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Submission on Default agreement for distribution services

Submission to the Electricity Authority

From the Electricity Networks Association

Contents

1. INTRODUCTION 3

2. SUBMISSION 3

3. EXECUTIVE SUMMARY 4

3. A PROPOSAL TO REPLACE THE AUTHORITY'S MUOSA ARRANGEMENT WITH A DEFAULT DISTRIBUTION AGREEMENT. 7

3.1 Drafting the 12A Code and DDA 7

3.2 A material shift in the Code affecting commercial contracts between retailer and distributors 8

3.3 The Authority's Jurisdiction 10

3.4 Problem definition 12

3.5 Principles underlining the development of changes to the Code, provisions in the core terms and provisions in the operational terms 16

3.6 Development of Part 12A 17

3.7 Cost benefit analysis 19

3.8 Detailed drafting of section 12A and the template DDA 25

3.9 Conclusion 25

4. SUBMISSION QUESTIONS 27

4.1 A.1 responses to the questions in the paper 27

4.2 A.2 comments on the detailed drafting of the Code amendment. 30

4.3 A.3 comments on the detailed drafting of the DDA template. 33

5. APPENDIX 42

1. Introduction

The Electricity Networks Association (**ENA**) appreciates the opportunity to make a submission to the Electricity Authority in respect of the **Default agreement for distribution services.**

The ENA represents all of New Zealand's 26 electricity distribution businesses (**EDBs**) or lines companies, who provide critical infrastructure to NZ residential and business customers. Apart from a small number of major industrial users connected directly to the national grid and embedded networks (which are themselves connected to an EDB network) electricity consumers are connected to a distribution network operated by an ENA member, distributing power to consumers through regional networks of overhead wires and underground cables. Together, EDB networks total 150,000 km of lines. Some of the largest distribution network companies are at least partially publicly listed or privately owned, or owned by local government, but most are owned by consumer or community trusts.

2. Submission

The ENA submits that the Authority has not made the case to replace the Model Use of System Agreement (MUoSA) arrangement with a compulsory default agreement and should consider an alternative course of action that:

1. Builds on the progress made under the MUoSA arrangements to date;
2. Draws on input from traders and distributors to modify the MUoSA so that it meets the Authority's statutory objectives while being commercially practicable; and
3. Allows time for all traders and distributors to adopt a Use of System Agreement (UoSA) that satisfies the Authority's objectives, participants' commercial objectives and the interests of consumers.

If the Authority elects to pursue its proposed course of action despite not having made the case for the change the ENA requests the Authority run a process whereby traders and distributors participate in the formation of the DDA and accompanying Code so they better balance risk and cost between distributors and traders. Traders and large distributors have demonstrated that they are able to negotiate mutually agreeable terms that have been adopted in other network areas.

3. Executive Summary

The ENA's interest in the default distribution agreement (DDA) comes about because these proposed contracts would replace the commercial terms and conditions for interposed Use of System Agreements (UoSAs) under which the majority of its members operate.

The Model Use of System Agreement (MUoSA) that the DDA replaces was established by the Authority as the basis for commercial arrangements between retailers[1] and distributors. By proposing to create a compulsory default contract and determining what terms should be included and which terms are not included, the Authority undermines existing contracts. Where the contracts it replaces are legacy contracts it is, perhaps, understandable that the Authority would want to assert its view of how its statutory objective should be incorporated into these commercial arrangements. However, to do so to contracts that have been negotiated with the Authority's MUoSA as the starting point and refined through a commercial and legal process between the counterparties as provided for in the current Code undermines the counterparties' property rights and in our view is likely to be outside the Authority's jurisdiction. For the Authority to proceed as proposed, its jurisdiction should be clear and the case should be sound.

The proposal in the consultation paper to move to a default agreement was signalled in 2011:

> *If the Authority considers that the arrangements remain unsatisfactory after approximately two years, it will consider developing the MUoSA to be a default agreement under the Code (i.e. an agreement that must be used by the parties if they cannot themselves agree on a UoSA).*[2]

The Authority considered progress towards adoption of the MUoSA as a model for negotiated agreements in 2013 publishing a consultation paper in 2014 with the preliminary conclusion:

> *That these objectives can be best achieved by amending the Electricity Industry Participation Code 2012 (Code) to establish the UoSA as a default set of terms that can be varied by mutual agreement between each distributor and retailers on that network.*[3]

The effect was that the Authority played a role in progress towards the slow adoption of the MUoSA by its signalling of where it expected to end up. A number of distributors took the view that they should wait until the inevitable default agreement was proposed. Had the Authority been more patient the gains from the level of standardisation achieved under the MUoSA arrangements would have been greater than those achieved to date.

This consultation paper advances the Authority's position:

> *7.3 Having considered all submissions received on the [2014] consultation paper, the Authority remains of the view that significantly enhanced standardisation of the terms and conditions related to supply of distribution services by 29 individual local distributors is a desirable goal.* [4]

The way this statement is written suggests that the Authority will proceed unless someone makes a compelling case against it, rather than it being an unbiased examination of two alternative proposals.

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[1] The proposed Code and DDA swap the term retailer for trader. This paper uses a number of historic references with the term retailer and some references where the term trader is used. For the purpose of this paper the two terms are interchangeable.

[2] Electricity Authority Consultation Paper *Standardisation: Model Use-of-System Agreements and Proposed Code Amendments* 11 August 2011 para 2.3.2 (e)

[3] Electricity Authority Consultation Paper *More standardisation of use-of-system agreements* 8 April 2014

[4] Electricity Authority *More standardisation of UoSAs consultation paper* 24 February 2015 Para 7.3

It is not unreasonable to expect that the drafting of the proposed Code and DDA is robust, that the case for change is made, the regulatory statement is of a recognisable standard, and that the proposal lies clearly within the Authority's powers under the Act (i.e. section 32(1) and section 16 [as supplemented by the Crown Entities Act]). The ENA considers that this consultation paper falls short on each point.

In the event that the Authority does not accept the ENA's submission that the case to proceed with the proposal has not been made the ENA proposes that distributors and retailers be involved in refining the Code and template DDA, as we have suggested in previous consultations and letters to the Authority CEO. This is an important point because the proposed change removes members' ability to negotiate mutually agreed terms and imposes the DDA provisions instead. On this basis the ENA's Distribution Pricing Working Group (DPWG) has carried out a thorough examination of provisions in the proposed Code and template DDA. The key issues for all ENA members and suggestions for a better approach to these issues are set out in detail in this submission in section 4.2 *A.2 comments on the detailed drafting of the Code amendment* and 4.3 *A.3 comments on the detailed drafting of the DDA template* in line with the format for submissions supplied by the Authority

The ENA commissioned Sapere Research Group to compare the DDA with the MUoSA and the contracts negotiated under the MUoSA framework by three distributors (Unison, Vector and WEL Networks). Each clause of the DDA, the MUoSA, and the negotiated contracts was assessed against the Electricity Authority's Statutory Objective clause. The Sapere report identifies a number of improvements in clauses in the DDA that could result in greater competition, reliability and efficiency in the long term interests of consumers. Overall the report finds:

1. None of the agreements negotiated within the auspices of the Authority's MUoSA arrangement were detrimental to the statutory objective. The differences in the negotiated agreements reflected operational practice and management of risk for each of the businesses.
2. The current arrangement of negotiated agreements has allowed for innovation in the contractual arrangements between distributors and retailers in the cases examined.
3. In most cases, the clauses in the negotiated agreements that varied from the draft DDA were preferable in that they better met the Electricity Authority's statutory objectives.

Notwithstanding the detailed review of the proposal, the ENA is not convinced that the code amendments are lawful and questions whether section 16 of the Act places constraints on the Authority that limit its ability to put the proposed scheme in place.

The ENA considers that the Authority has not:

- Fully acknowledged that arrangements to date have delivered efficiencies and learnings by retailers and distributors. (We note that a number of clauses agreed through bilateral negotiations have been adopted but that is not enough progress to satisfy the Authority that the MUoSA arrangement is working); or
- Demonstrated that amendments to the Code will improve the efficiency of the electricity industry for the long-term benefit of consumers; or
- Identified market failure such as may arise from market power, externalities, asymmetric information and prohibitive transaction costs; or
- Established a problem that is created by the existing Code, which either requires an amendment to the Code, or an amendment to the way in which the Code is applied; or

- Provided substantiated quantitative cost benefit analysis that supports the conclusion that the benefits from the proposal would be larger than its estimated cost (as stated in section four of the consultation paper); or
- Reviewed each term in the default agreement and formed a viewed on whether the term deals with matters that the Commission is authorised or required to regulate under the Commerce Act.[5]

The ENA considers the Authority has failed to substantiate a case for change. Ideally the Authority would:

1. Redo the Cost Benefit Analysis (CBA) to an acceptable standard and with robust analysis; and
2. Only proceed with the consultation if a real need for regulatory intervention is proven, and such intervention is in the long-term benefit of consumers.

The ENA requests:

1. The Authority produces a higher standard of regulatory statements in future for initiatives that impact on distributors;
2. The Authority considers an alternative course of action that:
   - acknowledges the progress made to date under the MUoSA;
   - is proportionate to and targeted at a well-defined and genuine problem;
   - has industry work with the Authority to modify the MUoSA to make it meet the statutory objectives while being commercially practicable; and
   - allows an appropriate time for all distributors to adopt a UoSA that generally reflects the intent of the MUoSA.

