level of compensation for providing additional security.

(b) Distributors questioned the rates payable. Some distributors who understood the clause stated that the charge for holding additional security is beyond commercial rates to mitigate risk and creates an incentive for the retailer to provide additional security. We propose to keep the rate as is because the additional charge reflects the economic cost to a small growing retailer to raise cash for prudential security. Also, clause 10.7 of the DDA template states the additional security is by request of the distributor, so it is the distributor's choice if they want to hold additional security.

The distributor's ability to draw on prudential security

C.90 Distributors asked why we have limited their ability to draw on prudential security. This relates to clauses 10.23 to 10.25, which were carried over from the MUoSA.

C.91 The prudential requirement clause has been limited to ensure that, if there is a genuine dispute over an amount of arrears, the dispute should be settled before the distributor has access to prudential security.

Recorded terms avoid regulating matters that the Commerce Commission is authorised to regulate under Part 4 of the Commerce Act

C.92 As part of our ongoing work to revise the proposed DDA template, we have considered whether terms in the DDA template may contravene section 32(2)(b) of the Electricity Industry Act. In brief, section 32(2)(b) means the Code cannot regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986.

C.93 As part of our analysis, we identified several terms in the DDA template which have the potential to fall within the Commerce Commission's jurisdiction.

C.94 We have created a new category of terms throughout the DDA template to minimise the risk of any aspect of the DDA template contravening section 32(2)(b) of the Electricity Industry Act. We call these 'recorded terms'.

The DDA template now has three levels of terms: Core, operational, and recorded

C.95 A summary of the terms and conditions, and how they apply, is provided in Table 5 and explained below.

Table 5: Summary of term and condition levels: Core, operational and recorded

	Core terms	Operational terms	Recorded terms
Service(s) covered	Distribution service		
Location of terms	Must be in each distributor's DDA		Placeholders or complete terms in DDA. Must be in executed distributor agreements
Are they default terms?	Apply unless both parties agree to other terms		Not regulated
Source of terms	DDA template in the Code	Distributor's drafting	
Appeal to the Rulings Panel	No	Yes	No
Alternatives available	Yes, by agreement		Not regulated

Core terms are nationally consistent

C.96 Core terms are a standard set of terms and conditions governing the provision of distribution services throughout New Zealand.

C.97 The majority of the core terms come from the MUoSA developed in 2012. The core terms are based on the terms of the MUoSA, amended to create fit-for-purpose default core terms.

C.98 Core terms in the DDA template must be included in each distributor's DDA. That means that core terms will be nationally consistent and identical across all distributors' DDAs.

Operational terms reflect local practices

C.99 Operational terms are terms that must meet requirements specified in the DDA template and comply with principles set out in clause 4 of Schedule 12A.4, but can vary between distributors to accommodate local practices and policies.

C.100 Operational terms typically relate to inter-business processes and are contained in the Schedules of the DDA template only. While operational terms may vary between distributors, they are often identical for retailers trading on the same local network. An example would be the billing process the distributor uses.

C.101 Distributors are responsible for writing their own operational terms to reflect local practices and policies. However, operational terms must meet requirements for operational terms specified in the Code. The DDA template includes drafting guidelines. For the purposes of clarity during the consultation process, we have highlighted in green boxes which sections of the DDA template are operational terms which can be completed by distributors. We intend that any final Code amendments will show only grey boxes. Each box has the heading "Requirements for operational terms". The drafting guidelines are italicised and can be deleted; but, non-italicised text cannot be changed.

C.102 A distributor must ensure that an operational term does not change or modify any core term.

C.103 Part 12A requires that each distributor consult on its operational terms with retailers trading on its network and other relevant participants and publish on its website a DDA that incorporates the default core terms and the operational terms. A participant that participated

in a distributor's consultation process can appeal one or more of the distributor's operational terms to the Rulings Panel.

C.104 A distributor may update the operational terms in its published DDA at any time but must follow the same process used when developing the initial operational terms (including that the distributor must consult on the amended terms).

