Daniel Tulloch
Electricity Authority
By email:
submissions@ea.govt.nz

24 October 2019

Dear Dan,

CODE AMENDMENT PROPOSAL: DEFAULT DISTRIBUTOR AGREEMENT CONSULTATION

Mercury welcomes the opportunity to provide a submission to the Electricity Authority ("the Authority") on the 'Code amendment proposal: Default Distributor Agreement' Consultation ("the Paper").

Summary of Mercury's views

We support the Authority's proposal to introduce a Default Distributor Agreement ("DDA").

We are a member of ERANZ and we endorse the ERANZ submission in relation to the DDA.

We agree that a DDA will deliver net benefits to New Zealand's electricity consumers. Specifically, it will:

- Address the contractual imbalance between EDBs with monopoly like characteristics and the retailer who has no choice but to negotiate with the EDB to use its network;
- Reduce transaction costs by giving parties access to a ready-made solution;
- Improve competition in the retail market by providing a level playing field through standardised terms and ensuring equal access to new entrants;
- Strike a balance between standardisation and flexibility allowing for the adoption of alternative agreements and for default terms to be updated over time to take into accommodate rapidly developing technologies.

We commend the work that the Authority has done to develop the DDA and appreciate the extent to which the EA has listened to industry to create a default agreement that will provide a genuinely workable solution for both distributors and retailers in the provision and use of distribution services.

To this end, we have some suggestions in relation to transition requirements and operational terms that we believe will further enhance net benefits of the DDA as outlined above and streamline the processes by which it is adopted.

As a priority, Mercury is advocating that where an agreement for distribution services based on the Model Use of Systems Agreement (MUoSA) already exists between a distributor and a retailer, the right to choose whether to transition that agreement or to opt to use the DDA should rest solely with the retailer. If distributors have the right to opt in to the DDA in these circumstances, they will effectively have the power to force retailers to unnecessarily renegotiate and override agreements that may have taken years of prior negotiation to finalise. This imbalance of power in favour of the monopoly provider would be inconsistent with the purposes of the new Part 12A.

These views are elaborated in our cover letter below and are cross referenced throughout our submissions.

Mercury's answers to the Authority's specific questions are set out in the attached Appendix.

1 Transition Requirements

We understand that the policy intention behind the transition requirements of Part 12A is to allow parties who are happy with their existing distribution agreements to transition these to the new regime (clause 12A.1.12(7)). Provided that an agreement does not include any terms that are inconsistent with Part 12A, then an "alternative agreement" is a distributor agreement for the purposes of the Code (12A.1.8(4)).

We believe that some changes are required to ensure that this process does not create an imbalance of power in favour of distributors and to reduce unnecessary cost and effort for all parties.

1.1 Retailer should decide whether to transition or adopt DDA

It is imperative that where there is an existing agreement based on the MUoSA in place between a distributor and a retailer, only the retailer should have the right to decide whether to transition existing arrangements or adopt the distributor's DDA.

We understand that the introduction of the DDA is designed to assist distributors in moving retailers from legacy Use of System Agreements (UoSA) to renegotiated agreements for distribution and additional services that reflect the changing electricity industry and will help to create a level playing field for retailers. We support this intention entirely. However, it is important to make a distinction between legacy agreements, and arrangements that have already been renegotiated based on the MUoSA.

Under the proposed regime, either party to an existing Use of System Agreement (UoSA) can opt to use the distributor's DDA, once this has been published on the distributor's website. This applies regardless of whether the existing agreement is a "legacy" UoSA or whether the existing agreement is based on the Authority's MUoSA. As such, a distributor will be able to use its ability to opt into the DDA to set aside any recently negotiated agreements based on the MUoSA if these agreements contain terms that are less than favourable to the distributor. This will cause an imbalance of power giving a monopoly EDB the ability to drive contractual relationships between the parties. Retailers will be forced to renegotiate with distributors despite months and, in some cases, years spent agreeing terms based on the MUoSA. If this imbalance of power is accepted, then the right to opt for the "fairer" agreement should be given to the weaker party – the retailer.

This is a critical issue For Mercury. In 2015, Mercury agreed to replace its legacy agreements with several distributors and enter new UoSAs based on the MUoSA. Negotiations were protracted and costly. In the most significant example, the signed UoSA under which the parties continue to operate contains a value exchange that was agreed between the parties to enable negotiations to move forward. In cases such as this, it would be unfair to allow distributors to bypass agreed terms by opting to use the DDA.