If the ENA's submission fails to convince the Authority that the case to change to a DDA has not been made and elects to press on with the DDA, ENA requests:

1. The DDA and accompanying Code are modified to better balance risk and cost between distributors and traders as per suggestions contained in this submission; and
2. Traders and distributors are able to participate in refining DDA's under which participants would conduct business in the future.

[5] As per *More Standardisation of UoSAs consultation paper – response to legal/process issues raised in submissions* para 3.6

3. A proposal to replace the Authority's MUoSA arrangement with a Default Distribution Agreement.

The proposed change from the MUoSA regime to the DDA has two important features:

1. The creation of a compulsory agreement which traders and distributors can elect to default to if an alternative is not able to be negotiated within a very short time frame; and
2. The core terms for the compulsory default agreement and provisions for operational terms to be customised by each distributor.

This paper submits on both points. In this paper the ENA considers the proposed Code and terms of the DDA as provided for in question 5 of the consultation paper. The paper also analyses the problem definition, construct of the compulsory default mechanisms and the regulatory statement as provided for in question 1-4 of the consultation paper.

3.1 Drafting the 12A Code and DDA

The ENA's Distribution Pricing Working Group has worked through the proposed Part 12A Code and the proposed template DDA and has a number of issues that are covered in its response to the detail under question 5 of the consultation paper. The group notes that a number of clauses contained in the MUoSA gain greater significance when applied to a compulsory default agreement. Issues such as the wording around indemnity, termination provisions, framing of liability and force majeure (FM), the use of the Good Electricity Industry Practice (GEIP) standard, the balance of risk between traders and distributors, the requirement that traders are able to satisfy their obligations when they enter into the DDA, the treatment of service interruptions in Schedule 1 and the treatment of conveyance agreements are all matters that the ENA members would like a say in. These are matters that govern the ENA members' commercial arrangements

The treatment of key issues for ENA members is set out in section 4.2 *A.2 comments on the detailed drafting of the Code amendment* and 4.3 *A.3 comments on the detailed drafting of the DDA template* below in line with the format for submissions supplied by the Authority

In addition the ENA commissioned Nives Matosin and Toby Stevenson from Sapere Research Group to conduct an assessment of whether the proposed DDA advances consumers' interests as per the Authority's statutory objective. The methodology for the "Sapere" paper compared the draft DDA to the negotiated distributor agreements for Unison, Vector and WEL. The approach they took was to:

1. Use the DDA as the base case agreement to compare the negotiated agreements to.
2. Compare the DDA to the MUoSA for the changes and in particular any material changes and where clauses have been shifted to or from the Schedules or the Code.
3. Compare the clauses in the DDA to clauses in each of the three negotiated agreements. They also considered the impact of the DDA where clauses that were in the MUoSA have been omitted from the DDA.
4. Assess the DDA clause relative to the negotiated clauses against the impact on competition, reliability and efficiency using the Authority's guidelines as the test.

5. Sapere's assessment considers:

   (a) Where the clauses in the DDA and the negotiated agreements are the same there is no need to assess against the statutory objectives of competition, reliability and efficiency (CRE).

   (b) Where the DDA clause and the negotiated agreement differ, they assessed the variation against the CRE test. Where the DDA satisfies the CRE test better than the negotiated clauses then they recommend that the DDA clause stands.

   (c) Where a negotiated clause better satisfies the CRE test then they recommend that the negotiated clause should replace the DDA clause.

   (d) Whether some of the clauses would be better to shift from the default core terms to the operational terms (or vice versa?).

6. Finally they assessed how their recommendations are in the long term interests of consumers.

In some cases, there may be merit in moving clauses to the Code and this is noted.

The Sapere work includes a clause-by-clause assessment of the DDA based on the method described above and a summary of provisions that the Authority should take into account modifying the DDA. ENA would like the Authority to review the points Sapere makes regarding improvements in clauses in the DDA that could result in greater competition, reliability and efficiency in the long term interests of consumers.

Overall Sapere finds:

1. None of the agreements negotiated within the auspices of the Authority's MUoSA arrangement was detrimental to the statutory objective. The differences in the negotiated agreements reflected operational practice and management of risk for each of the businesses in a commercial setting.
2. The current arrangement of negotiated agreements has allowed for innovation in the contractual arrangements between distributors and retailers in the cases examined, and facilitates an environment for further improvement and innovation.
3. In most cases, the clauses in the negotiated agreements that varied from the draft DDA were preferable in that they better met the Electricity Authority's statutory objective.

3.2 A material shift in the Code affecting commercial contracts between retailer and distributors

The ENA supports measures that will improve the market where those improvements satisfy the Authority's statutory objective; do not undermine other governing legislation such as Part 4 of the Commerce Act and where they are commercially practicable.

We understand that the genesis of the current proposal goes back to matters referred to in section 42 of the Electricity Industry Act 2010. The Authority had been established by the Act in December 2010 and s 42 required that:

> *1) Before the date that is 1 year after this section comes into force, the Authority must either—*
> *(a) have amended the Code so that it includes all the matters described in subsection (2) (the new matters); or*

> *(b) to the extent that the Code does not include all the new matters, have delivered to the Minister a report described in subsection (3).*

Notably s 42 (f) which refers to;

> *requirements for all distributors to use more standardised use-of-system agreements, and for those use-of-system agreements to include provisions indemnifying retailers in respect of liability under the Consumer Guarantees Act 1993 for breaches of acceptable quality of supply, where those breaches were caused by faults on a distributor's network:*

The Authority published MUoSAs in September 2012 after extensive consultation in 2011 and 2012. The Authority's work built on ongoing efforts by the electricity industry to develop a standard UoSA prior to the establishment of the Authority. The MUoSA interposed was originally published in March 2006 (and adopted as a basis for a number of agreements negotiated subsequent to its publication) but a move to have it utilised did not gather momentum until the Authority was put in place.

In August 2011 The Authority set out its preferred approach as follows. It: [6]

> *Decided to pursue an approach comprised of the following key elements:*
>
> - *Finalise the 'model' use-of-system agreement (MUoSA)4 (b)*
> - *Amend the Code to regulate some UoSA arrangements. (iii)*
> - *Specify arrangements for negotiating UoSAs.*
> - *Continue to work with distributors on a voluntary principles-based approach to improving distribution pricing.*
> - *Regularly monitor and review distribution UoSAs and pricing.*

The Authority signalled the action now proposed at the same time:[7]

> *If the Authority considers that the arrangements remain unsatisfactory after approximately two years, it will consider developing the MUoSA to be a default agreement under the Code (i.e. an agreement that must be used by the parties if they cannot themselves agree on a UoSA).*

The regime was introduced in 2012 and consultation on whether the industry thought the scheme was unsatisfactory began in 2013, two years later as foreshowed in 2011. This consultation was promulgated even though a number of distributors and retailers have spent considerable time and effort to negotiate agreements within the scope of the MUoSA arrangements and a number are waiting in a queue to follow suit. The evidence is that parties **have** agreed on UoSAs and more would be signed but for the intervention so the ENA is looking for a strong case for the proposed change.

The case for change is summarized as follows: [8]

> *Retailers and distributors were not moving to adopt the MUoSA or, if new UoSAs were being negotiated, many of the terms materially departed from the terms of the MUoSA.* [9]
>
> *Competition and innovation are inhibited by terms in UoSAs.* [10]

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[6] Electricity Authority Consultation Paper *Standardisation: Model Use-of-System Agreements and Proposed Code Amendments* 11 August 2011 s 2.3.2

[7] ibid

[8] Electricity Authority *Default agreement for distribution services* Consultation Paper 2.3.1

[9] ibid 2.3.1

> *Distributors and retailers face higher than necessary transaction costs from negotiating and administering many different UoSAs.* [11]

ENA members are frustrated because when the MUoSA arrangement was introduced the Authority set out a course of action with proposed time frames and it has not allowed the regime to run its course. Despite distributors successfully complying with the arrangements as set out by the Authority it has chosen to change tack essentially because:

> *The Authority received feedback that its competition and efficiency objectives were possibly not being met in relation to the formation of UoSAs.* [12]

This is not compelling by itself. What we learn from this statement is simply that the Authority received an unspecified number of complaints or comments that contributed to the Authority forming a view that its competition and efficiency objectives were possibly not being met in relation to the formation of UoSAs. The first evidence we see of a problem and support for a change to the regime is contained in the consultation paper. ENA would expect any action in response to those complaints to be followed up with a robust assessment by the Authority along the lines of section 32 of the Act and a Treasury Regulatory Impact Analysis (RIA)[13] approach. The ENA is concerned that proposed course of action still seems to be based on the initial concerns in 2013 rather than an updated view of the landscape in terms of the number of agreements entered into and the extent to which these agreements align with (or deviate from) the MUoSA. This submission considers the strength of the Authority's case for change and analysis of the proposed alternative in later sections.

