15 October 2019

Electricity Authority
Wellington
by email: submissions@ea.govt.nz

SUBMISSION ON THE PROPOSED DEFAULT DISTRIBUTOR AGREEMENT

Introduction

1 Orion New Zealand Limited (**Orion**) welcomes the opportunity to comment on the "Code Amendment Proposal: Default Distributor Agreement" consultation paper (the **Paper**) released by the Electricity Authority (the **Authority**) and dated 20 August 2019.

2 We have significant concerns about the impact that the Authority's approach will have on our business, on our customers, and on our costs. We are also concerned that it is not good practice to have an agreement in place in perpetuity.

3 We acknowledge that the finalisation of a default distributor agreement has been a long standing project for the Authority. We have contributed fully to past activity on this project and raised concerns about it and rationale for change. In many areas we have not had a response to the concerns we have raised. We urge the authority to consider and respond to the points we raise and alternatives that we suggest in this submission.

4 The Electricity Networks Association (ENA) has also submitted on the paper. Orion endorses the ENA submission.

5 The main issues we have identified include:

5.1 **It could be enforced in perpetuity**. The default distributor agreement can be invoked by a retailer and is then structured as an evergreen arrangement between the parties, with no provision for the distributor to withdraw, ever.

5.2 **The cost to change will exceed the benefits**. In our view, now that we have 27 agreements in place, and can demonstrate that the current approach has not been a barrier to new retailers, the cost of change will far exceed the benefits.

5.3 **It exposes distributors and customers to inappropriate levels of risk**. The proposed wording does not effectively cap liability, and forces consumers to bear the cost or risk of failure of new entrant retailers. The approach actively shifts the responsibility for risk away from the parties that are in the best position to manage that risk.

Orion New Zealand Ltd
565 Wairakei Road
PO Box 13896
Christchurch 8141
+64 3 363 9898
oriongroup.co.nz

5.4 **The proposal seeks to address issues that are already covered by the Code**[1]. In a number of areas, the Paper identifies benefits associated with the proposed approach where these issues are already covered by and could be addressed under the Code.

6 We explain these concerns, and others in the following sections.

It could be enforced in perpetuity

7 The structure of the proposed default agreement is that, in relation to the core terms, it effectively gives retailers access to a mandated approach which then operates as an agreement that is independent from the regulations. In the absence of changes to the regulation, this agreement could be enforced against distributors in perpetuity; there is no provision for a distributor to change the services it provides.

8 We consider that it is erroneous for the Authority to describe the term of the default agreement as "flexible" in the questions and answers provided. The default agreement gives the retailer the absolute right to keep it in place in perpetuity.

9 To address this, and without impacting on the outcomes that the Authority seeks, the default delivery agreement should be specified as applying only for as long as the Code requires distributors to offer default terms, and thereafter it should provide for a notice period for termination.

10 Aligned with this change, we consider that it should be rebranded as "default distribution terms". Using the word "agreement" in the title implies that we have reached an accord or consensus, or approached the relationship with some willingness. However, the proposal in the Paper will give us no option in relation to the core terms. We have no doubt that one or more retailers will elect to participate on the basis of the default, and we will have no choice.

11 These default terms can still be developed by distributors with the same consultation process, and can be deemed to apply if either party gives notice to the other that they wish to participate on that basis, without any need to execute or adopt them as an "agreement".

Issues with the cost benefit assessment

12 We question the basis of the cost/benefit assessment in the Paper. We consider that the consultation process alone will cost more than the $3,000 savings per new agreement negotiation suggested in the Paper (and we note that the Authority's own figures show an average of just 3 new retailers per year).

13 We also suggest that an error has been made in the assessment of the static efficiency benefit in the Paper. The Paper appears to take the entire estimated cost of negotiations under the current basis as a savings, when the Authority's estimate of savings is actually only 17% of total costs[2]. It appears that the Paper overstates the savings by more than 80%.

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[1] Electricity Industry Participation Code 2010 (the **Code**)

[2] Consultation Paper, para 5.28 and 5.33

14 We also question the average cost of negotiating under the current approach. It appears that this average has been significantly skewed by a single outlier – a retailer that claimed its costs were in the order of $150,000 for a single agreement, when most other participants operate in the $5,000 to $15,000 range. Statistically, the outlier should have been removed or the median should have been taken, rather than the average.

15 Separately, we note that a new "benefit" has been identified in the Paper – it suggests that making the changes to part 12A "neutral" will provide benefits in related services markets. However, no market failure in this area has yet been identified. We submit that issues in this area should be addressed if they arise, and this should not be taken as a benefit associated with the proposed change.

16 In all, we have not seen evidence that the benefits will exceed the costs associated with this change.

Not deliver the anticipated benefits to consumers

17 The Paper provides a list of net benefits to consumers. Some are quite tenuous and others are options already available in many cases. As such they cannot be attributed as benefits in adopting a default distributor agreement. Our main areas of concern are:

17.1 Lower cost to negotiate contracts – the approach provides the option for retailers to enter a market and avoid the cost of negotiation. That option is already available to retailers – they can elect to accept the distributor's current standard agreement that is in place with other retailers.