Our submission is therefore that where the parties are currently operating under an existing agreement that is based on the MUoSA and is not a legacy agreement, the right to choose whether to transition this agreement or opt to use the DDA should rest with the retailer. This is consistent with the intentions of Part 12A being to create a more equal bargaining position between retailers and distributors.

1.2 Existing arrangements become "Alternative Agreements"

The proposed transition provisions require parties who wish carry on operating under their existing distributor agreements to transition those arrangements into a new "alternative agreement" under Part 12A.1.12. In many cases the existing agreements will have taken considerable time to negotiate at great cost to the parties.

Given that the intention is to allow the parties to continue operating under their existing arrangements, it would be inefficient to require the parties to "repackage" their contracts to look like distributor agreements under the new regime.

A simpler mechanism would be to require parties happy with their existing agreements to notify the Authority of their intention to continue with the current arrangement and send a copy of that contract. This agreement is then deemed to have transitioned to become an Alternative Agreement under Part 12A.

1.3 Longer timeframe for transition

If the parties have an existing agreement, the proposed timeframe for transitioning to a new DDA or an Alternative Agreement is two months from the date that the distributor posted its DDA on its website.

Each negotiation will take time and consideration, and, in many cases, retailers will be negotiating with several distributors at once and vice versa.

We believe that three months is a more appropriate timeframe to allow for the transition of existing arrangements to DDA's or alternative agreements (see Part 12A.1(12).

1.4 Suggestions

Based on our comments above, we suggest changes to the transition provisions of Part 12A.1 so that the following process applies:

1. Distributor gives notice to all participants that it is willing to contract on the terms set out in its DDA as posted on its website.
2. Where the parties have an existing agreement in place:
   i. And that agreement is based on the MUoSA, the retailer/participant may decide whether to adopt the distributor's DDA or to transition the existing agreement;
   ii. And that agreement constitutes a legacy agreement, either party may decide to adopt the distributors DDA or the parties may mutually agree to transition their existing agreement; or
   iii. The parties may mutually agree to negotiate a new alternative agreement.
3. The parties have three months to negotiate any new terms;
4. At the end of the three-month period, if the Authority has not received either:
   i. Notice that the parties are transitioning their existing arrangements to become an alternative agreement together with a copy of the alternative agreement; or
   ii. A copy of the distributor agreement or any alternative agreement agreed between the parties;

   Then the distributor's DDA will apply as a binding contract.

2 Operational Terms

Operational terms are written by a distributor and are designed to reflect local practices. We support having flexibility within the terms of the DDA to reflect the different ways that each distributor conducts its business. However, for reasons that we set out below, Mercury would like to see operational terms become a standardised or core part of the DDA.

2.1 Issues with operational terms under current proposal

Under the current proposal, distributors will each draft their own set of operational terms that retailers will not see until the operational terms have been posted on the distributor's website as part of the distributors DDA.

Our concerns with this are as follows:

> Distributors must write operational clauses that are consistent with Part 12A however these may not reflect optimal or best practice. This will result in regional variances in contracts despite the intentions of the DDA to bring standardisation to the way participants contract for distribution services.
> There is an imbalance of bargaining power. A distributor is obliged to consult with participants prior to publication of its operational terms (12A.4.6(2)) however the extent of consultation or retailer feedback required

is not defined. Once the operational terms have been published, the only redress a retailer has is an appeal to the Ruling Panel (12A.4.7(1)). We note also that this right of appeal is only available to a participant who participated in consultation under 6(2). Part 12A does not deal with inadequate consultation or worse a failure to consult on the distributor's part. This imbalance of bargaining power is inconsistent with the intentions of the DDA.

- The Rulings Panel will be inundated with appeals from retailers over operational terms. This will result in unnecessary time delays and administrative costs for all parties. The intention of the DDA is to reduce costs and labour.
- The timeframe to assess operational terms is inadequate. Operational terms can be complex, and retailers will need time to analyse and assess each distributors DDA.
- No extension has been made to the notice period to allow for the appeal process.
- There will be duplication of effort with every retailer being required to undertake detailed assessment of each distributor's operational terms. This is at odds with the DDA's intention of lowering the cost and effort required to negotiate contracts.