The Authority's own predisposition to intervene has been a key reason why the MUoSA arrangement has been slow to be implemented. We submitted previously:

> *However, the ENA submits that by signaling it had concerns early in the process (mid-2013) the Authority undermined the negotiation process by increasing regulatory risk and reducing parties' willingness to invest in negotiations.* [14]

While the ENA senses the Authority's frustration that the MUoSA has not evolved as it wishes and that it is serious about resolving an issue with the UoSA arrangements, the paper – as we discuss below - does not make the case for change. Rather, it seeks to confirm its decision to move to a compulsory default agreement.

3.3 The Authority's Jurisdiction

The DDA requires Distributors to provide Distribution services to traders on the basis of default terms set out in the DDA where an alternative agreement is not successfully negotiated within 20 business days. The ENA understands that the Authority relies on section 32 of the Act as the source of its jurisdiction to promulgate the DDA and the Authority's powers in relation to the Code are broad.[15] However, in the ENA's view there is a distinction between the source of a power to act, and the purposes or objectives which properly inform the exercise of that power.

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[10] ibid 2.4.2

[11] ibid 2.4.2

[12] ibid

[13] See the NZ treasury website http://www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook

[14] ENA Submission on More standardisation of use-of-system agreements 2014 consultation

[15] Electricity Authority *More Standardisation of UoSAs consultation paper – response to legal/process issues raised in submissions* 4.60-07.12

The Authority's functions are specified in section 16 of the Act (as supplemented by the Crown Entities Act). Those powers include the power to make and administer the Code. That power must be exercised in a manner consistent with the objectives of the Authority as specified in section 15, and be consistent with Sub-part 3 of Part 2.

The ENA has taken legal advice and sought the views of members (some of whom have also received legal advice) and based on these inputs we do not believe that the broad provisions of section 32 can be used to augment or expand the Authority's functions as specified in section 16. The question then becomes whether the Authority's functions in section 16 are broad enough to encompass the proposed DDA.

There are a number of factors which suggest that the legislature did not intend this to be the case.

First, section 16(1) (f) expressly refers to model arrangements in the context of market-facilitation measures. While these terms are not defined, the concept of facilitation implies assisting in bringing about a particular end or result, rather than active intervention.

Second, the legislature contemplated that the Authority consider whether to include requirements for all distributors to use "more standardised" use of system agreements. The Authority reported to the Minister in 2011[16]. The Authority declined to introduce amendments beyond those introduced in 2011. It considered that more prescriptive amendments risked an overly regulated approach and that the "Ministerial Review was very careful to recommend 'more standardisation' and not 'standardisation' for precisely these reasons".[17]

It is a well accepted principle of statutory interpretation that every word is presumed to have a meaning. The word "more" can be assumed to have been included in section 42 for a reason. As the Authority recognised in 2011, it was arguably intended to increase the standardisation in the industry rather than move it to uniformity.

Third, we regard it as significant that the Act includes a specific provision addressing mandatory default terms and conditions for benchmark transmission agreements. There is no analogous provision for distribution agreements in the Code. Principles of statutory interpretation are relevant. An implied exclusion can arise when legislation specifically addresses a particular matter but is silent with respect to other items that are comparable. It is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned. This principle of interpretation supports the view that if the legislature had intended the Authority to be able to require mandatory DDAs it would have stated this expressly in the legislation.

As Part 12A Code is currently drafted, a distributor operating under an interposed model is required to offer to a trader to contract on terms as outlined in its DDA. This may result in an alternative arrangement being agreed but the obligation to offer to contract on the basis of the DDA is compulsory. This is reflected in the enforcement and penalty provisions which will apply to a distributor who fails to offer to contract on that basis. In this sense, we believe that the proposed Part 12A creates a mandatory obligation.

Fourth, the extension of Part 12A to extant use of system agreements can be viewed as an interference in existing property rights, which are the subject of bilateral negotiation. ENA understands that the courts generally strive to avoid an interpretation of legislation which interferes in property rights in a manner which is unfair or not plainly contemplated by the empowering legislation.

Section 32.2 also prohibits the Authority from introducing Code that:

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16 Report of the Electricity Authority, *Report on Completion of the Section 42 new matters in the Electricity Act 2010* 31 October 2011.

17 ibid Para 142.

purports to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986

A number of clauses in the proposed template DDA may have the effect of regulating distributors in areas where *the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986* For example:

- DDA 4.8 – planned service interruptions. The DDA requirement "to schedule Planned Service Interruptions to minimise disruption" has implications for Part 4 of the Commerce Act as minimising disruption often means the work takes place at night. Meeting an unspecified standard of "minimising disruption" risks one of two outcomes. Either costs incurred to meet the unspecified standard are not recoverable under part 4 of the Commerce Act or the costs incurred are higher than would be the case under the specified GEIP standard, and would be recoverable under Part 4 of the Act.
- DDA 4.10 – Distributor to restore distribution services as soon as practicable. The standard "as soon as practicable" is an unspecified standard. Meeting an unspecified standard of "as soon as practicable" risks one of two outcomes. Either costs incurred to meet the unspecified standard are not recoverable under part 4 of the Commerce Act or the costs incurred are higher than would be the case under the specified GEIP standard and would be recoverable under Part 4 of the Act.
- DDA 24.5 & 24.7 – having no reference to GEIP, and having no cap on annual Distributor liability introduces significant risks for the Distributor that result in higher costs and risks than would be the case if the recognised GEIP standard is applied. The risk of having no standard of GEIP and no cap on annual Distributor liability risks one of two outcomes. Either costs incurred to meet the unspecified standard are not recoverable under part 4 of the Commerce Act, or the costs incurred are higher than would be the case under the specified GEIP standard, and would be recoverable under Part 4 of the Act.

The Authority has addressed the point of a possible overlap between a default agreement and Part 4 of the Commerce Act previously:[18]

Accordingly, when preparing a regulated default agreement (if that is what the Authority ultimately decides to do), the Authority would review each term in the default agreement and form a view on whether the term deals with matters that the Commission is authorised or required to regulate under the Commerce Act. Any terms that are identified as being matters that the Commission is authorised or required to regulate would not be regulated by the Authority, and therefore would not be included in a default UoSA.

A search of the consultation paper shows part 4 of the paper is referred to and that information disclosure requirements for distributors are addressed in Part 4 of the Commerce Act. Otherwise, no evidence is provided that the Authority has considered any possible cross over with Part 4 of the Commerce Act or *reviewed each term in the default agreement and formed a view on whether the term deals with matters that the Commission is authorised or required to regulate under the Commerce Act* as it undertook to do previously.

3.4 Problem definition

[18] Electricity Authority *More Standardisation of UoSAs consultation paper – response to legal/process issues raised in submissions* para 3.6

Consultation paper question 1 asks:

> *What is your view of the Authority's assessment of the arrangements that are currently in place governing the way distributors and retailers develop, negotiate, and agree UoSAs, and of the issues that the Authority has identified? Please provide your reasons.*

Section 2.4 presented the following points as problem definitions in relation to arrangements currently in place:

- The absence of a regulatory mechanism to standardise UoSA terms;
- Lack of standardisation in UoSA terms;
- The potential for variation across UoSAs;
- The potential for inefficient terms in UoSAs;
- The transactions costs to distributors and retailers from negotiating multiple UoSAs;
- The barriers to retail entry arising from the transaction costs associated with negotiating UoSAs;
- Distributors' monopoly power.
- Continued retail expansion results in a proliferation of variation and hence *fragmentation* of terms in UoSAs.

> *4.1.2 In summary, the Authority considers there is a problem with the way that distributors and traders develop, negotiate, and agree agreements for distribution services. The current arrangements are based on a largely voluntary regime that gives rise to problems in relation to the competition and efficiency limbs of the Authority's statutory objective.*
>
> The problem statement is now specified as *the way in which* agreements are negotiated, and the largely voluntary nature of the current regime.

The ENA expects the case for intervening between commercial parties to the agreement to be based resoundingly on the statutory objectives. This should start with a clear problem definition however this section 2.4 is a mix of issues that generally concern the Authority and symptoms that reflect the state the industry as it shifts to the MUoSA framework.

This section of the consultation paper states:

> *2.4 The Authority considers there is a problem with the way UoSAs are developed, negotiated, and agreed:*
> *2.4.2 Other than for a small number of specific terms regulated under Part 12A (referred to in paragraph 2.2.3), there is currently no regulatory mechanism in place that requires or incentivises standardisation of UoSA terms.*

This couches the problem as being the absence of regulation. It suggests the root cause for regulatory intervention is a lack of standardisation, rather than defining it in economic terms (i.e. a specific market failure).

This section then goes on to describe a number of symptoms, which are described as 'problems'.

> *2.4.2 (a) Competition and innovation are inhibited by terms in UoSAs.*

Here specific *terms* in UoSAs are inhibiting competition and innovation. No substantiating evidence for the consequent impact on competition and innovation is provided. In fact no examples or case studies are provided at all to support this statement. Next:

> *2.4.2 (a) …Distributors may offer retailers in similar circumstances different terms, meaning that retailers with less favourable terms may be at a competitive disadvantage.*

The Code and the MUoSA require adoption of UoSAs on the principal of "equal access and even handed treatment", and subsequent disclosure – rather than offering different terms (which would contradict the Code/MUoSA). The issues therefore seem to be:

- Lack of progress in adopting UoSAs on this basis (according to the Authority but not substantiated), and
- An associated lack of enforcement / incentive mechanisms for "offenders" that frustrate or deviate from the process

The implication is that competition **may** be inhibited by the possibility of variation in terms across agreements. It does not detail the nature and extent of any variation of terms across agreements (e.g., which terms are varied and in what ways). Nor does it establish whether or how any such variation *is* resulting in some retailers being at a competitive disadvantage or the impacts of this. In any event the current proposal will similarly allow distributors to negotiate different terms with retailers in similar circumstances, in which case the competition impacts arising from any on-going/future variation will remain unresolved. It also doesn't recognise that evidence of variation is evidence that commercial negotiations are happening and that its MUoSA/voluntary regime is leading industry to negotiate in good faith.

