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Electricity Authority  
Level 7, ASB Bank Tower  
2 Hunter Street  
**WELLINGTON 6143**

By email: [submissions@ea.govt.nz](mailto:submissions@ea.govt.nz)

## **SUBMISSION ON CONSULTATION PAPER - CODE AMENDMENT PROPOSAL: DEFAULT DISTRIBUTOR AGREEMENT**

### **Introduction**

WEL Networks (WEL) appreciates the opportunity to make a submission to the Electricity Authority (the Authority) regarding the consultation paper: **Code amendment proposal: Default Distributor Agreement (DDA)**.

WEL acknowledges the Authority's work to date on the DDA project and that the Authority has the power to regulate terms between distributors and retailers. WEL also notes that the Electricity Price Review panel has effectively recommended the DDA be introduced, and the Minister's indication that the Authority should expedite this project.

However, owing to the contentious nature and long-lasting impact of the reform being proposed, we urge the Authority to run a second stage of consultation and allow cross-submissions. This would allow complex issues to be appropriately scrutinised and 'ironed-out', to avoid unintended consequences which may be difficult to unwind.

WEL refers to, and supports, the submission by the Electricity Networks Association (ENA) including the recommended Code and DDA amendment appendices.

### **Contract Formation, Variation & Termination**

WEL supports and adopts the ENA's submissions in relation to contract formation, variation and termination, and the targeted safeguards it has proposed to ensure distribution agreements can appropriately evolve within the framework of the regulated, standard agreement.

Describing the proposed DDA as an "agreement" is a misnomer; in reality, its terms are largely prescribed and a participant may elect to utilise the DDA without negotiation or consensus from the counter-party. We consider a more appropriate description for the document is "Default Distribution Terms", as this would better reflect the mandated nature of what is being proposed.

As currently drafted, Part 12A of the Code provides for evergreen contracts that cannot be updated to reflect changes in market conditions or the parties' reasonable requirements. This results in inflexible binding terms that may last well beyond the regulations that brought them into existence.

WEL submits that the proposal ought to be reworded so that participants are only required to adhere to any DDA for as long as the Code requirement remains in force.

For as long as there is a Code requirement, key changes proposed (by the ENA and adopted by WEL) include establishing a mechanism to periodically 'refresh' all distribution agreements to reflect the Distributor's current DDA and requiring the Authority to periodically review Part 12A of the Code and the template DDA to ensure these remain fit for purpose.

WEL shares the concerns raised by the ENA in relation to the role of the Rulings Panel and the incorporation of Guidelines into the DDA. To elaborate:

- Several clauses in the DDA (ie. clauses 6.2, 7.4, 17.4, 17.5) refer to Guidelines published by the Authority which, under the DDA, must be adhered to and effectively elevates these guidance documents to quasi-regulation status. Such approach bypasses the statutory framework and rigorous process for rule-making through the Code, creates an unsound precedent and unacceptable risk to market participants. WEL agrees with the ENA's recommendation to delete references to these Guidelines in the DDA.
- The role of the Rulings Panel, the scope of its determinations and the effect that these might have upon other distribution agreements made under the DDA are not sufficiently defined. The proposed amendments by the ENA (and adopted by WEL) will clarify the principles for operational terms, require that the Rulings Panel be satisfied that an operational term under consideration is inconsistent with the principles before exercising its power to amend, and require the Rulings Panel to consider the impact of adopting the amended term on the Distributor.

### **Negotiation Timeframe**

The timeframes for negotiation of distribution agreements (20 business days) made under the DDA and to commence trading (5 business days) are insufficient and unrealistic when taking account of practical matters such as billing system setup, outage management and other network operations setup, connections, and prudential security set up.

WEL agrees with the ENA recommendation of enlarging the timeframes to (at least) 40 and 20 business days respectively.

### **Liability & Indemnity**

In the draft DDA, the Authority has endeavoured to apportion risk and liability between Distributors and Traders but, with respect, failed to strike the right balance. The costs on Distributors associated with risk and liability under the template DDA are onerous and will ultimately be borne by consumers through regulated distribution prices.