2.2 Operational terms should be standardised

Operational terms should be a standard and non-negotiable part of the DDA, like core terms.

Standardisation of the operational terms reflects the Government's recently released Recommendations from the Final Report of the Electricity Price Review. The government is emphatic in its support for offering retailers standard default terms for network access and encourages the Authority to complete this project.

There is no reason why standardisation should not include operational terms. The Paper acknowledges at chapter 3, page 8 that "the underlying distribution service is essentially the same throughout New Zealand". Any standardised operational terms could still be designed to give distributors flexibility in cases where there is a genuine local difference to their operations. Further, where parties wish to agree other terms they are free to do so by way of an alternative agreement.

2.3 Suggestions

Based on our comments above, Mercury suggests that The Authority should coordinate the drafting of operational terms that reflect best and accepted industry practice. Where there is an actual difference in a network's practices this can be dealt with by providing (for example) an A, B or C option that the distributor chooses. Any deviations that a distributor makes from the default can then be easily highlighted in a table that forms part of the DDA and will be posted on the distributor's website.

In this way, retailers will not be surprised by any element of the distributor's operational terms and the process for the adoption of DDA's will be hugely simplified.

We reiterate our support for the DDA and the work that the Authority has done to reach this consultation phase. Please don't hesitate to contact Jo Christie on 09 3086353 or 0212882276 if there is anything in our submissions that requires clarification or that you would like to discuss further.

Yours sincerely

Jo Christie
Regulatory Strategist

Appendix: Specific questions in consultation

Submitter: Mercury NZ Ltd

Question	Mercury Comment
Q1. What are your views on the problem definition? Specifically:	Mercury supports the problem definition. The Paper correctly identifies the issues faced by the industry and the need for regulatory reform.
a. The efficiency problem	**1.1 The efficiency problem** We agree that the cost of negotiating UoSA's with multiple distributors is hugely inefficient and costly to retailers. There is an unnecessary duplication of effort every time a retailer expands into a new network, even though the underlying distribution service sought is fundamentally the same throughout New Zealand. Ultimately these costs are borne by the end consumer. A DDA will significantly reduce costs and avoid duplication of effort.
b. The competition in retail markets problem	**1.2 The competition in retail markets problem** We agree that unequal bargaining power exists when bi-lateral negotiations take place between retailers and distributors. A distributor can adopt a "take-it-or-leave-it" stance that forces retailers to accept the agreement offered or not trade on the local network. A DDA will promote competition by standardising terms and conditions and by limiting a distributor's ability to include unnecessary terms in the contract for distribution services.
c. The competition in related services problem	**1.3 The competition in related services problem** We agree that distributors can favour themselves or their affiliates in related-services markets. Distributor's include terms in UoSA's that assign to them or to their affiliate the right to provide related services that would otherwise be contestable. Similarly, a distributor can link the distribution services to the supply of additional services by the retailer. Retailers are forced to accept these related services or to provide additional services as they form part of the contract that the retailer is required to sign to trade on the distributor's network. This threat of anti-competitive behaviour can be enough to discourage a third party from entering a local network.

Question	Mercury Comment
	A DDA will ensure that no undue barriers prevent third parties from procuring contestable services or entering a local network.
Q2. What are your views on the revised: **a. Part 12a proposal**	**2.1 Modular and Flexible Part 12A** Mercury welcomes a modular and flexible neutral Part 12A of the Code. The Authority has considered the changing needs of the sector and through Part 12A has designed a mechanism that both: a. regulates the relationship between distributors and retailers currently operating on an interposed basis; and b. enables the Authority to regulate any new distributor-participant arrangements that may require regulation in the future.
	2.2 Additional Services – Data Template We strongly support the addition of default terms for common additional services in Part 12A of the Code, particularly in relation to Schedule 12A.1, Appendix C, the provision of customer information. As the Authority knows, Mercury has been part of the ERANZ Data Working Group (DWG) set up to specifically deal with issues around data access for distributors and mechanisms for exchange. In April 2019 following the Authority's publication of an initial draft Appendix C, Mercury submitted to the Authority in favour of the proposed regulated regime, with some recommendations in relation to protecting the privacy of our customers and around tightening the definition of the purposes for which data provided to a distributor may be used. Subject to our technical comments set out below under question 3, Mercury is in favour of the proposed Data Template and appreciates the amendments that the authority has made following the initial submissions to incorporate industry feedback. Specifically, the restriction on who Consumption Data may be disclosed to has been expanded to include any person involved in the provision of electricity retail services. Distributors who retail or offer competitive products, will be unable to obtain an unfair advantage by acquiring high value customers that competitors cannot identify as easily. The Data template gives retailers comfort that Consumption Data may only be used for limited purposes and within a strict framework with remedies available to the retailer in the event of breach.