> *2.4.2 (a) …A distributor can also impose inefficient terms on all retailers on its network, which can prevent retailers from innovating and providing new services in the face of evolving technologies, and restrict innovation and competition in related markets (in particular, the demand response market).*

This quote shifts the problem from lack of standardisation to uniformity. No evidence is provided on the actual incidence of inefficient terms, or the ways in which they are inefficient, and again the problem is qualified as a possibility rather than a fact.

The Authority goes on to state that (unspecified) inefficient terms in UoSAs can (qualified again) restrict innovation and competition in related markets, but this does not explain how. No evidence is provided for the particular example given.

In reality the problem definition (and CBA) are focused on "high" transaction costs from negotiating and administering UoSAs. The optimal level of transaction costs is not described, nor is the extent to which transaction costs exceed this optimum quantified (i.e., the scope for reducing these costs). No evidence to support this statement is provided. There is also no evidence or quantification to support the statement that (excessive) transaction costs are being passed on to consumers as claimed.

> *2.4.2 (b) …Higher than necessary transaction costs also undermine retail competition by increasing the cost of doing business – entrant retailers are less likely to expand to trade on new networks.*

No evidence is provided regarding barriers to market entry, or reasons for any retailers not entering particular networks. Moreover, this statement suggests that *the primary reason* behind any retailers not entering a network is the transaction costs from having to negotiate UoSAs. A more objective problem diagnosis would have identified all the significant barriers to entry and demonstrated how the transaction cost of UoSAs is the most egregious.

The link between *standardised* terms in UoSAs, and equal and open market access is not made or substantiated. Perhaps the converse is true – that tailored agreement terms foster competition and innovation.

> *2.4.5 However, some distributors and retailers have not adopted the MUoSA terms, and therefore more standardisation of distribution terms of service has not occurred.*

Again, a causal link between standardisation and increased retail competition is assumed, but not substantiated.

Some distributors who have agreements not based on MUoSA nevertheless continue to sign up new entrant traders using its pre-Model Use of Network Agreement (UNA). For example two major distributors have each signed up six new entrants in the last couple of years, so their current agreements are clearly not barriers to entry. Moreover no potential new entrant has told either network that they decided not to trade on the network area due to its agreement.

> *2.4.5 …Some distributors have developed UoSAs which, to varying extents, have introduced numerous minor and material variations from MUoSA terms and with the terms of earlier versions of UoSAs. There is therefore significant variation and fragmentation of service terms governing distribution services and little likelihood of improvement under prevailing, largely voluntary, arrangements.*

The nature and extent of variation is not explained or quantified (e.g., what terms, how do they vary, and what is the impact?). Variation is also equated with 'fragmentation', without explaining what this means. There is no evidence to support the statement that there is 'little likelihood of improvement'.

The Authority ignores the possibility that variation is likely to occur in a commercial environment where parties differ significantly across the country, in size, scope, stringiness / line length, and where retailers have different business models and size

> *2.4.7 The Authority estimates that there are 311 UoSAs as at September 2015. Each of these is a bespoke agreement that has been drafted and negotiated by businesses' technical, commercial and legal resources. The Authority considers there is scope for further retail expansion, which means that new UoSAs will need to be negotiated. This provides scope for further fragmentation of the terms governing distribution services.*

The current quantum of resources being invested in negotiating UoSAs is not quantified. The basis for the Authority's view that there is scope for further retail expansion is not explained. However, this paragraph suggests the problem is not that negotiating UoSAs is a barrier to entry/expansion, but rather that continued retail expansion will result in more UoSAs being required, which in turn will contribute to a proliferation of 'fragmentation' of terms.

> *2.4.9 The Authority considers the problems with competition and efficiency outlined above are likely to be unresolvable under the current, largely voluntary, regime.*

No evidence is provided to support or substantiate this view.

> *2.4.10 The situation is therefore inconsistent with the competition and efficiency limbs of the Authority's statutory objective. The Authority considers that less voluntary measures are necessary to achieve the efficiency and competition objectives expected from introducing MUoSAs.*

The link between the 'largely voluntary' basis of current arrangements and the identified problems is not established. As with earlier statements, no alternatives to mandatory standardisation are identified or discussed.

The problem definition also largely ignores the improvements that have come about under the voluntary regime. A great deal is made about the cost and awkwardness of Vector's negotiations with retailers but the current version is much closer to the MUoSA. Also, other completed negotiations have the benefit of those early negotiations, retailers can elect to move to agreement negotiated later than their own, and the DDA includes several provisions adopted from the Vector Use of System Agreement (VUoSA).

3.5 Principles underlining the development of changes to the Code, provisions in the core terms and provisions in the operational terms

Consultation paper question 2 asks:

> *What feedback do you have on the information in section 3, which describes the Authority's proposed new Part 12A of the Code, which includes a DDA template, requirements to develop a DDA, and provisions that provide that each distributor's DDA is a tailored benchmark agreement?*

The consultation paper treats ICPs that are tied to an interposed agreement differently from ICPs tied to conveyance agreements. The DDA is intended to replace the interposed MUOSA.

3.5.1 Interposed

The process to arrive at the proposed DDA has not been conducted with participation by affected parties and the Authority acknowledges that it can't be familiar with the commercial and physical realities of running a distribution network.

> *3.7.7 The Authority acknowledges that it may not fully understand all of the clause-level concerns that participants have raised. Participants are invited to provide further submissions, including further elaboration on issues of concern, in response to this consultation paper.* [19]

In letters and previous submissions we have asked that a process for developing any standardised terms to be participant led or at least participant inclusive. For example:

> *The ENA strongly submits that a participant led process be put in place to make changes based on:*
>
> - *learnings from the negotiated changes made by participants since 2012*
> - *up-to-date industry systems and practices*
> - *future-proofing the agreement to the extent possible.* [20]
>
> and
>
> *If a mandatory approach were to be adopted, we would appreciate the opportunity to work with the Authority to ensure that some sections of the MUoSA are commercially and operationally practicable, particularly the provisions relating to evenhandedness, load management and liability.*[21]

This has not taken place. Instead the paper appears to be written as though the Authority is set on its path.

> *7.3 Having considered all submissions received on the consultation paper, the Authority remains of the view that significantly enhanced standardisation of the terms and conditions related to supply of distribution services by 29 individual local distributors is a desirable goal.* [22]

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[19] Electricity Authority *Default agreement for distribution services* Consultation Paper

[20] ENA Submission on More standardisation of use-of-system agreements 2014 consultation

[21] Letter from ENA to Carl Hansen 4 December 2014

[22] Electricity Authority *More standardisation of UoSAs* consultation paper 24 February 2015 Para 7.3

No guidance or principles for the way Part 12A should be constructed to achieve the objective of the change are provided. It is our view that the way the argument is presented in the paper and the degree of evidence provided to support the initiative would only convince parties who already agree on the course of action that it should proceed.

3.5.2 Conveyance

ENA notes that the Code and DDA are inconsistent around the treatment of conveyance agreements and the Authority needs to provide clear direction for these agreements. The proposed Part 12A does not apply to distributors who have a contract in respect of the conveyance of electricity with one or more customers. Most distributors in New Zealand supply more than one customer through a contract in respect of the conveyance of electricity and two distributors have 100 percent of customers on conveyance contracts. ENA notes that despite the provisions of Part 12A the DDA provides for circumstances where a distributor enters into direct customer agreements with customers so provisions for conveyancing , whether 100% or a handful of large customers, have not been fully worked through in these proposed arrangements.

3.6 Development of Part 12A

The consultation paper has two question 3s. One is as shown in the Appendix and the other is as shown on page 44 (referring to 4.4.1 to 4.4.14 inclusive). The two question 3s are addressed separately below

Consultation paper question 3 (as per appendix A) asks:

What feedback do you have on the detail provided in section 3, which describes the Authority's proposal to introduce a DDA into Part 12A of the Code along with supporting processes that are designed to allow distributors' DDAs to act as tailored benchmark agreements?

Section three steps through the workings of the proposed 12A and the DDA. Detailed comments are provided under submission response A2. ENA notes that the construct of Part 12A and the consequential provisions of the DDA assume that:

- The DDA accounts for the commercial practicability of agreements that balance the distributors' role as the provider of the services and traders' access to the services. Whether or not this is the case, the ENA notes that this has not been tested with retailers and distributors outside the consultation processes for the proposal to change arrangements.
- That the Authority is in a position to rebalance the risks between distributors and traders and yet this is not tested. The experience with the Vector, Unison and WEL agreements negotiated with the MUoSA framework is that, given time, retailers and distributors can achieve a balance, and yet those agreements would be swept aside by the proposed arrangement.
- There is no overlap between matters raised by the DDA and Part 4 of the Commerce Act. This is not necessarily the case and the consultation paper does not include an examination of the overlap. The shift away from GEIP in places raises the possibility that the costs to meet undefined standards in the DDA may not be recoverable under part 4 of the Commerce Act.
- The shift away from the GEIP standards will lower transaction costs and deliver benefits as per the statutory objectives. The impact of a shift to a less well defined and well understood term is likely to be the opposite or be detrimental to reliability, as EDBs are incentivised to "water down" operational standards in the face of uncertain obligations (without the context of GEIP).