WEL supports and adopts the ENA's proposed changes to the DDA liability and indemnity provisions (sections 24 to 27). In particular:

- The proposed revisions to 24.7 that:
  - Clarify the reference to "each ICP on the Network at which the Trader traded

electricity on the day of the event” is limited to any such ICP adversely affected by the event.

- Introduce an annual liability cap on a Distributor’s liability to a Trader, which is proportionate to the Trader’s share of ICPs on the network; without such revision, the cumulative liability amount is determined by one blunt measure (ie. number of Traders on the network).
- The proposed changes to section 26, clarifying that the Trader who seeks to be indemnified by the Distributor under the Consumer Guarantees Act is to give written notice before a remedy is provided and as soon as reasonably practicable.
- The proposed revisions to clause 27(a)(ii), which will:
  - ensure the indemnity is limited to circumstances where the Distributor is at fault and it will not be liable or disadvantaged where legitimately exercising rights under the DDA.
  - exclude any losses that are not actual losses incurred as a “direct, natural and probable consequence”, and also certain Network Event Losses.

The proposed DDA provides no limitation of liability in relation to breach of confidentiality. WEL submits that liability should similarly be limited (by excluding losses that are not a direct, natural and probable consequence of the breach) and/or capped at a reasonable level – a liability cap of \$2,000,000 is considered sufficient and appropriate in this regard.

### **Prudential Security Requirements**

The current Code allowance for Distributors to only request two weeks’ prudential security from a Trader before they may trade on a network has been shown to be wholly insufficient in practice. Although there is provision to request additional prudential beyond two weeks, it comes with the obligation to compensate Traders with a hefty interest rate of 15% over the daily bank bill yield rate; this is prohibitively expensive for most Distributors and as a result, few Distributors hold anywhere close to the true value of security required to mitigate the risk of a Trader defaulting on their networks. The result is Distributors, and ultimately their consumers, are underwriting the risk of Traders entering the market.

WEL considers that if Traders are to be allowed to access networks on default terms, Distributors must be given the ability to collect sufficient prudential at a reasonable cost to cover an event of Trader default.

WEL supports and adopts the ENA’s recommended Code amendment that additional prudential security be compensated at “not more than the trader’s actual daily costs of holding the security on arms-length commercial terms and not exceeding the reasonable market costs that would be incurred by a prudent and reputable trader.”

### **Phoenix Traders**

The proposed Code amendment permits a Trader, whose distribution agreement is terminated as a result of its default, to simply request a new DDA. The DDA gives Traders the absolute right to trade on a network and there is no requirement that the Trader first settle its arrears before continuing to trade.

WEL supports and adopts the ENA’s recommended Code amendment to allow Distributors to apply to the Authority for exemptions from having to contract with certain Traders (ie. Sch 12A.1, cl 14). As

detailed in the proposed amendment, exemptions would be available where a Trader has had their DDA terminated or they have shown reasonable grounds to indicate that they are unlikely to fulfil their obligations under a future DDA.

### **Data Access**

While acknowledging the Authority's pro-active approach in enabling access to metering consumption data, the proposed restrictions (inability to combine data, onerous audit requirements and requirement to destroy data) undermine its usefulness to Distributors and are administratively and logistically burdensome.

WEL supports and adopts the ENA's submission on data access and its recommended amendments.

### **Load Control**

Although the Authority describes the proposed DDA as flexible and forward-looking, the approach of section 5 (Load Management) is in fact limiting and focuses on historic arrangements. The prescriptive approach proposed may limit the introduction of innovative solutions going forward, to the long-term detriment of consumers.

WEL supports and adopts the ENA's proposed amendment to allow for an "Other Load Control Option" on the basis that consumers are likely to benefit from future opportunities developed relating to load control.

If you would like to discuss any of the points raised in this submission, please contact either of the writers.

Yours sincerely

David Wiles  
**REVENUE MANAGER**

DDI 07 850 3745  
E david.wiles@wel.co.nz

Karleen Broughton  
**COMMERCIAL LEGAL COUNSEL**

DDI 07 850 3645  
E karleen.broughton@wel.co.nz