Question	Mercury Comment
	2.3 Transparency, prescribed terms and monitoring Mercury supports the requirement for all retailers to submit copies of contracts for distribution services and any side agreements to the Authority so that the Authority can monitor the types of terms being included in distributor agreements. If the authority becomes aware of any terms that compromise its statutory objective, the Authority may prohibit such terms by way of Code amendment. This will deal with any clauses that impact negatively on the Authority's statutory objective. It does not however deal with clauses in alternative agreements that may give some retailers a significant advantage but that are not inconsistent with the Authority's statutory purpose. Under the current proposal there is no mechanism to level the playing field and give this benefit to all retailers. The MUoSA included equal access and even-handedness clauses that have been removed from the DDA. The Authority's rational for this is that: a. the DDA template should ensure more standardisation of distribution services; and b. any amendment to a distributors operational terms will be deemed to apply to any existing distributor agreements that include those terms. We submit that to provide a truly level playing field and genuine standardisation, the Authority should either: a. reintroduce equal access and even-handedness clauses; or b. use its ability to prescribe standards terms that are consistent with its statutory objective (as confirmed by the Court of Appeal) to add beneficial clauses to the DDA where these become apparent through the Authority's monitoring process. It might also be argued that not giving all retailers the benefit of certain clauses could be anti-competitive – and this of course would fall within the Authority's statutory objective.
	2.4 Collateral Terms Mercury agrees that retailers should have a genuine choice as to whether "collateral terms" are included in distributor agreements. The proposed Part 12A will do this by excluding from a DDA any collateral term that a retailer does not agree with. We think that the mechanism provided by Part 12A will allow retailers to have this choice, provided that collateral terms are clearly identified as such by distributors. To this end, we submit that the DDA should include a schedule that contains all or any collateral terms that the distributor wishes to include in its DDA.

Question	Mercury Comment
b. DDA template proposal	**2.5 Maximum Liability Cap** We recognise that the Authority has included the maximum liability caps which are set out in the MUoSA. Based on feedback given at the Authority's DDA Workshop, we also understand that the Authority's view is that the proposed maximum liability cap reflects the liability caps in existing UoSA's that have been negotiated by traders and distributers. We think that the maximum liability caps set out in existing UoSA's are likely to be reflective of the unequal bargaining power that exists between traders and monopolistic EDBs and may not be a true reflection of a trader's potential losses. Further, we consider that a blanket amount should not be applied as a maximum liability cap across all retailers and distributers as it is not necessarily reflective of the size of a network and the level of retailer's activity in a network. To this end, we submit that a formulaic approach to a liability cap which enables the amount of the cap to be determined by reference to the size of the network and the extent of a retailer's use of the network would be more appropriate. *In any event, there should be no liability cap for either party for wilful breach or gross negligence.*
	2.6 Equal access and even-handedness clauses See above at 2.3.
	2.7 Alternative and side-agreements Mercury supports the parties having the ability to negotiate alternative or side agreements. We would also urge the Authority to clarify the mechanism for an existing arrangement to automatically transition to an alternative agreement under the new regime (see our cover letter and paragraph 2.8 below).
	2.8 Development and implementation of a DDA 2.8.1 Five distributors to develop DDA's first We agree with the Authority's staggered approach to the publication of the DDA by Group 1 and Group 2 distributors. We are uncertain however as to how this will work in practice. Our concern is that the larger distributors in Group 1 are likely to be negotiating with most retailers and unless some form of standardised operational terms are introduced (please see our cover letter at paragraph 2.3) neither the distributor nor the Rulings Panel will be able to cope with the inevitable volume of queries and objections. 2.8.2 Both parties obliged to enter into a DDA if one party opts in