- Twenty days is enough time to negotiate an alternative agreement to the compulsory default agreement and, by implication, establish that a trader is competent to trade. Experience with the MUoSA suggests that this is too tight. This time frame doesn't allow for a process of establishing a trader's preparedness to trade or to reasonably negotiate all of the negotiable terms.

Consultation paper question 3(As per page 44 – refers to 4.4.1 to 4.4.14 inclusive) asks:

What are your views of the Authority's assessment of the likely levels of demand for new and replacement UoSAs in coming years? Please support your response to this question with reasons and your alternative quantified assessment, if any.

The paper bases its discussion on the likely levels of demand for new and replacement UoSAs on there being 29 distributors. When management agreements are taken into account there are 26 local distributors of which 24 use interposed arrangements. The full list of effective distributors is available in the appendix at the end of this paper.

Notwithstanding the above shortcoming, we note that the increase of UoSAs that the Authority say "should" have been in place from May 2013 to Sep 2015 increased by 64 based on a combination of more retailers and more networks per distribution network, seven traders operating on a single network are referred to as niche retailer. We also note that the continued signing of contracts based on the MUoSA and the ongoing negotiations for further signed contracts indicates progress in working with the MUoSA and success with the regime.

The consultation paper suggests:

4.4.9 If all active traders (but ignoring niche traders) sought to expand operations to trade on all 27 local distribution networks, this analysis shows an additional 175 UoSAs would be needed.

This number is reduced to 124 additional UoSAs that should have been in place from May 2013 to Sep 2015 once replacement of legacy UoSAs is taken into account. This observation in the consultation paper raises four unanswered points:

1. The Authority could have surveyed retailers and asked them about the likelihood of expanding to all distribution networks. It does not appear to have done so.
2. 124 UoSAs yet to be signed is an upper bound. It is more likely that a number representing wider penetration of distributors but not full national representation for all distributors would be a better number on which to base calculations. (This approach would be more consistent with the approach taken in the scenarios at 4.4.24)
3. The 124 number of prospective UoSAs overstates the potential number of discretely different UoSAs that might be required for national representation, because it is derived from an overstated number of effective distribution businesses.
4. Traders' concerns regarding proliferation of UoSAs do not just relate to the 26 EDBs. There is a distinction between the distributors that are actively negotiating around the MUoSA as distinct from the Distributors who have proven to be slow to negotiate new agreements based on the MUoSA. There are better ways to deal with this problem than move to a DDA. Retailers tell us the greater problem is, in fact, the almost 200 (and growing) embedded networks for which there are at present not even model terms, and which are excluded from the DDA.

Paragraph 4.4.14 reflects the consultation paper's direction by concluding:

4.4.14 Under the current arrangements, significant effort and resource would likely be needed for new and replacement UoSAs. That reflects a significant effort in agreement formation, including incremental development (assuming distributors evolve their default UoSAs from well-established agreement templates), commercial and legal advice, negotiation, possible redrafting and contract execution.

There is no evidence provided to support the assertion that significant effort and resource *would likely* be needed for negotiating new and replacement UoSAs, how 'likely' this is, or explanation of what is meant by 'significant'. Note the assumption that significant resource would be required to incrementally develop agreements, a role which will fall to the Authority in future, under this proposal. It is not clear whether their estimates of costs to the regulator reflect this, or whether any costs will be passed on to participants and hence consumers (thus potentially increasing retail prices).

3.7 Cost benefit analysis

Consultation paper question 4 asks:

What are your views on the regulatory statement set out in section 4?

Section 4 is titled Regulatory Statement. As required in section 39 of the Electricity Industry Act 2010, these regulatory statements must evaluate the costs and benefits of the proposed amendment as well as alternative means of achieving the desired objectives. In its Consultation Charter, the Authority further specifies that Code changes to regulate market activity will only be considered in cases where the Authority provides a clearly identified efficiency gain, or market or regulatory failure; and that it will use quantitative cost benefit analysis to quantify the net benefits of proposed amendments.

These requirements are similar to the Regulatory Impact Analysis (RIA) requirements that apply to other government agencies in New Zealand. The government expects that 'departments will not propose regulatory change without clearly identifying the policy or operational problem it needs to address, and undertaking impact analysis to provide assurance that the case for the proposed change is robust'.

A Regulatory Impact Statement prepared within the New Zealand Treasury's RIA guidelines has a clear analytical framework that includes: a definition of the root cause of the problem; description of the costs and benefits of the status quo; statement of the desired objectives/outcomes; identification of the full range of practical options; and for each feasible option, an appropriate quantification of the full range of costs and benefits, as well as the incidence (distribution) of these.

The regulatory statement set out in chapter four doesn't have the rigour of some other similar statements in other consultation papers released by the Authority. Further, it doesn't meet the standards expected of analysis for regulatory proposals from other government agencies. For example we would expect a robust and consistent problem definition that identifies the underlying market failure, and an assessment of the costs and benefits of the current situation. As discussed above, no market failure is identified and the costs and benefits of the status quo are not quantified (so there is no base case for the cost benefit analysis). We would also expect the full range of feasible options to be identified and assessed, but this consultation paper does not evaluate any option other than mandatory standardisation via the compulsory default agreement. We would also expect that the CBA for each option would identify the full range of costs and benefits and quantify each of these to the extent possible

(in reference to the status quo/base case), and then evaluate the extent to which each option would address the stated problem and would achieve the desired objectives.

We would expect a CBA to set out costs and benefits for the full term of the NPV calculation. We would expect the profile of the costs and benefits to reflect trends over the assessment period.

To summarise this section, the ENA's view of the regulatory statement is:

1. The problem is not clearly defined (multiple, inconsistent definitions).
2. There is a general lack of empirical evidence, especially with respect to the efficiency benefits. The analysis of costs and benefits that are quantified (transaction costs) are not profiled across the analysis period as we would expect in a conventional CBA.
3. The problem definition and the regulatory analysis/CBA are not aligned.
4. Neither the proposal nor the alternative options listed are assessed against the stated objectives.

3.7.1 Quantification of benefits and costs

The regulatory statement assumes it is not possible or necessary to quantify the efficiency benefits other than the range of benefits set out in paragraphs 4.4.16 – 4.4.26 under the heading Static Efficiency Effects:

> *4.4.16 Under the proposal described in this paper (the proposed new Part 12A), transaction costs are lower than under the status quo. Transaction costs include the costs of drafting, reviewing, negotiating, amending, approving and maintaining a distribution agreement. These costs include time spent by business analysts, technical and commercial experts, managers, lawyers and Board members.*

The level of transaction costs under the status quo has not been quantified. The paper sets out why transaction costs will be lower than the current unspecified transaction costs in paragraph 4.4.17 and claims:

> *4.4.18 This may facilitate some dynamic efficiency benefits over time, as distributors and traders will likely be more willing to make amendments to their distribution agreements for reasons of service innovation and product development, knowing that the cost of doing so is materially less than at present.*

This paragraph uses the subjunctive tense – this *may* facilitate some dynamic efficiency benefits; participants *will likely* be more willing. (Note that this section is discussing static efficiency so it is unclear why dynamic efficiency effects are being raised here). The potential for variations for reasons of commercial innovation (e.g., business model) is not mentioned. The assertion that distributors and traders will know that the cost of the DDA arrangements *is materially* lower than they are currently, shows the bias of the writer.

The regulatory statement proceeds to estimate an upper bound of $50,000 as the cost retailers could pay for negotiating MUoSA-based contracts over the cost of negotiating an alternative agreement or entering into a DDA. It proceeds on the basis that this upper bound would apply for a ten year period:

> *4.4.21 The Authority estimates the proposal would reduce the cost of negotiating a distribution agreement by between:*
>
> *(a) (lower bound): $5,000 per agreement*
>
> *(b) (upper bound): $50,000 per agreement.*
>
> *4.4.22 This is based on the feedback the Authority received on its April 2014 consultation paper on a proposal to achieve more standardisation of UoSAs. It reflects that costs accrue to both the distributor and the trader from the following, all of which requires commercial and legal input and advice:*

(a) developing and updating default agreements

(b) negotiating agreements

(c) executing and maintaining agreements.

Question 14 of the April 2014 consultation paper asked: "Based on your experience negotiating UoSAs, what is the average time and cost for a retailer and a distributor to negotiate and thereafter administer a UoSA on a local distribution network that the retailer is entering for the first time?"