17.2 Retailers can compete on a level playing field – the vast majority of existing agreements include a provision to offer any new agreement to existing participants. If this is an issue in a small number of network areas, then a Code requirement to include such a provision would represent a much more cost effective fix than entirely replacing all agreements.

17.3 Level playing field and increased transparency in negotiation – we currently advise all existing retailers of each new agreement and give them the option to adopt it. The proposed approach would allow us to negotiate a deal with a specific retailer and not offer it to others, and not support a level playing field.

17.4 More equal bargaining position – at least some of the surveyed retailers suggested that they did not consider that they held an unequal bargaining position. In conjunction with the requirement to offer any new agreement to all existing retailers, this concern is largely moot.

17.5 Competition in emerging markets – this is a new benefit identified in the Paper, but we are yet to see if there are any issues that need to be solved in this area.

Start-up retailer risk

18 We consider that the low prudential requirements leave our customers facing a disproportionate share of the risk associated with the failure of start-up retailers.

19 In competitive markets it is normal to find a higher failure rate among new entrant start-up participants. Some innovate, succeed and enhance competition, but others do not. Often these parties are smaller and their approach may not attract the anticipated type or number of customers. This is normal in a competitive environment.

20 The issue with the proposed approach in the DDA template is that the cost of these failures is borne by the broader customer base, rather than by the new retailer itself. The cost manifests as either a bad-debt following failure, or a high 15%+ interest rate if additional prudential security is sought by the distributor, or both. These costs are ultimately passed on to other retailers and other customers via operating expenditure allowances.

21 While the wider customer base might benefit from retail competition, it has no means of controlling the risks taken by or faced by a new entrant retailer.

22 In the absence of paying the bonus 15% interest, the proposed DDA template limits the bond to an inadequate 2 weeks' charges. At the same time the DDA template requires distributors to charge for delivery services in arrears. At the point of an initial non-payment on the 20th of the following month, 50 days of distribution services have been provided without payment. This is further compounded by it being likely to take several weeks (or months) to establish that a retailer has in fact failed (and is not just paying late) and to then switch customers to another retailer (as it is not feasible for us to withdraw the service by disconnecting customers).

23 The DDA template, in effect, requires customers to act as angel investors (but with little prospect of reward). Credit risk is a real issue, and to provide some perspective of what we face, the following is an extract from a "failure to pay" notice that we issued to a start-up retailer in August 2019:

> **Delivery services agreement notice – failure to pay**
>
> We hereby give notice under clause 16.1.1 of our delivery Services Agreement dated [redacted] 2018 that [redacted] Limited (trading as [redacted]) has failed to pay the delivery services invoice dated 1 August 2019 and due on 20 August 2019.
>
> This notice follows late payment of the September, October, November, December 2018, January, February, April, May and June 2019 invoices, when we also issued "failure to pay" notices. We also note that [redacted] Limited defaulted on our agreement by not meeting the prudential bond requirement in November 2018, and we only agreed to withdraw the termination of the agreement based on your assurances that you would meet your obligations on time. But following this you then failed to pay eight of the nine monthly invoices by the due dates, including the current August invoice.

24 With the above considerations in mind, and in the interests of our customers, we request that the 2 week allowance for prudential security (without interest payment) should be extended to 3 months. This prudential security duration would adequately match the period it would likely take for a distributor to withdraw service (through switching ICPs). We realise that this would be difficult for some new entrant retailers, but would clearly signal the risks and expectations for entering the market and ensure that they have adequate backing for their undertakings.

25 By doing this the Authority would appropriately require the retailer to bear the cost of its default, as opposed to other customers.

26 Quite separately, we note the Authority's encouragement for us to progress toward cost reflective pricing. In the circumstance where we request an additional 6 weeks' bond from a retailer we are then faced with a 15% charge for holding that bond. We can clearly identify the source of that cost, and we seek the Authority's views on applying that cost as a loading on delivery prices charged to that retailer.

27 As a related issue, Clause 10.22(a) of the DDA template includes an odd restriction on calling on a security – it states that a call on a security can only be made if the retailer has provided an "acceptable" security. This would appear to restrict a call on a security if, say, the security lodged is for less than the required amount (i.e. not acceptable). It is difficult to know the intent of this sub clause, but we suggest that it can be deleted.

No stand-down period

28 The proposed Code obligation to enter a default agreement could require us to trade with retailers who may have defaulted and have outstanding obligations to us. In the extreme, a retailer could default, owing money, and re-sign the following day to repeat the cycle. In the absence of a realistic bond allowance (as noted above), where the party is the same or a related party, we request the ability to:

28.1 defer any new agreement until all prior obligations have been met, and

28.2 require a one year stand-down period before there is any obligation to enter into a new agreement.

29 The second restriction ensures that the retailer cannot provide continuous services to its customers while not meeting its contractual obligations to the distributor.