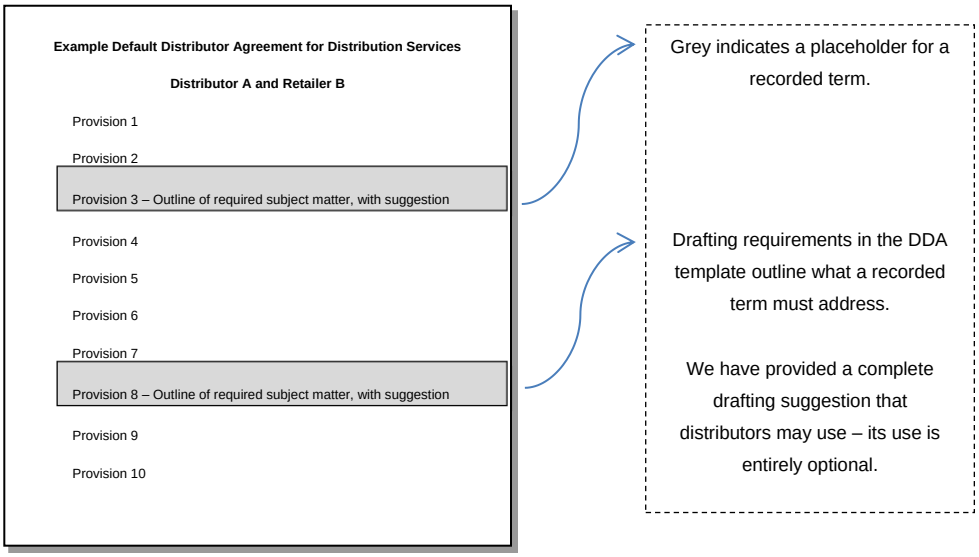
Recorded terms relate to matters that may fall within the Commerce Commission's jurisdiction

C.105 Recorded terms are terms that may fall within the Commission's jurisdiction, and therefore outside of our jurisdiction.[48] We have also included a core term that provides for the amendment of recorded terms where the amendment is allowed as a result of a determination of the Commission. The purpose of recorded terms is to provide for distributors to record particular rights or obligations that might be expected to be seen in a complete contract for distribution services, but that relate to matters the Commission may have the jurisdiction to regulate under Part 4 of the Commerce Act and cannot be regulated by the Code.

C.106 The DDA template includes placeholders for recorded terms. Recorded terms must be included in any distributor agreement entered into under clause 6 of Schedule 12A.1 (which is based on a distributor's DDA). However, distributors are not required to include recorded terms in their published DDAs.

C.107 We have highlighted placeholders for recorded terms throughout the DDA template, as shown in the example in Figure 14. The provisions in Figure 14 are illustrative only and do not reflect recorded terms in the actual DDA template.

Figure 14: Example of recorded terms



Source: Electricity Authority

C.108 The DDA template identifies the subject matter that each recorded term must address in a binding distributor agreement. For each recorded term, the distributor may:

(a) write their own term

(b) use the drafting suggestion provided by us

48 For example, a provision that limits how frequently distributors can change their prices may fall within the Commerce Commission's jurisdiction.

(c) indicate that the provision is not applicable (ie, no rights or obligations of the type described in the placeholder in the DDA template apply).

C.109 Part 12A of the Code does not require distributors to follow any procedural requirements when developing their recorded terms and does not regulate the substance of any rights or obligations recorded terms might record. For example:

(a) distributors do not need to consult on their recorded terms

(b) distributors are not required (but may choose) to publish recorded terms in their published DDAs

(c) recorded terms do not need to comply with any principles in the Code

(d) recorded terms are not subject to the Rulings Panel's jurisdiction

(e) although we propose to include drafting suggestions for recorded terms in the DDA template, distributors are not required to use them

(f) distributors have the option of drafting recorded terms that state that no rights or obligations of the type described in the relevant placeholder in the DDA template apply.

C.110 The only requirements for recorded terms are that they are included in particular places distributor agreements entered into under clause 6 of Schedule 12A.1 of the Code, and address the subject matter identified in the placeholders in the DDA template.

C.111 Recorded terms must not be inconsistent with the core terms or operational terms in a DDA. Core terms and operational terms are firmly within our jurisdiction.

Equal access and even-handedness clauses

C.112 Retailers are concerned that we did not carry-over clause 4 of the MUoSA which contained even-handedness obligations.

C.113 The even-handedness clause in the MUoSA gave all retailers equal access to the distribution service and required distributors to treat all retailers even-handedly. The clause also gave retailers the ability to adopt any alternative contract the distributor negotiates with any other retailer within 12 months of negotiation date.