Question	Mercury Comment
	We agree with this mechanism where there are no existing arrangements between the parties. If, however, the parties have an existing agreement for distributions services that is based on the MUoSA and is not therefore a legacy agreement, we believe it is critical that the right to opt in to the DDA should belong solely to the retailer. Our reasons for this are set out in full at paragraph 1.1 of our cover letter. 2.8.3 Rulings Panel involvement limited to operational terms Mercury supports the Rulings Panel as the appropriate forum to deal with disputes regarding operational terms. If however standardised terms were to be introduced as per our submission set out at paragraph 2 of our cover letter, the role of the Rulings Panel would be greatly reduced and this would result in cost and time savings for all parties, including the Authority. 2.8.4 A transitional process for existing agreements to continue Mercury strongly supports the transitioning of existing arrangements for distribution services. We do not agree however that: • where the parties decide to carry over an existing agreement they should be required to enter into a new distributor agreement; or • that the distributor can force the retailer to enter into the distributors new DDA if the retailer is happy to continue operating under an agreement that may have been negotiated over a long period of time at great cost to the retailer. Instead, the parties should simply be required to notify the Authority of their decision to transition an existing agreement and this will be deemed to become an alternative agreement under the new regime. Further, the right to opt in to the DDA where existing agreements based on the MUoSA are in place, should belong solely with the retailer. Our reasons for this are set out in full at paragraph 1 of our cover letter together with our suggestions for an alternative transition mechanism that we believe reflects the true intentions of Part 12A.

Question	Mercury Comment
	2.9 Dispute Resolution Procedure We note that the DDA prevents either party from initiating court proceedings in relation to a dispute under the DDA. Dispute resolution by mediation and arbitration is confidential in nature and we think that the removal of the option to initiate court proceedings may run counter to the Authority's aims of achieving consistency and transparency across distribution agreements. The industry will have no transparency of decisions made regarding disputes under the DDA and inconsistencies in dispute resolution and decisions as to interpretation and/or treatment of the DDA may arise across different networks/regions.
Q3. What are your views on the draft Code, appended to this paper, which would introduce the proposal? **Schedule 12A.1 – Requirements for entering distributor agreements**	**3.1 Section 12A.2 – Participants to which this Part applies** We support the modular and flexible design of Part 12A as implemented by this clause. It can easily be amended to extend coverage to any new network users, for example those involved in emerging technologies whose precise needs have not yet been identified.
	3.2 Schedule 12A.1.6(3)(a) – When default distributor agreement applies as a binding contract We submit that the proposed 20 business day timeframe is inadequate to give participants time to assess a distributor's DDA and its operational terms. Whilst the core terms of the DDA will be the same for each distributor, there will be variations in the operational terms due to regional or network nuances. Operational terms can be complex, and, in many cases, retailers will be negotiating with more than one distributor at a time. A three-month timeframe would be more appropriate. We note however that if our suggestion in relation to standardising operational terms were adopted by the Authority (see paragraph 2 of our cover letter and 2.8.3 of this Appendix), the shorter timeframe proposed by this clause would be acceptable as there would be fewer surprises for retailers on publication of the distributor's DDA.
	3.3 Schedule 12A.1.7 – Terms relating to additional services

Question	Mercury Comment
	We strongly support the option to include additional services such as Appendix C (Provision of Customer Information) in a distributor agreement. We agree that either party should be able to opt to use the default templates or that the parties can mutually agree to alternative terms relating to additional services.
	3.4 Schedule 12A.1.8 – Alternative Agreements We strongly support the parties having the right to adopt an alternative agreement. We have submitted at paragraph 1 of our cover letter and section 2.8.4 of this Appendix that the transition provisions should be amended to clarify that existing agreements can become alternative agreements simply by notification to the Authority. If this suggestion is taken up by the Authority, section 12A.1.8 should be amended, for the avoidance of doubt, to include existing agreements that have become alternative agreements.
	3.5 Schedule 12A.1.11 – Providing distributor agreements to the authority Mercury supports the transparency that will be achieved by the Authority requiring copies of all distributor agreements. We understand that the intention of Part 12A, based on submissions received, was to do away with requirements to sign agreements as a means of preventing unnecessary delays in connection to a distributors network. We note however that subsection (1) of this section requires executed agreements to be provided to the Authority. If the parties have not agreed their DDA or alternative agreement within a certain timeframe, the distributors DDA will apply. This will happen regardless of whether an agreement is signed. Does this clause refer to the final agreement made between the parties or the distributors DDA that has taken effect in default?
	3.6 Schedule 12A.1.12 – Transitional provisions for existing agreements Please see our comments at paragraph 1 of our cover letter and paragraph 2.8 of this Appendix. For the reasons previously set out, we submit that: 1. We do not support distributors having the ability to opt in to use their own DDA as per subsection 12A.1.12(3) where the parties already have an existing agreement that is based on the MUoSA. These are not legacy agreements and do not fall within the type of arrangement that the DDA is designed to replace. These are recently negotiated agreements that reflect current technologies and business models. If in these circumstances the distributor can opt to use its own DDA, retailers are forced to unnecessarily renegotiate terms that may have taken months if not years to agree. This gives an imbalance of power to a monopoly EDB who will hold the ability to drive