Limitation on liability

30 Liability limits are important to ensure that an appropriate level of risk falls to the parties that are able to mitigate or control that risk. In the context of a distribution service where we collect less than $1000 per annum from a typical residential customer, it is important that we face an appropriate level of liability to mitigate risks where it can be done at reasonable cost – faced with liabilities that are too high, a distributor might invest too much in an effort to mitigate risks, and distribution service charges to the customer could increase substantially.

31 We consider that a limit of 10 times the annual charges (approximately $10,000) provides an appropriate share of risk between us and customers. In considering this, we note that different customers have very different risk levels (from a builder's temporary supply with almost no risk, to a commercial customer with refrigerated stock and a very high level of risk). It is much more efficient for customers to customise this risk mitigation to match the value, with things like insurance, surge arrestors, back-up generators where needed.

32 Having said this, we realise that our liability limits are overshadowed, in some circumstances, by the provisions of the Consumer Guarantees Act, but in situations where the limits might apply, be believe they should be fit-for-purpose, and the draft template DDA falls short, as noted in the following sections.

33 ***Liability not limited*** - The proposed DDA template sets out a limitation on liability, but this limitation is subject to exclusions (clause 24.8), and these exclusions provide for no limitation on liability:

33.1 in relation to confidentiality,

33.2 in relation to the Consumer Guarantees Act, or any indemnity under that act, and

33.3 for any indemnity for a third party claim, including arising from breach of agreement (clause 27).

34 In relation to the first exclusion, we consider that the $2,000,000 cap is a sufficient incentive to maintain the confidentiality provisions, and these obligations should not be carved out of the limitation on liability.

35 Separately, the last exclusion effectively means that the limitation of liability where we indemnify the retailer **does not apply if we breach the agreement**, even if this is inadvertent. Given this carve out, and in relation to loss or damage at ICPs, we can't actually think of a situation where the limitation would apply. **The DDA, as it is currently worded, inappropriately exposes us to unlimited liability.**

36 We submit that the only exclusion that should apply under DDA clause 24.8(a) is the exclusion in relation to the Consumer Guarantees Act or indemnities under that act (for the avoidance of doubt, the exclusions under 24.8(b) and (c) should remain).

37 ***Limit per ICP*** - the Paper states that the proposed DDA template calculates the liability cap based on the number of ICPs affected. We submit that this is not the case. The proposed DDA template limitation of liability clause does not include the word "affected". In addition, it clearly links the limit to $10,000 for each ICP at which the retailer traded electricity on the day of the event.

38 Also, the Authority has previously made it clear that the wording is not intended to impose a limitation per affected ICP, and we quote the Authority:

> *"The per-ICP limit is not intended to cap liability at $10,000 per each affected ICP. Rather, the liability limit would be determined by the total number of ICPs on the distributor's network at which the retailer trades only if the number of ICPs supplied electricity on the network by the retailer multiplied by $10,000 is less than $2,000,000."*[3]

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[3] Information Paper and Summary of Submissions - Standardisation of distribution arrangements - model use-of-system agreements Information paper, Electricity Authority dated 11 September 2012, available at https://ea.govt.nz/dmsdocument/13654-information-paper-and-summary-of-submissions

39 The current suggestion that the proposed wording in the DDA template (which remains unchanged from the wording of the model agreement referenced above) somehow limits liability to affected ICPs is surprising. The suggestion in the Paper that distributors indicating this cap was inappropriate "used…. a different method to calculate the cap" is incorrect; we actually used the method that the Authority clearly set out.

40 However, we are encouraged by the discussion in the Paper which makes it clear that the Authority intends that liability should be limited to affected ICPs, and this can be achieved with an adjustment to the wording.

41 We support the approach of limiting liability to those ICPs affected because:

41.1 it aligns with the individual limits that retailers have in their retail contracts with customers,

41.2 it provides a level of risk for us that is commensurate with the cost of the service we are providing (we charge less than $1000 per annum for typical residential connections), and

41.3 it leaves the greater share of the risk with the customer, where it can best be efficiently managed with protective measures and insurance where this is appropriate.

42 However, the issue is actually a little more complicated than simply referring to ICPs affected. Hypothetically, consider a situation where 1000 ICPs are "affected" by a voltage spike and subsequent outage, but only one of those ICPs suffers damage totalling $2,000,000 (and that ICP is supplied by a large retailer):

42.1 The wording in the proposed DDA (as drafted) would not limit liability on the basis of the $10,000 per ICP, because this would be based on the large number of ICPs that the retailer supplied on the date of the event,

42.2 A limit based on $10,000 per ICP affected would also not limit liability on the basis that 1000 ICPs were "affected", and the cap would calculate out to $10m.

43 In this example, the intended limit, which would likely match the retailer's limit in its retail contract, is $10,000. In this extreme case, the DDA template, as it is currently proposed, could see us pay the retailer $2,000,000 and the retailer only pass $10,000 of this on to the customer!