C.114 We have not included this clause in the DDA template, because equal access and even-handedness treatment is achieved through two mechanisms:

(a) First, the introduction of the DDA template should ensure more standardisation of distribution services, as it serves as a starting point for negotiation.

(b) Second, we have amended Part 12A so that any amendment to the operational terms of a distributor's DDA apply to existing distributor agreements that include those terms, which are deemed to be amended accordingly.

Parties may agree an alternative agreement and side-agreements

C.115 The proposed neutral Part 12A allows the parties to negotiate an alternative agreement or agree side-agreements for additional or other services.

C.116 If a distributor and retailer do not wish to contract on the terms of the distributor's offered DDA, they may agree an alternative agreement. A distributor agreement that differs from a distributor's DDA only because one or more collateral terms have been excluded from the distributor agreement (because the retailer has given written notice objecting to its or their

inclusion) is not an alternative agreement. However, a distributor agreement that includes one or more other terms not included in a distributor's DDA is an alternative agreement.

C.117 An alternative agreement could be:

(a) an agreement that is identical to the distributor's DDA, except that the parties agree to amend, add one or more terms into, or delete one or more terms (other than collateral terms) from, the contract for distribution services. The amended, added, or deleted terms may relate to the main body of the distributor's DDA, or the additional services covered by Appendices A to C of Schedule 12A.1

(b) at the other extreme, an agreement that replaces all provisions in the distributor's DDA, or

(c) something in between.

Parties are free to offer or agree to an alternative agreement

C.118 Distributors and retailers are able to modify, add or delete any provision in a DDA with an alternative provision if they both wish to do so.

C.119 If one or more terms are amended in any way, added, or deleted then the contract is an "alternative agreement". For the avoidance of doubt, the following are examples of alternative agreements. An agreement that:

(a) includes wording for one or more terms that is different from the core, operational, recorded, or collateral terms in the distributor's DDA

(b) includes one or more terms not in a distributor's DDA (other than the default terms for additional services provided for in Appendices A to C of Schedule 12A.1)

(c) deletes one or more terms (other than collateral terms or other than by inserting the words *Not applicable* in the place of one or more recorded terms) that are included in the distributor's DDA

(d) includes any other terms that the distributor and retailer have negotiated.

C.120 Figure 15 shows examples of the DDA and alternative agreements, and how they compare with the DDA template in the Code. The following are:

(a) considered DDAs:

(i) Panel (B), because the contract has adopted all the default core terms from the DDA template and the operational terms from the distributor's DDA without changes

(ii) Panel (C), because the contract has adopted all the default core terms from the DDA template and the operational terms from the distributor's DDA without change, and collateral terms are identified.

(b) considered alternative agreements:

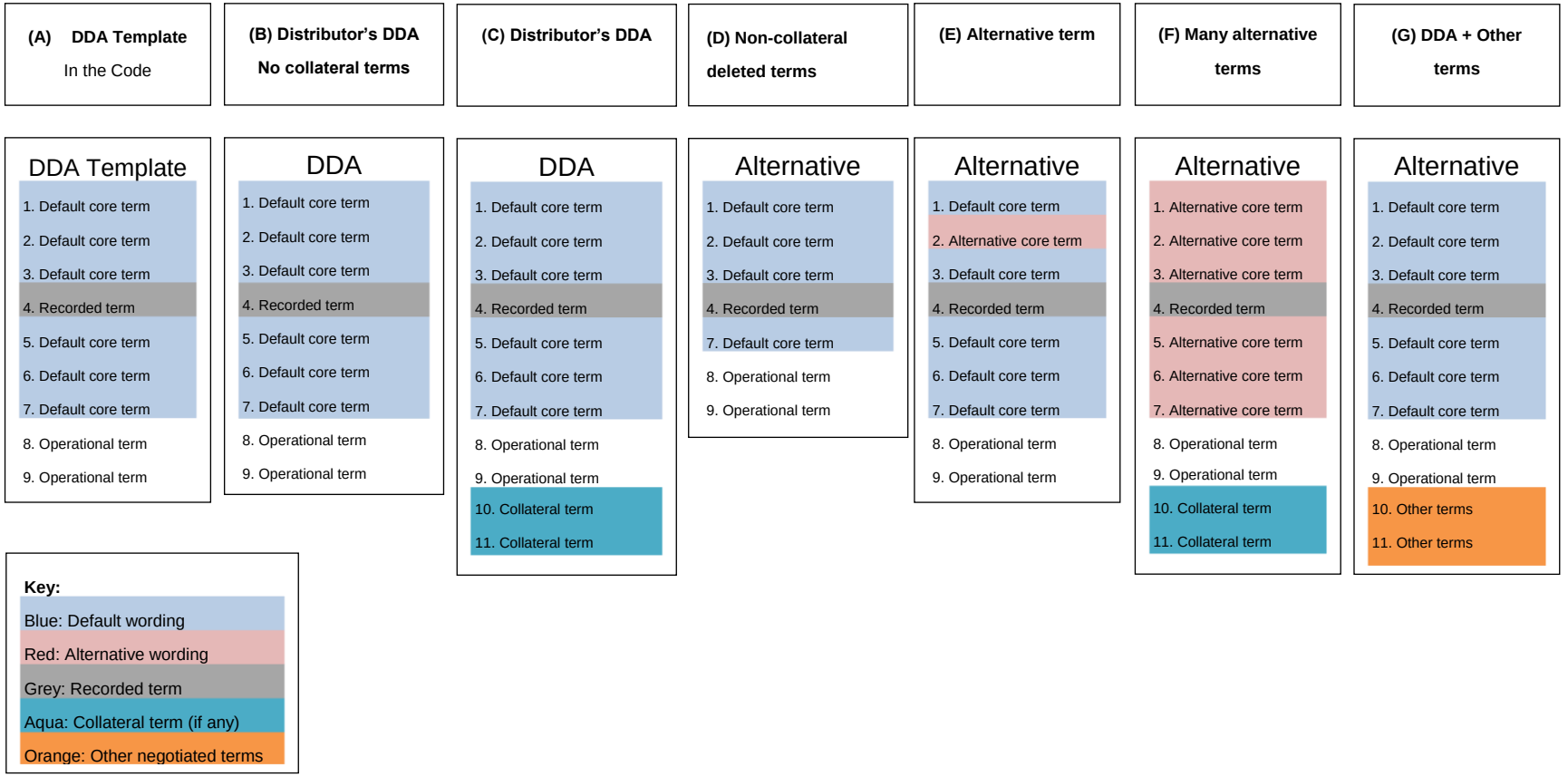
(i) Panel (D), because one or more default terms have been removed

(ii) Panel (E), because at least one default term has been modified

(iii) Panel (F), because all core terms have been modified

(iv) Panel (G), because one or more other terms not in the distributor's DDA have been included.

Figure 15: Examples of the DDA template, DDAs, and alternative agreements



Source: Electricity Authority

C.121 The retailer and distributor can also negotiate other terms, or separate agreements or "side-agreements", for related- and other additional-services. However, those terms, and any side-agreements agreed over the course of negotiations for a distributor agreement, must be disclosed to the Authority. This requirement ensures that the Authority is able to monitor the types of terms that are being added to distributor agreements, and identify terms that might need to be prohibited or added to the DDA template.

How to develop and implement a DDA

C.122 Some distributors and retailers requested more clarity about how a DDA will be designed and/or implemented. We have clarified, through drafting changes, some of the processes required to implement the DDA proposal.

Key policy decisions considered for implementing the DDA:

1) the order in which distributors develop DDAs

2) being unable to terminate the DDA without cause

3) clarifying the process for entering into a DDA

4) the Rulings Panel's role in mediation

5) being able to refuse distribution services to a trader who had previously defaulted

6) continuing existing agreements

Five distributors will develop DDAs first

C.123 To make the initial DDA development process more manageable for participants, we proposed assigning distributors to one of two groups:

(a) **Group 1 distributors**: Will have 90 business days after the Code amendment comes into force to develop and consult on their operational terms and then publish a DDA

(b) **Group 2 distributors:** Will have 150 business days after the Code amendment comes into force to develop and consult on their operational terms and then publish a DDA.

C.124 We have added Wellington Electricity to Group 1 and also extended the time to develop and consult on their operational terms and then publish a DDA.

C.125 The Authority now proposes that the Group 1 distributors are:

(a) Orion

(b) Powerco

(c) Unison

(d) Wellington Electricity

(e) Vector.

C.126 We will also consider volunteer distributors who want to be included in Group 1 to help develop the first DDAs.