The Authority's summary of submissions shows the answers to those questions as set out below. [23]

Submitter	**Quoted from the summary of submissions**	**Quantification for initial experiences with negotiating around an MUoSA**	**Projection of reductions in costs for future contract negotiations with a DDA**
Contact	*Not relevant but has cost information relevant to its own contract management function.*	Not quantified	Not quantified
Meridian	*Reported on costs relevant to its own contract management function. It considered the range of costs were difficult to estimate precisely, and depended on the distributor with which it was negotiating. It considered the Authority's estimate of negotiation costs ($30,000 - $60,000) to be broadly accurate.*	Authority's estimate of negotiation costs ($30,000 - $60,000)	Not quantified
Simply Energy	*The UoSA it recently negotiated with Vector would have taken at least 5 days of an internal persons' time and cost plus circa 1.5 days of an external lawyer's time and cost.*	5 days at executive salary plus 1.5 days of lawyer time:[24] $6675	Not quantified
Trustpower	*Negotiating UoSAs is just one of the costs that any commercial operation needs to consider in a competitive market, but did not suggest what those costs might amount to.*	Not quantified	Not quantified
MRP	*Reported on recent experience with its engagement in the UoSA standardisation process and through its regional expansion of the GloBug and Tiny Mighty Power retail brands. However, it considered average time and costs would be difficult to estimate (at this stage).*	Not quantified	Not quantified
Nova Energy	*Required about five days total input from different parties within the organisation per agreement.*	5 days at executive salary: [25] $6000	Not quantified
ENA	*Negotiation costs would depend on whether the agreement is already well-established or not.*	Not quantified	Not quantified
Orion	*Where a retailer pretty much accepts our standard agreement our costs would be less than $1,000", so*	Less than $1000	Less than $1000

[23] Electricity Authority *More standardisation of UoSAs Summary of Submissions* 14 November 2014

[24] Based on an average annual salary of $312,000 and lawyers costs at $450 per hour

[25] ibid

	costs cannot be reduced by $30,000-$60,000 per agreement as stated in the consultation paper.		
PwC.	*A default approach will not completely eliminate all variation and negotiating costs.* *A default approach might not promote efficiency, because transaction cost savings are just one efficiency consideration.* *Negotiated terms that make a UoSA more workable might produce more one-off and ongoing efficiencies than boiler plate terms.*	Not quantified	Not quantified
Unison	*The costs varied depending on whether the retailer sought to negotiate specific clauses or chose to sign up to one of the existing agreements. It reported that the combined time spent on negotiations is no less than 40 hours in total spread out over a period of weeks, sometimes months.*	At least 40 hours of executive time: [26] $6000	Not quantified
WEL Networks	*To date WEL's total external spend (i.e. not including staff costs) is less than $50k, which included the development of WEL Networks' MUoSA-based UoSA, three signed agreements with new retailers (one new entrant and 2 expanding) and the beginnings of negotiations with three existing retailers.*	Less than $50,000 for 3 signed agreement and the beginnings of agreements with 3 existing retailers	Not quantified

The only representation from original submissions that might support the assumption that $50,000 should be an upper bound for a possible reduction in transaction costs was Meridian. Meridian referenced the Authority's own estimate based on otherwise unsubstantial "feedback from industry participants".[27] (Feedback from distributors who have negotiated with Meridian suggests that this reduction in costs is unlikely to apply to all distributors.)[28] None of the other submitters indicated that an upper bound for possible reductions in transaction costs of $50,000 is warranted.

Further, the consultation paper did not ask what the reduction in costs between MUoSA based negotiation and DDA scheme would be once large retailer and larger distributors completed negotiations, after the issues to be discussed had been reduced to a few issues and once other distributors have signed MUoSA based agreements. Early signs from subsequent agreements are that the transaction costs for each agreement are much lower, and it follows that the ability for these to be reduced with a DDA is much less.

In a cost benefit analysis we would expect the profile of benefits and costs through the whole term of the analysis to be shown, not just a value at year 0. Based on the submissions and discussion with seven representative retailers, ENA suggests the difference in costs between negotiating relative to the MUoSA once the system has settled down and the DDA, is between $1,000 and $5,000 over the ten year period of assessment.

3.7.2 Possible benefits not quantified

ALLOCATIVE BENEFITS

[26] ibid

[27] Electricity Authority *More standardisation of use-of-system agreements - consultation paper* 8 April 2014 Foot note to para 7.3.4

[28] One of our members reports their own experience with Meridian is that the negotiation could not have cost this amount as no external council was in evidence and nor were protracted negotiations were required. A figure an order of magnitude less than this would seem more realistic in that member's experience.

Under the allocative benefits section paragraph 4.4.27, the Authority does not provide any evidential basis for the assertion that consumers' satisfaction will be greater under the proposal, or explain the causal relationship between the changes resulting from the proposal and the increase in either the price paid by consumers and/or the value they receive from distribution services (given that these services are assumed later in this chapter to be 'homogeneous'). It does not discuss or describe the calculation of consumer surplus underpinning the statement that it 'would be greater' under the proposal. There are no charts or equations/quantification to explain how this change in consumer surplus has been estimated.

This section concludes:

> *4.4.31 Hence, the net benefit from improved allocative efficiency under the counterfactual is estimated to be approximately equal to the additional consumer surplus arising from implementing the counterfactual.*
>
> *4.4.32 In summary, allocative economic efficiency net benefits under the proposed new Part 12A are expected to be higher than under the status quo.*

There is no substantiating evidence provided for these statements and neither the evidential nor the analytical basis for the 'expectation' that they will be higher than the (unquantified net benefits of the) status quo is provided. Moreover, they appear to assume that the regulator can develop agreement terms that are more efficient than those in agreements voluntarily agreed by market participants.

ESTABLISHMENT COSTS

> *4.4.36 Negotiating new alternative agreements is not a cost of the proposal, but rather a business-as-usual cost.*

This is not correct, as not only will existing agreements have to be transitioned over to the new regime, but new alternative arrangements will *by definition* be different from those that would otherwise have been negotiated (under the status quo) as they must not be inconsistent with, or modify the effect of, the proposed default core terms. In addition, the costs of developing new agreements for those elements of current agreements that are not covered by the new regime have not been included in the analysis, but should have been.

HOW 12A AND CORE TERMS WILL EVOLVE

Clauses 4.4.19, 4.4.20 and 4.4.43 indicate the Authority expects the terms/standards to evolve over time, but the proposal does not make it clear how the Authority will do so in a manner that delivers more efficient outcomes than the market .

These paragraphs underscore an inherent tension between the objectives of increasing standardisation and enabling innovation by allowing alternative agreements. Not only is it unclear how these balance out, it also appears that the Authority has weighted the (assumed) benefits of standardisation more heavily than the benefits of (or risks to) innovation. This is despite the learnings from economic history cited by the Authority's Chairman that "dynamic efficiency is far more significant for the long-term benefit of consumers than allocative or productive efficiency".[29]

CONCLUSION

> *4.4.51 Having undertaken the assessment of benefits and costs set out above, the Authority considers that, on balance, amending the Code to include the proposed new Part 12A is likely to deliver a net benefit and is preferable to the status quo. Static efficiency benefits alone could equal or outweigh the*

[29] Brent Layton, *The Electricity Authority's strategy – where to from here?*, address to Downstream Conference, 2 March 2016.

> *costs of implementing the proposal. When the dynamic efficiency benefits (which are unquantified but expected to be significant) are added, the net benefit of the proposal is likely to be positive.*

This conclusion does not match the analysis presented earlier. Neither the net static or dynamic efficiency benefits are quantified, nor is there any evidence to support the conclusion that costs will outweigh benefits. We note again the use of equivocal statements (the net benefit is 'likely' to be positive).

The opposite case is dismissed to the extent it is considered at all. Namely, the impact on dynamic efficiency resulting from a mandatory approach in place of a market mechanism (or its equivalent in the context of the MUoSA regime) may be negative rather than positive.

3.7.3 Evaluation of alternative means of achieving the objectives to the proposed amendment

Clause 4.5.3 implies a pre-determined preference on the part of the regulator for standardised terms. The analysis makes no estimate of the extent/level of standardisation that will be achieved under the proposal, given that variations can be agreed. The costs and benefits of these alternative options are not presented.

Despite the claim made in the paper, no evidence is presented to support the statement that the proposal maximises regulatory certainty and minimises transaction costs compared to the alternative of allowing distributors to develop bespoke operational terms. In particular, there is no evidence to suggest that the proposal strikes precisely the right balance between entirely market-developed operational terms and entirely regulated operational terms.

> *4.5.4 In summary, the Authority considers that in contrast to the alternatives it has considered, the proposed new Part 12A balances standardisation and certainty with flexibility and incentives to mutually agree value-adding terms of service.*

Neither the theoretical nor the empirical basis for this conclusion has been made. Moreover, this section does not assess the alternative options against the stated objectives of the proposal which are to: reduce the transaction costs associated with distribution agreements; improve competition in retail markets by lowering the barriers to entry and reducing the costs of doing business for traders; and to facilitate innovation and development of services and business models in response to evolving technologies (paragraph 4.3.1).

3.7.4 Assessment under section 32(1)

The consultation paper assesses the Code provisions under section 32(10 of the Act. As discussed above the Authority's functions are specified in section 16 of the Act (as supplemented by the Crown Entities Act). Those powers include the power to make and administer a Code. That power must be exercised in a manner consistent with the objectives of the Authority as specified in section 15, and be consistent with Sub-part 3 of Part 2.

ENA does not believe that the broad provisions of section 32 can be used to augment or expand the Authority's functions as specified in section 16. The question then becomes whether the Authority's functions in section 16 are broad enough to encompass the proposed DDA.