44 To address this, we submit that the wording should be changed to:

24.7 ***Limitation of liability****: Subject to clauses 24.1 and 24.8, but despite any other provision of this Agreement, the maximum total liability of each party under or in connection with this Agreement (whether in contract, tort (including negligence) or otherwise) for any single event or series of connected events will not in any circumstances exceed the lesser of:*

(a) where the liability relates to damage at an ICP, the value of that damage up to a maximum amount of $10,000 (applied as a cap at each ICP affected), or

(b) $2,000,000 in total.

45 ***Growing Liability*** - We are very concerned that, under the proposed DDA, each additional retailer that trades on our network will expose us to an additional $2m in liability. We currently have 27 retailers trading on our network, so this theoretically means that a single event could expose us to a $54m loss. To put this in perspective, this approximately equates to our entire annual profit. A commercial organisation could not bear this risk.

46 We understand that the Authority wishes to enhance competition including by attracting new retailers to the market. Addressing this liability concern will help distributors support this objective.

47 The per-retailer cap also means that customers supplied by large retailers are disadvantaged, as the $2m cap is more likely to be reached and applied for those retailers, creating an inequity.

48 We understand the challenge for retailers in their undertaking to customers, but we must have some confidence to continue to participate with an appropriate level of exposure. We submit that, although difficult to apply, the distributor should have the ability to scale payments in relation to any event so that the total payment does not exceed a combined total amount per event, and we propose this amount be set at $5m. This can be achieved with an additional clause:

[... will not ... exceed the lesser of:…]

> *"24.7 (c) where the total liability of the Distributor to the Trader and all other traders in relation to that single event or series of connected events would be in excess of $5,000,000 (after the application of the cap in part (a) or (b) of this clause), the proportion of $5,000,000 that the liability would otherwise bear to the total liability for that event. In order to quantify this limitation, the Distributor may, acting reasonable, delay payment of a portion of any liability if it considers that this limit may apply."*

49 ***Retailer undertakings inappropriately indemnified*** - Clause 27.2 of the DDA template provides for the distributor to indemnify the retailer for any loss associated with a breach by the distributor (without limitation). We are concerned that retailers might elect to provide generous terms to their customers on the basis that they can pass any amount of liability through. For example, the trader might agree to extensive service guarantee payments which exceed an actual loss at a customer premise, but would still represent a direct loss by the retailer, and be subject to the indemnity. We don't think this was intended.

50 We submit that the indemnity should be limited to the direct and actual loss incurred by the claiming party (as well as being subject to the monetary limitations as noted above).

51 ***Surprise indemnity by the Distributor*** - Clause 26.1 of the DDA template applies from the time at which the trader "wishes" to be indemnified, and provides for this wish to be determined some time after the claim. This could severely prejudice a distributor's position where a trader simply pays out claims without turning its mind to whether it "wishes" to be indemnified. In that situation the distributor would have had no opportunity to be notified of or consulted on the claim, but this will not prevent the trader then seeking indemnification from the distributor after the fact. This would defeat the purpose of the clause.

52 We submit that it is reasonable for the distributor to be notified as soon as the trader is aware that the claim might be related to an event on the network, and that the indemnity only apply where the distributor is given reasonable notice in advance of a claim being settled.

53 ***Strict liability for service standards*** - Schedule 1 of the DDA template appears to present the Service Standards as strict obligations, such that any non-compliance may be viewed as a breach of the agreement, and may trigger an indemnity liability for the distributor under clause 27. In reality, a certain level of performance payments should be expected (with excursions appropriately minimised by the distributor), and the payment should be the extent of the obligation in the absence of any wider breach.

54 Further, to avoid duplication of liability, any payment under the service standards should be offset against any other claim and payment made for the same event.

Provision of customer information (names, contact details)

55 We currently receive monthly updates of customer information from all retailers. The information is treated as confidential and the ways we use it are specified and restricted within our current agreements. The process works well and we are able to use the information to provide a significantly enhanced level of electricity distribution service to customers.

56 The information is used for:

56.1 Identifying a customer's connection point (ICP) to help respond to queries - customers that phone in often do not know their ICP number, and addresses can be ambiguous. Having the customer account holder name helps us find the ICP records and ensure we are discussing the correct connection.

56.2 Contacting customers in the event of power supply emergencies.

56.3 Contacting customers where corrective measures are required (e.g. power factor correction, safety issues, tree trimming).

56.4 Notifying customers in relation to planned outages and unplanned outages (in situations where such notice is to be provided by the distributor), and/or contacting customers when such outages exceed intended durations.

56.5 Issuing price variation notices (where disclosure requirements provide for individual notification).

56.6 Arranging audits for power quality, interference and other network code requirements.

56.7 Consulting on changes to services (including price changes, security levels, and customer satisfaction).

56.8 Validating connection information (correcting and improving ICP addresses, resolving discrepancies, locating connections).

57 Although there have not been any confidentiality concerns expressed to us, we know that some retailers would elect not to provide this information in the absence of a contractual obligation – we suspect to avoid the administrative effort. If we were not to receive the information we would not be able to provide the same level of service, and many efficiencies would be lost.