C.127 The Authority proposes that the Group 2 distributors are the remaining distributors that adopt interposed arrangements.

C.128 This grouping of the distributors recognises that:

(a) Group 1 participants are among the largest by proportion of IPCs, all holding over 100,000 ICPs each, it will yield immediate benefits to the majority of consumers

(b) A large proportion of traders are concentrated in Group 1 distributors, so it will yield immediate benefits to the majority of traders

(c) Group 2 distributors may be guided by the operational terms developed by each of the Group 1 distributors.

C.129 Separating development into two groups will also benefit traders, particularly those traders trading on many networks, by providing more time to renegotiate contracts with distributors.

C.130 The Code does not prevent a Group 2 distributor from taking early steps to commence development of its operational terms, or from consulting on or publishing its final DDA.

C.131 We consider that the timeframe to implement the DDA proposal is reasonable because:

(a) Distributors need only to transfer the operational terms they have in existing contracts into a DDA. There are no new operational processes required. Distributors who already developed operational terms based closely on the MUoSA will likely have suitable, or near-suitable, operational terms. But distributors must consult on the operational terms of their DDA.

(b) Distributors also have the option to adopt the suggested operational terms we have included in the DDA template, or to use these terms as a starting point for development. Amendments will be necessary only if the distributor's practice differs from that described in the suggested terms in the DDA template, or if the DDA template does not include suggested terms.

(c) Distributors and retailers can continue to negotiate alternative agreements while contracting on the basis of a distributor's DDA. By agreement, they can enter into an alternative agreement instead of a contract based on the distributor's DDA.

The DDA cannot be terminated without cause

C.132 Distributors raised concerns about the lack of 'without cause' contract termination, meaning they could be stuck with perpetual contracts.

C.133 We have not introduced a clause to allow termination without cause. The inability to terminate the DDA without cause recognises that the DDA is not a standard contract – it is an agreement for distribution services given effect through the Code.

C.134 Providing retailers access to the distribution network promotes the competition aspect of our statutory objective in the retail market, as it allows retailers to access the network with a basic level of distribution services.

C.135 Distributors and retailers are also free to negotiate an alternative agreement that includes a without cause termination provision. This agreement can replace the DDA by agreement of the parties.

C.136 Also, a distributor has the right to terminate its contract with a retailer in certain circumstances set out in the DDA template, including if the retailer commits a breach that is an event of default.

Both parties are obliged to enter into a DDA if one party opts to use it

C.137 Some submitters requested it be clear that both parties are obliged to enter into a DDA if one party opts to elect it.

C.138 Clause 2 of Schedule 12A.1 requires that any participant who wishes to connect to a distributor’s network has an agreement with the distributor.

C.139 Clause 6 of Schedule 12A.1 outlines when a distributor's DDA applies as a binding contract. In short, the DDA including the distributor's recorded terms applies:

(a) when a participant gives notice that they want the DDA to apply, on one of:

(i) 5 days after the notice is given, or

(ii) the day the person becomes a registered participant (eg, a new entrant who has not yet begun trading), or

(iii) any other date agreed by the parties.

(b) at the end of 20 business days after notice is received by the distributor that the participant wants to trade on the distributor's network, and the parties have not agreed on an alternative agreement.

The Ruling Panel’s involvement is limited to operational terms

C.140 Distributors and retailers provided a range of submissions regarding the role of the Rulings Panel, including:

(a) that the Rulings Panel:

(i) is an appropriate forum to handle disputes

(ii) is not an appropriate forum to handle disputes

(b) participants requesting the ability to seek mediation or arbitration

(c) participants requesting the Authority have a greater role in mediation and arbitration.

C.141 We considered these suggestions carefully but have not made any changes to the Code or the proposed DDA template. The reasons being:

(a) the Rulings Panel is the most appropriate forum to deal with disputes regarding operational terms. Each distributor will have one set of operational terms in their DDA, which will apply to all retailers equally. There would be a significant duplication of effort if each retailer sought mediation or arbitration regarding the distributor’s operational terms, as each retailer may bring their own set of requirements. In practice, it would be unworkable for a mediator or arbitrator to balance the needs of all retailers. Therefore, the Rulings Panel will act as a single forum for hearing disputes on operational terms. This does not preclude a retailer seeking to negotiate an alternative agreement with the distributor.