Question	Mercury Comment
	contractual relationships between the parties. Sub-sections (2) and (3) should be amended to provide that where there is an existing agreement between the parties based on the MUoSA, only the retailer may give notice that it wishes to contract with the distributor on the terms set out in the distributor's DDA, or under a new set of terms to become an alternative agreement under the new regime. 2. We strongly support the transitioning of existing agreements to alternative agreements under the new regime. It would be inefficient however to require the parties to existing agreements who are keen to continue operating under those terms to repackage their contracts to look like distributor agreements under the new regime. A simpler mechanism would be to require parties happy with their existing arrangements to notify the EA of their intention to continue with the current arrangement and send a copy of that contract. This agreement would then be deemed to have transitioned to become an Alternative Agreement under Part 12A. 3. The two-month timeframe for the negotiation of a distributor agreement at subsection (5) is not adequate given that the parties will be negotiating with many distributors at once and vice versa. We would suggest that three months is a more appropriate timeframe. 4. Based on our comments above, we suggest changes to the transition provisions of Part 12A.1 so that the following process applies: a. Distributor gives notice to all participants that it is willing to contract on the terms set out in its DDA as posted on its website; b. Where the parties have an existing agreement in place: i. And that agreement is based on the MUoSA, the retailer/participant may decide whether to adopt the distributor's DDA or to transition the existing agreement; ii. And that agreement constitutes a legacy agreement, either party may decide to adopt the distributors DDA or the parties may mutually agree to transition their existing agreement; or iii. The parties may mutually agree to negotiate a new alternative agreement. c. At the end of the three-month period, if the Authority has not received either: i. Notice that the parties are transitioning their existing arrangements to become an alternative agreement together with a copy of the alternative agreement; or ii. A copy of the distributor agreement or any new alternative agreement agreed between the parties; Then the distributor's DDA will apply as a binding contract.
Schedule 12A.1, Appendix C **Provision of consumption data**	**3.7 Schedule 12A.1, Appendix C - Data Template generally ("Appendix C")** As previously stated at paragraph 2.2 of this appendix, Mercury strongly supports the ability for either party to opt to use Appendix C for the provision of consumption data. Appendix C gives retailers comfort that consumption data may only be used for limited purposes, within a strict framework, with remedies available to the retailer in the event of breach. Specifically, we strongly support the following:

Question	Mercury Comment
	i. Section 21 – the definition of "Permitted Purposes" for which consumption data may be used being limited to developing distribution prices and the planning and management of the network to provide distribution services; ii. Section 3(2) – the format of the Data Agreement that provides a tight framework around the provision of consumption data to the distributor including a Permitted Time Period during which the Consumption Data may be utilised and specifying the Frequency of Access that the distributor may have to the Consumption Data; iii. Section 3(4) – the Consumption Data may only be used for the Permitted Purposes; iv. Section 4 – the distributor will pay the Trader's reasonable costs; v. Section 5 – the distributor will comply with the Privacy act to the extent it applies in relation to the Consumption Data; vi. Sections 7(2) and 8(2)(b) - the expansion of the restriction on to whom Consumption Data may be disclosed to include any person involved in the provision of electricity **retail** services. Distributors who retail or offer competitive products, will be unable to obtain an unfair advantage by acquiring high value customers that competitors cannot identify as easily.
	3.8 Appendix C, Section 3(2)(b) "Other Purposes" Under this section the parties can set out in the Data Agreement any "Other Purposes" for which the data may be used in addition to the Permitted Purposes. Based on feedback given at the Authority's DDA Workshop, we understand that the intention of Appendix C is that the Other Purposes for which a distributor can use the Consumption Data must only be those that are agreed between the parties. If the parties are unable to agree "Other Purposes", the Consumption Data may only be used for "Permitted Purposes". We submit that "Other Purposes" should be defined to make the requirement for mutual agreement clear.
	3.9 Appendix C, Sections 3(2)(d) and 19 – Frequency of consumption data exchange and Data Agreement Whilst we support specifying the frequency of data exchange in the data agreement we disagree with ongoing access being given at any frequency less than six-monthly or annually. Even though the distributor is required at section 4 to pay the Trader's reasonable costs, the administrative effort that goes into the process of providing consumption data is considerable and it would not be feasible to provide this service on a daily, weekly, monthly or quarterly basis.
	3.10 Appendix C, Section 12 – Liability and indemnity Section 12 of Appendix C provides that the Distributor's liability is unlimited for breach of the data sharing provisions. We agree with this position.

Question	Mercury Comment
	However, because the terms of Appendix C are effectively incorporated into the DDA through the relevant provisions of Part 12A of the Code and of the DDA, there is ambiguity in this position. The liability cap in clause 24.7 of the DDA is expressed to apply "despite any other provision of this Agreement". The definition of "Agreement" includes any other attachment or document incorporated by reference. Therefore, Appendix C, as part of the DDA, would be subject to the same clause 24.7 liability cap despite section 12 of Appendix C. We strongly urge the EA to clarify this position. Either Appendix C should be clarified as being a stand-alone agreement, and not incorporated within the DDA which would require a number of references in Appendix C to "this agreement" being replaced with "this Appendix and the inclusion of an interpretation provision clarifying the independent, stand-alone nature of Appendix C. Alternatively, if Appendix C is intended to be incorporated within the DDA, then we submit that section 12(2) of Appendix C is amended to read "The Distributor's liability for breach *of this Appendix* will not be limited by this Agreement or any other agreement entered into by the parties." Further clarity would be required, including interpretation provisions which clarify how the clauses will be prioritised in the event of inconsistencies between the DDA and Appendix C. Also, clause 24.7 of the DDA would need to specifically carve out section 12 of Appendix C. This would achieve the intention of section 12(1) of Appendix C; that the Distributor's indemnity is not capped despite any other provisions of the DDA. The same comments apply in respect of Appendix A and Appendix B. Section 10 of Appendix A provides that the Distributor's indemnity applies despite any other provisions in this Agreement. Section 5(5) of Appendix B provides that Distributor's liability for breach of the clause is not limited by any terms in this Agreement. However, each of these clauses are inconsistent with clause 24.7 of the DDA. All appendices would benefit from clarification based on the considerations set out above. *In any event, there should be no liability cap for either party for wilful breach or gross negligence.*
	3.11 Appendix C, Section 18(7) – Dispute resolution Clause 23 of the DDA sets out the provisions for resolving disputes under the "Agreement" but the Appendix has its own dispute resolution provision at section 18(7). Our view is that Appendix C should have its own disputes resolution procedure. Our view is that while parties may wish to refer a dispute to alternative dispute resolution procedures, the parties should not be precluded from referring a dispute to the courts. Further, if the EA disagrees that Appendix C should have its own dispute resolution procedure, given the nature of the obligations in Appendix C, it is imperative that section 12(3) of the Appendix C is clarified to apply despite any provisions to the contrary in the DDA so that the retailer will be able to seek equitable relief if appropriate.