58 Appendix 3 is entitled "Customer information" and we submit that it should be extended to include the provision of such (ie names, addresses, contact numbers and email addresses), as well as consumption information. Alongside this inclusion, the appendix can explicitly specify permitted uses and exclusions for the information.

Loss factors

59 The DDA template requires distributors to calculate loss factors. We request that:

59.1 The provision, requiring the Trader to investigate and minimise non-technical losses, that was in the previous model be reinstated,

59.2 The ability for a trader to dispute a loss factor with provision for mediation and arbitration be removed. There is no one right way to calculate loss factors or determine the groups across which different average factors should apply. Retailers may dispute factors in order to achieve a lower factor for their customers, and this can only come at the expense of other groups. The dispute provision should be replaced with an obligation on the distributor to act reasonably in determining factors.

59.3 The reference requiring the distributor to calculate loss factors in accordance with the Authority's guideline should be removed. The guideline was not consulted on as a mandated approach, and should not become one in the absence of due process.

Use of money adjustments

60 The DDA template *requires* distributors to apply use of money adjustments to wash-ups. Such adjustments can be small but come with a significant overhead – the adjustments are not subject to GST (in an invoice that is otherwise subject to GST), and there is a requirement to deduct resident withholding tax (where the retailer does not hold an exemption certificate).

61 In terms of the cost/benefit analysis in the Paper, we are concerned that the system changes and administration of this requirement alone might exceed the benefits that have been identified.

62 We submit that the DDA template should instead *permit* the application of use of money adjustments, and require that the application of use of money charges and credits be applied consistently.

Requirement to apply adjustments

63 Clause 9.3(e) of the DDA template requires distributors to apply revision invoices in the month after revised information is received. We are continually receiving revised billing information but we apply all revisions in line with the reconciliation manager's cycle, so that each month that an invoice is issued, we also issue revised invoices for exactly 4 prior months spanning the prior 14 months.

64 These revised invoices include all revisions, including adjustments for peak charges, and to fixed charges for backdated switches. Importantly, it allows us to spread the wash-up of the peak change (which can be significant) over a six month period, mitigating the impact of this adjustment.

65 Requiring all revisions to be applied immediately would require us to reissue up to 14 months' invoices each month. This would carry a significant overhead in our billing process, and also for retailers that must check and approve payment for the revision invoices.

66 We request that the provisions be adjusted to allow the distributor to align its revision cycle with the reconciliation manager's cycle, or alternatively establish a process for revision invoices that does not unreasonably delay the application of adjustments to billing information.

Notice period for application

67 With the proposed changes to the billing process (in particular, the required application of use of money interest and immediate application of revision invoices noted above), adoption of the default distributor agreement will take some time.

68 We will need to scope, specify, commission and test significant changes to our billing system, and we would usually consult on such changes with retailers.

69 If there are to be mandated approaches to the billing process, we request that a provision for 12 month notice period (at least) to enable the adjustments to be made.

70 As a preferred alternative, we request that the billing and payment section be re-drafted as an operational term, so that distributors can develop documentation that reflects their current processes, and avoid the unnecessary cost of changes.

Controllable load

71 We have a number of concerns in relation to the proposed rights to controllable load.

72 ***Access during emergencies*** - The DDA proposal only prioritises access to controllable load during grid emergency events. However, there are many situations where access to controllable load can avoid complete outages following events on the distribution network, or allow supply to be restored sooner than it might otherwise be following an event.

73 The boundary between transmission (on the national grid) and sub-transmission (on a distribution network) is somewhat arbitrary, but the risks of contingent events, and the benefits of access to controllable load following those events are similar.

74 We submit that priority access to controllable load should be extended to capacity emergencies on the distribution network following contingent events.

75 ***Coordination of load management*** - Distribution networks are efficiently designed to meet the diversified load of connected customers. People are very good at doing stuff at different times, and this diversity in behaviour reduces an individual customer's contribution to peaks. A typical house has probably 50kW of appliances of various sorts that might be turned on at some point, but the house will happily get by with a 15 kW (60 Amp) supply fuse, set a half hourly anytime

maximum demand of around 8 kW yet only make a 3 kW contribution to coincident network peak demand, the latter being the demand that drives high voltage distribution network investment and transmission investment.

76 Carefully applied and co-ordinated management of controllable load can improve on this diversified loading peak. Delaying lower value loads (like storage water heating) so that they do not contribute to the peak allows for a lower level of peak capacity to be built - we can do even better than diversity – and so the same amount of energy can be delivered over a smaller capacity network. This approach has been a feature of distribution network design, build and operation in New Zealand for decades. Generally, end-consumers choosing to contribute to this coordination partnership are rewarded by some form of price discount.

77 However, a characteristic of load management is that it eliminates the diversity in the controlled load. Without any intention to do so, it is very easy to create load peaks or localised loads that are much higher than would otherwise occur, and this can put system security at risk. System security might also be put at risk if the actions of two or more separate load managing parties happen to coincide.