There are a number of factors which suggest that Government did not intend this to be the case.

3.7.5 Assessment against the code amendment principles

When considering amendments to the Code, the Authority is required by its Consultation Charter to have regard to the following Code amendment principles; to the extent that the Authority considers that they are applicable. The principles are:

Principle 1 – Lawfulness:

ENA is not convinced that the code amendments are lawful and questions whether section 16 of the Act places constraints on the Authority that limit its ability to put the proposed scheme in place.

The ENA is also concerned that provisions in the DDA may coincide with provisions of Part 4 of the Commerce Act. The ENA notes that the Authority does not appear to have "reviewed each term in the default agreement and formed a view on whether the term deals with matters that the [Commerce] Commission is authorised or required to regulate under the Commerce Act" as it has previously indicated it would do if it moved towards a default agreement.

Principle 2 – Clearly Identified Efficiency Gain or Market or Regulatory Failure:

ENA considers that the Authority has not:

(a) demonstrated that amendments to the Code will improve the efficiency of the electricity industry for the long-term benefit of consumers;

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

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

Principle 3 – Quantitative Assessment

The consultation paper does not provide meaningful, quantitative cost-benefit analysis to assess long-term net benefits for consumers,

ENA considers that the Authority does not provide substantiated quantitative proof that the benefits from the proposal would be larger than its estimated cost in section four of the consultation paper.

3.8 Detailed drafting of section 12A and the template DDA

Consultation paper question 5 asks:

What are your views on the detailed drafting of the Code amendment provided in Appendix B and Appendix C?

Detailed issues on the detailed drafting of the Code amendment provided in Appendix B and Appendix C that are of significance to ENA members are set out detail in this submission in section 4.2 *A.2 comments on the detailed drafting of the Code amendment* and 4.3 *A.3 comments on the detailed drafting of the DDA template* in line with the format for submissions supplied by the Authority

3.9 Conclusion

The ENA is not convinced that the code amendments are lawful and questions whether section 16 of the Act places constraints on the Authority that limit its ability to put the proposed scheme in place.

The ENA considers the Authority has failed to substantiate a case for the change to be required. Ideally the Authority would:

1. Redo the CBA to an acceptable standard and with robust analysis; and
2. Only proceed with the consultation if a real need for regulatory intervention is proven, and such intervention is in the long-term benefit of consumers.

In response to the proposal the ENA requests:

1. The Authority produces a higher standard of regulatory statements in future for initiatives that impact on distributors;
2. The Authority considers an alternative course of action that:
    - acknowledges the progress made under the MUoSA to date;
    - is proportionate to and targeted at the well-defined and genuine problem;
    - has industry work with the Authority to modify the MUoSA to make it meet the statutory objectives while being commercially practicable; and
    - allows an appropriate time for all distributors to adopt a UoSA that generally reflects the intent of the MUoSA.

If the ENA's submission fails to convince the Authority that the case to change to a DDA has not been made and elects to press on with the DDA ENA requests:

1. The DDA and accompanying Code are modified to better balance risk and cost between distributors and traders as per suggestions contained in this submission; and
2. Traders and distributors are able to participate in refining DDA's under which participants would conduct business in the future.

4. Submission questions

4.1 A.1 responses to the questions in the paper

Question No.	General comments in regards to the:	Your response
1	What is your view of the Authority's assessment of the arrangements that are currently in place governing the way distributors and retailers develop, negotiate, and agree UoSAs, and of the issues that the Authority has identified? Please provide your reasons.	Section 2.4 presented the following points as problem definitions in relation to arrangements currently in place: • The absence of a regulatory mechanism to standardise UoSA terms; • Lack of standardisation in UoSA terms; • The potential for variation across UoSAs; • The potential for inefficient terms in UoSAs; • The transactions costs to distributors and retailers from negotiating multiple UoSAs; • The barriers to retail entry arising from the transaction costs associated with negotiating UoSAs; • Distributors' monopoly power. • Continued retail expansion results in a proliferation of variation and hence *fragmentation* of terms in UoSAs. *4.1.2 In summary, the Authority considers there is a problem with the way that distributors and traders develop, negotiate, and agree agreements for distribution services. The current arrangements are based on a largely voluntary regime that gives rise to problems in relation to the competition and efficiency limbs of the Authority's statutory objective.* The problem statement is now specified as *the way in which* agreements are negotiated, and the largely voluntary nature of the current regime. The ENA expects the case for intervening between commercial parties to the agreement to be based resoundingly on the statutory objectives. This should start with a clear problem definition. However this section 2.4 is a mix of issues that generally concern the Authority and symptoms that reflect the state of the industry as it shifts to the MUoSA framework. In the ENA's view, there is no clear problem definition for the current set of arrangements.
2	What feedback do you have on the information in section 3, which describes the Authority's proposed new Part 12A of the Code, which includes a DDA template, requirements to develop a DDA, and provisions that	The consultation paper treats ICPs that are tied to an interposed agreement differently from ICPs tied to conveyance agreements. The DDA is intended to replace the interposed MUOSA. INTERPOSED The process to arrive at the proposed DDA has not been conducted with participation by affected parties and the Authority acknowledges that it can't be familiar with the commercial and physical realities of running a distribution network. In letters and previous submissions we have asked that a process for developing what we now know as a DDA to be participant led or at least participant inclusive. This has not taken place. Instead the paper appears to be written as though the Authority is set on its path.

	provide that each distributor's DDA is a tailored benchmark agreement?	No guidance or principles for the way Part 12A should be constructed to achieve the objective of the change are provided. It is our view that the way the argument is presented in the paper and the degree of evidence provided to support the initiative would only convince parties who already agree on the course of action that it should proceed. CONVEYANCE ENA notes proposed Part 12A does not apply to distributors who have a contract in respect of the conveyance of electricity with one or more customers. Most distributors in New Zealand supply more than one customer through a contract in respect of the conveyance of electricity and two distributors have 100 percent of customers on conveyance contracts. ENA notes that despite the provisions of Part 12A the DDA provides for circumstances where a distributor enters into direct customer agreements with customers so provisions for conveyancing , whether 100% or a handful of large customers, have not been fully worked through in these proposed arrangements.
3	What feedback do you have on the detail provided in section 3, which describes the Authority's proposal to introduce a DDA into Part 12A of the Code along with supporting processes that are designed to allow distributors' DDAs to act as tailored benchmark agreements? (As per appendix A)	Section 3 steps through the workings of the proposed Part 12A and the DDA. ENA notes that the construct of Part 12A and the consequential provisions of the DDA assume that: • The DDA accounts for the commercial practicability of agreements that balance the distributors' role as the provider of the services and traders' access to the services. Whether or not this is the case, the ENA notes that this has not been tested with retailers and distributors outside the consultation processes for the proposal to change arrangements. • That the Authority is in a position to rebalance the risks between distributors and traders and yet this is not tested. The experience with the Vector, Unison and WEL agreements negotiated with the MUoSA framework is that, given time, retailers and distributors can achieve a balance, and yet those agreements would be swept aside by the proposed arrangement. • There is no overlap between matters raised by the DDA and Part 4 of the Commerce Act. This is not necessarily the case. The shift away from GEIP in places raises the possibility that the costs to meet undefined standards in the DDA may not be recoverable under part 4 of the Commerce Act. • The shift away from the GEIP standards will lower transaction costs and deliver benefits as per the statutory objectives. The impact of a shift to a less well defined and less well understood term is likely to be the opposite or be detrimental to reliability as EDBs are incentivised to "water down" operational standards in the face of uncertain obligations (without the context of GEIP). • 20 days is enough time to negotiate an alternative agreement to the compulsory default agreement and, by implication, establish that a trader is competent to trade. Experience with the MUoSA suggests that this is too tight for both parties. This time frame doesn't allow for a process of establishing a trader's preparedness to trade or to reasonably negotiate all of the negotiable terms.
3	What are your views of the Authority's assessment of the likely levels of demand for new and replacement UoSAs in coming	This section assumes 124 additional UoSAs should have been in place from May 2013 to Sep 2015 once replacement of legacy UoSAs is taken into account. This section in the consultation paper raises four unanswered points: 1. The Authority could have surveyed retailers and asked them about the likelihood of expanding to all distribution networks. It does not appear to have done so. 2. 124 UoSAs yet to be signed is an upper bound. It is more likely