(b) Clause 23 of the DDA template introduces a dispute resolution procedure. This includes: internal dispute resolution, the right to refer to mediation, and arbitration to resolve disputes. This does not preclude retailers seeking to negotiate the use of a mediation and/or arbitration in any alternative agreement.

Distribution services cannot be refused to retailers who meet prudential requirements

C.142 Some distributors raised concerns that they cannot refuse to provide distribution services to:

(a) a retailer who has previously defaulted and has not remedied the default,

(b) a ‘phoenix’ retailer – a new retailer who has emerged from the collapse of an insolvent retailer.

C.143 We have not made any changes to the DDA template because we consider that the provisions already protect the distributor.

C.144 The distributor is protected because there are obligations an entrant retailer must fulfil before they can trade electricity. The Authority is responsible for setting these obligations. The obligations include requirements to comply with legislation, Authority guidelines, and to be registered as an industry participant.

C.145 Previous defaults are not a factor in being able to trade on a network if the retailer currently meets all its Code obligations and financial obligations under its distributor agreement (prudential requirements). The prudential requirements in the DDA template already protect the distributor. Specifically:

(a) Clause 10.6 allows a distributor to cover the reasonable estimate of distribution services for a period of not more than two weeks

(b) Clause 10.7 allows the distributor to require additional security

(c) Clause 10.7 allows the total value of all security, prudential plus additional security, to cover up to 2 months of distribution services (based on a reasonable estimate).

5.114 If the retailer currently meets all prudential requirements, it is able to seek access to the distributor's network through the distributor's DDA. When a retailer does not comply with the terms and conditions of its distributor agreement with a distributor, it is in breach of that agreement with the distributor and the distributor will have contractual remedies under the distributor agreement.

A transitional process for existing agreements to continue

C.146 Some distributors and one trader expressed concerns about the potential for counterparties to break existing UoSAs under the DDA proposal. They are concerned that existing UoSAs have taken a lot of effort to put in place, and that both parties are happy with them.

C.147 Several submitters on the April 2014 consultation paper expressed a view that executed UoSAs based on the 2012 MUoSA should not be interfered with. Submitters holding this view consider that significant time and effort had been invested in negotiating those UoSAs with the resulting agreements being MUoSA-based agreements that both parties are satisfied with and want to retain.

C.148 If both parties are satisfied with an existing UoSA, the proposed Code provisions allow the parties to enter into a new distributor agreement that carries over the existing terms relating to distribution services.

C.149 The objectives of the proposed transitional provisions are:

(a) to ensure each retailer currently trading on a local network has a distributor agreement with the local distributor

(b) to provide for a retailer and a distributor to:

(i) carry over the terms from an existing agreement into a new distributor agreement, if both parties are satisfied with those terms (this would be an 'alternative agreement') or

(ii) negotiate a new distributor agreement (an ‘alternative agreement’), if either party is not satisfied with one or more of the terms of an existing agreement and the parties agree to negotiate or

(iii) adopt the distributor’s published DDA (with or without any collateral terms from the distributors’ DDA) and recorded terms, if either party prefers this option to either of the alternatives described above, or if the parties try but fail to negotiate an alternative agreement within 2 months.

C.150 This is to provide clarity about the scope of a distributor agreement under Part 12A, including the effect of the proposed Code amendment on terms in existing UoSAs (or in other agreements) for additional services. In particular, clause 12(5)(b) of Schedule 12A.1 provides that, if a distributor and a trader are unable to negotiate a distributor agreement so that distributor’s DDA (with the distributor's recorded terms) applies as a binding contract between them, the terms of those parties’ existing agreement that directly or indirectly relate to distribution services or the additional services in the Appendices to Schedule 12A.1 will expire. Under clause 12(5)(a) of Schedule 12A.1, additional services included in the Appendices to Schedule 12A.1 can be added to the new distributor agreement in the usual way. Clause 12(6) of Schedule 12A.1 also allows a trader to exclude a distributor’s collateral terms from a new distributor agreement in the usual way.

C.151 We have also considered the possibility that some parties may not be satisfied with one or more aspects of a current UoSA. Retailers’ responses to the 2018 DDA survey indicated that many signed up for additional services because negotiations were not workable. In effect, the additional services had to be accepted in order to receive the distribution service. The proposed transitional process would determine whether both the distributor and retailer party to an existing UoSA are genuinely satisfied with its terms, whether in recently agreed or legacy UoSAs.