78 The only way to mitigate this risk is to accept that a central coordination role is necessary for load management. We are sure there will be useful developments in this space over time, but as an initial step we submit that schedule 8 should be extended to include:

78.1 The ability for distributors to set prudent limits on maximum change and rate of change of load as a result of load management,

78.2 The requirement for retailers to submit load management programs and the basis of operation to the distributor for approval, at its discretion, and

78.3 The ability for distributors to adjust such limits and approvals to mitigate issues that might arise over time.

79 We respect that there may be value in managing load that exceeds the benefit of diversified loads, and network capacity might need to be enhanced to accommodate this. It may be worth giving some consideration to a framework for distributors and load controlling parties to agree the terms on which such a network capacity upgrade might be provided.

80 In the absence of these provisions, any activity of significance in the load management space has the potential to increase shared network costs and put system security at risk.

81 ***Manage load only where a category is selected*** - Clause 5 of the proposed DDA template provides for the distributor to control load only where it provides a price category or price option for a non-continuous supply. This appears to assume that the reward for ceding controllable load is given through a lower price. Unfortunately this does not cater for situations where cost reflective pricing is in place, and in these situations, the act of controlling load can be rewarded via a lower chargeable quantity (without applying a separate price category).

82 To explain by example, a category that has a network peak demand price might apply to a mixture of ICPs both with and without a controllable water heater. Those that have an uncontrolled water heater will have a higher contribution to the peak charge, and those with a controlled water heater less. There is no separate category.

83 The same issue applies with ripple controlled night time water heating as part of a day/night pricing plan. Customers with and without controlled water heating can take advantage of the day/night pricing plan, and no separate category or price needs to be made available.

84 Our concern is that we don't have the required separate category, and the DDA template, as it is worded, would prevent us from continuing with peak load management and night rate water heating from the day it is effective. This would have significant, sudden and widespread impact on our customers and on our costs.

Inadvertent regulation

85 The DDA template refers to several guidelines issued by the Authority that distributors must comply with. These include:

85.1 Distribution pricing structure consultation guidelines (cl 7.4(a))

85.2 Medically dependent and vulnerable customers guidelines (cl 17.4)

85.3 Loss factor guidelines (cl 6.2)

85.4 Unmetered load management guidelines (cl 17.5(c))

86 Referencing these guidelines creates a quasi-regulation-making power for the Authority. The guidelines were developed with consultation on the basis of guidelines (not regulation). Referencing them in the DDA effectively mandates them without due process, and without the normal consultation obligations should the Authority decide to change them.

87 We submit that all references to these guidelines should be deleted, or distributors should be obliged only to have regard to the guidelines.

Price change provisions

88 We have identified a number of issues with the restriction in price changes suggested in recorded term 7.3 in the DDA template (clause 7.3):

88.1 it provides for price increases in certain circumstances, but would then inappropriately lock in an annual cycle of price changes that might deviate from 1 April,

88.2 it allows for price decreases at any time, but would then prevent a subsequent price change for 12 months,

88.3 if a price for a specific customer was changed, it would prevent all other price changes for 12 months.

89 We suggest that this be redrafted as follows:

*"**7.3 Price changes**: Unless otherwise agreed with the Trader, the Distributor may not increase its Prices for any one ICP more than once in any 12 month period ending on 31 March, excluding any change that results from a change in:*

(a) a cost that is a pass-through cost or a recoverable cost specified in a determination of an input methodology by the Commerce Commission under Part 4 of the Commerce Act 1986 in respect of the services provided by the Distributor;

(b) the Distributor providing new Distribution Services or materially changing existing Distribution Services, provided that any proposed Price change must only apply to ICPs affected by the new or changed Distribution Services; or

(c) the law.

Nothing in this clause prevents the Distributor from decreasing a Price at any time, or from increasing a Price with the agreement of the Trader."

Clarity of arrangements

90 We are concerned that the proposed approach may leave us in a position of being unclear if an "agreement" is in place. New retailers often request agreements at the stage they are exploring options, but may then elect not to go ahead. We have a number of disclosure requirements and the DDA includes a number of obligations (like issuing price variation notices) which apply with each new retailer.

91 We request that, whatever form the agreement or terms take, they should include a clear request and acceptance process, that explicitly identifies that the arrangement is in place and the date from which it applies.

Updates for Consumer Law Reform

92 We note that some aspects of the DDA template have been updated to reflect the recent Consumer Law Reform legislation. However, associated with this reform, the Consumer Guarantees Act (CGA) was amended to make its application more broad. In particular, the situations in which parties can contract out of the provisions of the CGA were further restricted.

93 The principal change is that the CGA can now only be contracted out of where the supply occurs in trade, the written agreement between the parties states that the CGA does not apply, and where it is "fair and reasonable" for the CGA not to apply. Our view is that the last of these requirements is unlikely to be met in the absence of individual negotiation of a retail supply agreement.

94 Contrary to this, clause 24.9 of the DDA template requires the retailer to exclude the provisions of the CGA where "the Customer is acquiring or holds itself out as acquiring electricity for the purpose of a business".