Question	Mercury Comment
	Our comments regarding the status of Appendix C in relation to the DDA also apply to this provision.
	3.12 Appendix C – General comments i. **Standalone Agreement**: Appendix C would benefit from some clarity as to whether it is intended to operate as a standalone document or whether it is to be incorporated into the DDA such that the provisions of the DDA apply to Appendix C. If the latter is the intention, some interpretation provisions should be included to clarify how the clauses will be prioritised in the event of inconsistencies and what clauses, if any, do not apply to Appendix C should be set out clearly in the DDA and the Appendix C. Further, there are a number of sections that refer to the "Agreement" which may need to be refer to the "Appendix, see section 12 and section 14, for example. The same comments apply with respect to Appendix A and Appendix B would also benefit from clarification as to their status in relation to the DDA. ii. **Disclosure of Consumption Data:** there is some scope for inconsistency between the clauses dealing with the disclosure of Consumption Data. We submit that section 7 of the Appendix C should be amended to clarify that the distributor must only disclose Consumption Date to its employees, directors, agents, advisors, contractors (as provided for in section 7(1)) in accordance with section 8. This will ensure a distributor can only disclose the Consumption Data to those persons who are part of the "Data Team" (unless the retailer has otherwise approved the discloser to another person in writing). iii. **Breaches of the Appendix:** there are currently two sections (sections 11 and 14) that deal with how the distributor must respond to a breach. To avoid any inconsistencies (and for clarity), it may be more appropriate to include these provisions in the same clause. iv. **Termination:** we submit that references to "this Agreement" in section 15 should be replaced with references to "this Appendix" to clarify that the termination provisions in the Appendix only allow either party to terminate the Appendix; they do not give a right to terminate the full DDA. v. **Destruction of Consumption Data:** we suggest that in section 16, references to "this Agreement" should be changed to "this Appendix". If this is not changed, arguably the distributor would not be obliged to destroy the Consumption Data on termination of Appendix C; it would only be required to destroy the Consumption Data on termination of the DDA.
Schedule 12A.4 **Requirements for developing, making available, and amending default distributor agreements**	**3.13 Schedule 12A.4, Section 3 – Content of default distributor agreements** We reiterate our submission at paragraph 2 of our cover letter that operational terms should become a standardised part of the core DDA.
	3.14 Schedule 12A.4, Section 6(2) – Consultation on operational terms

Question	Mercury Comment
	As previously submitted, (see paragraph 2.1 of our cover letter), the obligation to consult is arbitrary. What would constitute adequate consultation? What comeback is there for a retailer who does not agree with the operational terms presented by the distributor prior to publication? This process would be impossible to oversee and is an inefficient use of the parties' time where consultation is unlikely to bring any real benefits. If operational terms were standardised (see paragraph 2.2 and 2.3 of our cover letter), consultation would not be necessary. Retailers would already be familiar with standard terms and the alternative terms available to distributors where there might be regional or network variances. These variances would be clearly set out in a schedule appended to the distributors DDA.
	3.15 Schedule 12A.4, Section 8 – Rulings Panel Appeal Process Under the current proposal the Rulings Panel will be inundated with notices from participants requiring review of operational terms. As previously submitted (see paragraph 2 of our cover letter), standardisation of operational terms would greatly simplify the process and save all parties time and money. From a drafting perspective, we note that if a participant appeals an operational term under Schedule 12A.4(8) they will require an extension to the negotiation timeframe set out in Schedule 12A.1(3) and 12(5).
Schedule 12A.4, Appendix A **Default distributor agreement for distributors and traders on local networks (interposed)**	**3.16 DDA, Section 9.2 – Billing information and payment (Wash up clause)** The DDA does not include a wash up clause. Due to the cyclical nature of meter reading it is impractical to provide completely accurate data for each ICP within the timeframe required for the provision of data under section 9.2 without incurring unreasonable system costs. We submit that the inclusion of a wash up clause would offer a practical solution to avoid such unreasonable costs.
	3.17 DDA, Section 24.7 – Maximum liability cap Please see paragraphs 2.5 and 3.10 of this Appendix for our submissions in relation to the maximum liability cap and how we think it should be applied generally and in relation to the agreements for additional services (Schedule 12A.1 appendices A, B and C).
	3.18 DDA, Schedule 5.1 - Unplanned service interruption (operational term)

Question	Mercury Comment
	This section provides that the distributor must only notify the trader of an Unplanned Service Interruption "affecting 20 or more Customers". However, what if this threshold were not met and one of the customers were Medically Dependent? We submit that a trader should be notified of every Unplanned Service Interruption.
	3.19 DDA, Equal access and even handedness clauses The DDA contains no equal access or even handedness clauses. Please see paragraph 2.3 of this Appendix for our submission in this regard.
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.**	Mercury agrees with the Authority's Regulatory statement and has no further comments to add.