95 We submit that this should be amended to align with the new provisions and include a reference to "fair and reasonable".

DDA Negotiation timeframe

96 The Paper supports negotiation of alternative arrangements. However, the proposed Code clause 12A.1(6)(3) specifies that the default delivery agreement applies as a binding contract at the expiry of 20 business days. This is not sufficient time for either party to consider the impact of changes or alternatives, and to seek legal advice and internal approvals. If a negotiated alternative is a genuine option, then we submit that the timeframe should be open-ended, but with either party having the ability to give notice to contract on the basis of the default delivery agreement at any time.

97 Further, the 5 business day timeframe for when the DDA applies as a binding contract following notice is insufficient to ensure that all systems and processes needed to support a new retailer are in place. We request this be extended to 10 business days.

Recorded terms inappropriately locked in

98 The DDA template provides for the inclusion of recorded terms where necessary, which is useful. However, these terms would then come under the umbrella of the evergreen agreement, effectively locking them in in perpetuity. We reiterate the request above that the DDA should have a sunset clause so that it only applies for as long as distributors are required to offer a default agreement under the Code, but even this limitation would not be satisfactory for recorded terms. We submit that all recorded terms should be identified and, consistent with the distributor's discretion to include them in the first place, the distributor should have the ability to give notice and change or delete the recorded terms.

Data access

99 We have a number of concerns relating to the customer information provisions:

100 ***Uncertainty*** - Appendix C of the DDA template provides for a data agreement to be attached. We submit that it should form part of the actual agreement, rather than being referenced as an attachment. We also submit for inclusion of a fall-back position if the parties are not able to reach agreement on the terms.

101 ***Unable to combine data*** – the DDA template prevents the distributor from combining data with any other data or database without written consent. The value of the data is almost entirely eliminated in the absence of such action – it is the combining of data that provides an overview of total loading levels, loading levels in specific electrical areas, and checks against pricing and other chargeable metrics. We submit that this restriction be removed, as the permitted purposes provides sufficient restriction on use of the information.

102 ***Onerous audit provisions*** – the DDA template provides for the trader to appoint an auditor to look into the distributor's processes in relation to customer information. This could lead to a large number of audits at considerable cost. Separately, there is no provision for the distributor to object to a specific auditor, or to protect the confidentiality of its own information. The Authority already has a participant audit process that would provide a more efficient mechanism to check on these processes, and we submit that the function be included in the Authority audit instead.

103 ***Destruction of data*** – The DDA template requires distributors to destroy data once it has been used for the permitted purpose. Distributors need to be able to defend and justify the conclusions they have reached using the data, and need to retain it for this purpose. Also, in many situations, a significant value in the data is derived from observing variations and trends over long periods of time, and information needs to be retained for this benefit.

104 **Use too narrow** – The DDA template restricts use of the information to "permitted purposes", including development of prices, planning and management of the network. The information has wider applications in the efficient provision of a distribution service. In particular, the information is useful when responding to or interacting with customers in relation to upgrades or downgrades, power quality issues, and considering pricing options or alternatives, and investigating consumption anomalies.

Rulings Panel is poorly placed to make decisions on operational terms

105 We consider that the Rulings Panel is not well placed to consider appeals against the operational terms in an distributor's DDA, because:

105.1 it is not clear what basis it would consider a complaint against (and many situations might simply come down to siding with one party or the other),

105.2 the timeframe for establishment is insufficient for its involvement,

105.3 there is no right of appeal,

105.4 a solution/ruling might suit one retailer, but not others (and in some situations it is not possible for us to provide differentiated services).

106 Schedule 12A.4 clause 10 provides for the Rulings Panel to determine which party can elect to apply the change. Where the retailer is given the election, this could result in the distributor being forced to accommodate agreements that carry different operational terms. This could create significant cost and complexity and undermines the objectives of standardisation and efficiency.

107 We are also concerned that the distributor's pricing methodology, price categories, price options are part of the operational terms, and would therefore also be subject to challenge via the Rulings Panel. We suggest that these aspects of a distributor's business are already adequately addressed via regulation, and adding a provision for decisions by the Rulings Panel would cut across existing regulatory processes under Part 4 of the Commerce Act, and also the existing price change and consultation provisions in clause 7 of the DDA. We request that these aspects be more clearly carved out from the Rulings Panel appeal process.

108 We submit that the Code requirement should extend only as far as an obligation to consult on operational terms, to act reasonably, and to have due regard for the impact on retailers.

Vacant site disconnections

109 Clause 8.12(c) of the DDA template establishes that the distributor is responsible for vacant site disconnection following notification from the retailer. In many situations the retailers are responsible for this work and the distributor is not involved – this clause appears to pre-empt the operational processes in schedule 6.

110 We suggest that this clause be altered to apply only where the distributor is responsible for disconnections in accordance with schedule 6.

Operational policies in schedules

111 We are concerned that the default text in the operational schedules may become a pseudo-standard, and we think it would refining the provisions before they are rolled out and adopted:

111.1 S6.25 Includes a requirement that a party undertaking a decommissioning must remove the meter. This is a service that the distributor is not responsible for. Meter removal and return is a matter between the meter owner and the retailer. The reference should be removed.

111.2 S8.1 Use of controllable load. This only gives priority for grid emergency and market participation. There is no priority for what is currently the highest value use of load control – network investment deferral. This provides an avenue for retailers to eliminate our access to controllable load which would immediately require us to undertake a large capital spend to upgrade our network (and possibly the USI[4] grid). Once upgrades are undertaken, the benefit of their deferral is no longer available, ever. Retailers may be faced with benefits associated with market participation, without being exposed to higher network costs (which they may view as a pass-through cost), and so may not act in the interests of customers. The policy should be re-worded to protect existing use and benefits.

111.3 S6.14 Requires distributors to update the registry for temporary disconnections – distributors are not able to do this update on the registry.

111.4 S6.15(b) Gives an explicit requirement to reconnect on any date requested by the customer (the provisions in part (a) of the clause are not repeated). This is not practicable, and not appropriate in situations where the grounds for disconnection have not been resolved.

111.5 S6.13(i) requires the distributor to use the customer's address last supplied by the retailer, but the agreement does not require retailers to provide this information in the first place, so it would not be available to use. As noted separately, customer name and address information should be included under the ambit of customer information provided for in Schedule 12A.1 appendix C.

[4] Upper South Island

111.6 S6.4(d) Requires the distributor to advise that a new ICP is ready to connect within 2 working days of reaching agreement on the terms. This doesn't leave a lot of time to construct the new network that might be needed for the new ICP. The date should be amended to refer to the completion of any upgrades or extension that might be needed.

111.7 S5.16 Requires the distributor to meet the retailer's costs in notifying customers of planned outages. This is not appropriate because:

- The retailer is the only party in a position to minimise these costs and will not be incentivised to do so if reimbursed, and
- All costs are ultimately borne by customers, so the transactional cost of reimbursement and then including it in delivery charges is an unnecessary burden.

111.8 S5.3(b) requires the distributor to provide an ETA for restoration no later than 10 minutes after a fault. This is impracticable and we suggest 30 minutes would be more in line with operational response times (particularly in a rural setting).

111.9 S5.8 allows the retailer to refer calls direct to the distributor. This undermines the contractual obligation for the retailer to take calls (in situations where it is the retailer's responsibility).

111.10 S3.2 Needs to be updated to refer to the separate EIEP 5A and EIEP 5B files.

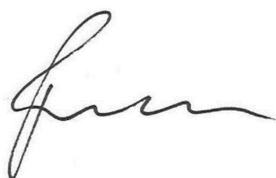
111.11 S2.1 (c) (the last c) GXP charges are calculated as prices applied to "quantities". Prices are not applied to ICPs.

Concluding remarks

112 Given the significant nature of the issues, and the changes that would be required to address them, we request that the Authority undertakes a further round of consultation before concluding its position.

113 Thank you for the opportunity to make this submission. Orion does not consider that any part of this submission is confidential. If you have any questions please contact David Freeman-Greene (Pricing Manager), DDI 03 363 9848, email David.Freeman-Greene@oriongroup.co.nz.

Yours sincerely



Rob Jamieson
Chief Executive

Appendix: Responses to specific questions

Submitter	Orion New Zealand Ltd

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.	**Q1 (a) We do not agree that the current approach of negotiating agreements is leading to inefficient outcomes.** **(b) We do not observe a lack of competition in retail markets that relates to the current approach for agreements.** **(c) While the proposal provides a framework to address any problem in related services, no such problem has yet been identified.** **Please refer to the body of our submission for more detailed comments.**
Q2. What are your views on the revised: a. Part 12A proposal b. DDA template proposal	**Q2 (a) We object to a wide range of aspects that would be introduced by the part 12A proposal.** **(b) We also object to a wide range of aspects that would effectively be mandated and locked in by the DDA template proposal.** **Please refer to the body of our submission for more detailed comments.**
Q3. What are your views on the draft Code, appended to this paper, which would introduce the proposal?	**Q3. See response to Q1 above.**

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.	**Q4(a) We do not agree with the assessment of costs and benefits in the Paper. We also consider that the cost of change will exceed the available benefits.** **(b) We do not agree that the proposal will increase transparency in the negotiation process – the proposal specifically allows for individual negotiation and supports differing outcomes – while these outcomes might be apparent, there is no basis for other retailers to seek the same outcomes.** **(c) The DDA template provides a basis for participants to compete for existing and new contestable services, but does so by excluding distributors from these activities, even where the distributor might be the most efficient provider. It provides a basis for participants to provide and profit from new services without regard for the impact that it might have on distributors' costs (which will then ultimately be borne by customers).** **Contrary to the comments in the Paper, we consider that changes will have an adverse impact on reliability of supply, as the proposal provides for uncoordinated demand management which is much more likely to increase or create loading peaks than it is to reduce them.**