	years? Please support your response to this question with reasons and your alternative quantified assessment, if any. (As per page 44 – refers to 4.4.1 to 4.4.14 inclusive)	that a number representing wider penetration of distributors but not full national representation for all distributors would be a better number to base calculations on. (This approach would be more consistent with the approach taken in the scenarios at 4.4.24) 3. The 124 number of prospective UoSAs overstates the potential number of discretely different UoSAs that might be required for national representation because it is derived from an overstated number of effective distribution businesses. 4. Traders concerns regarding proliferation of UoSAs do not just relate to the 26 EDBs. There is a distinction between the distributors that are actively negotiating around the MUoSA as distinct from the Distributors who have proven to be slow to negotiate new agreements based on the MUoSA. There are better ways to deal with this problem than move to a DDA. Retailers tell us the greater problem is, in fact, the almost 200 (and growing) embedded networks for which there are presently not even model terms and which are excluded from the DDA.
4	What are your views on the regulatory statement set out in section 4?	The ENA's view of the regulatory statement is: 1. The problem is not clearly defined (multiple, inconsistent definitions). 2. There is a general lack of empirical evidence especially with respect to the efficiency benefits. The analysis of costs and benefits that are quantified (transaction costs) are not profiled across the analysis period as we would expect in a conventional CBA. 3. The problem definition and the regulatory analysis/CBA are not aligned. 4. Neither the proposal nor the alternative options listed are assessed against the stated objectives. Further, the ENA does not believe that the broad provisions of section 32 can be used to augment or expand the Authority's functions as specified in section 16. The question then becomes whether the Authority's functions in section 16 are broad enough to encompass the proposed DDA. There are a number of factors which suggest that Government did not intend this to be the case. The ENA notes that the Authority does not appear to have "reviewed each term in the default agreement and formed a view on whether the term deals with matters that the [Commerce] Commission is authorised or required to regulate under the Commerce Act" as it has previously indicated it would do if it moved towards a default agreement. The ENA is not convinced that the proposal meets the Authority's Code amendment principles. In addition to the above it has not clearly identified efficiency gain or market or regulatory failure as per principle 2.
5	What are your views on the detailed drafting of the Code amendment provided in Appendix B and Appendix C?	Under the MUoSA arrangements, individual clauses could be negotiated between traders and distributors. Under the proposed drafting of the Code and template DDA, the agreement becomes a compulsory default agreement so the Authority's treatment of each clause becomes more important. The ENA is disappointed that Part 12A and the DDA have not been prepared with input from distributors and traders. The treatment of key issues for ENA members is set out in section 4.2 *A.2 comments on the detailed drafting of the Code amendment* and 4.3 *A.3 comments on the detailed drafting of the DDA template* below in line with the format for submissions supplied by the Authority

4.2 A.2 comments on the detailed drafting of the Code amendment.

	Reference	Issue
1	Subpart 1	Sub part 1 should be corrected to state that the template DDA should apply to all ICPs where distributors do not have a conveyance agreement. This would deal with identifying clearly where the interposed DDA applies and where it doesn't, notwithstanding any explicit exceptions. Also, the Authority should clarify whether the conveyance MUoSA will prevail for ICPs where conveyance agreements are in force, or whether this is an interim step before a conveyance DDA is introduced.
2	12A.2, 12A.13 and 12A.21	12A.2 (a) (ii), 12A.13 (a) (ii), and 12A.21 (a) (ii) appear to exclude distributors operating with one or more consumers on conveyance agreements. If this is the case, most distributors would be ruled out of all provisions in Part 12A If this is modified to capture ICPs distributors with interposed agreements then there would be a clear distinction between customers on interposed agreements and those on conveyance agreements.
3	12A.4	1. 12A.4 requires a distributor to offer to a trader to contract on terms as outlined in its DDA. 12A.10 includes provision for alternative agreements to be negotiated within 20 days but the obligation to offer to contract on the basis of the DDA is compulsory. 2. 12A.4 does not provide for the event of default by a retailer. 12A.4 obligates the distributor to reinstate an agreement. That should not be the case unless the retailer subsequently qualifies for an agreement following a default. 3. When read alongside the treatment of termination in the clause 19, the DDA operates more in the manner of a mandatory arrangement than a default arrangement.
4	12A.4 (4)	It's proposed that distributors be given a time limit from when the Code amendment comes into force to develop and consult on their operational terms, and then publish a DDA. For four "Group 1" distributors (Orion, Powerco, Unison and Vector), the period is proposed to be 60 business days, with the other distributors having 120 business days. We understand the Authority may have proposed this to assist retailers review published DDAs. However distributors and retailers are given only two months to consider negotiating an alternative agreement. This means that for larger distributors, such as Vector, it has two months to consider alternative agreements with 21 retailers. The timeframe is arbitrary and does not appropriately reflect the significance of the transition for retailers and distributors. Further, the Authority doesn't advance its

		statutory objectives by imposing such a tight time frame. Further, there is an inconsistency between the timing in clause 12A.4 and 12A.12 (5). 12A.4 gives distributors 60 (or 120) business days to publish their DDA, but 12A.12(5) gives distributors two months from the clause coming into effect to agree an alternative contract with existing traders, failing which the DDA will apply. Assuming both clauses come into effect on the same day, it's probable that a number of distributors will not have published their DDA by the time the DDA will be deemed to come into force under clause 12A.12 (5). The timeframe in clause 12A.12(5) should run from when the distributor has published its DDA in accordance with the timeframe in 12A.4 ENA requests that members: • be notified of the gazette date; and • regardless of how much notice is given for the gazette date, the four "Group 1" distributors should have 120 business days to develop and consult on their operational terms and then publish a DDA, with the other distributors having 180 business days. • Members then have no less than three [3] months from the date they have published their DDA to agree with existing traders a new distribution agreement.
5	12A.4 (5) and 12A.5	These clauses remove mediation prior to an adjudicative process through the Ruling Panel for the establishment of operational terms. This is a change from the current situation where disputes around what are effectively operational terms are able to be resolved through mediation. This will add to transaction costs and not advance the statutory objectives.
6	12A.9	No allowance is made for a situation when a trader has previously defaulted. In this case, provision should be made for an additional carve out so a distributor is not forced to enter into a DDA unless the trader has remedied the circumstances of its default.
7	12A.9	12A.9 (1) provides for a trader to be able to trade with only 20 business days notice. The short time frame proposed under the DDA means that any risk / non-compliance becomes a breach of contract issue, where under the current regime distributors can take the time required to ensure the retailer is in fact ready to trade before actually commencing. (i.e., .it removes the risk of needing to remedy any non-compliance under contract). It also places risks on the clearing manager and the wider industry by presuming the trader has the requisite billing system and provisions for information exchange in place. The long term interests of consumers is better served by a process of assessing that traders meet certain requirements regardless of the time it takes, rather than forcing the distributor to allow the trader to commence before the trader is clearly ready to operate. Requirements on a trader before they are allowed to trade include: • Have the requisite systems in place to enable accurate billing; • Prudential requirements satisfied ; • Providing a forecast of likely monthly billing;

		• Time to source copies of the new retailer's customer terms and conditions to check they contain the customer clauses required by the UoSA; • Meeting with the distributor to understand their operational expectations. Traders to confirm they understand the distributor's operational expectations and can meet their obligations.
8	12A.9 and 12A.10	The construct for establishing the DDA, negotiating an alternative agreement and the mechanism where the default agreement binds the parties, is unclear. If parties don't sign an alternative, or it appears that the DDA becomes posted terms allowing the trader access to the network as long as they have a connection contract in place and post appropriate prudential cover. In particular 12A.9 Negotiating distribution agreements provides: *A trader that wishes to trade on a distributor's network must give notice to the distributor of that fact at least 20 business days before the trader proposes to commence trading on the distributor's network.* The effect is that after 20 business days either party can elect to use the default agreement (or it applies automatically). That time constraint is quite ambitious and will lead to more use of the default and fewer alternative agreements, if any, thus making the DDA arrangements effectively mandatory. Ideally the construct of the DDA should be that the reverse applies, with innovative bilateral alternative arrangements being encouraged and the default option being the exception.
9	12A.9 and 12A.10	ENA notes that 12A is ambiguous about the ability to remedy. It may be that recourse under the DDA is through the courts or under the Code. Legal recourse under a negotiated, alternative contract is through the court. ENA would prefer legal recourse for failure under both the DDA and negotiated alternatives to be through the courts.
10	12A.9 and 12A.10	At a minimum, existing contracts with fixed terms negotiated under the auspices of the Authority's MUoSA arrangements should be left to run their course. Retailers have informed ENA members that the issue of UoSAs lies more with the evergreen legacy agreements than agreements negotiated under the Authority's guidance. UoSAs negotiated with reference to the Authority's MUoSA that have been negotiated for a fixed term and in good faith. While the Authority is dissatisfied with the existence of variations and the pace of progress, these agreements are consistent with the regime the Authority established and should be allowed to run their full term.
11	12A.11	The combination of 12A.11 and the termination provisions creates an arrangement that will lead to non-standardisation. These two provisions together mean that distributors cannot update all DDAs for all traders even where an operational term they wish to introduce must by definition have to apply to all traders. Those changes can't be forced onto the traders, which would lead to a proliferation of operational terms and non-standardisation. This point adds to the theme that the proposed scheme will not address one of the

		objectives. The difficulty is that the problem definition is so muddled it is not clear which issues the proposed scheme is designed to address.
12	12.A.12	Clause 12A.12 requires distributors with existing UoSA agreements to "offer to contract with the trader on the terms set out in the default distribution agreement". This provision makes the default provision compulsory because it obliges distributors to offer an alternative agreement that overrides the existing commercially negotiated agreements already in place. If the intention is to treat the DDA as a "default", parties should only seek to use it where they have failed to reach mutual agreement. The ENA's view is that the combination of provisions in 12.A making it compulsory for the default agreement to be available (see reference to 12.A.4 above), providing no requirement that both parties sign the default before it to come into effect (see reference to 12A.9 above), the 20 business day limit on negotiating an alternative (see reference to 12A.9 above) and this provision 12A.12, creates a mandatory obligation.
13	12A.16 12A.17	Prudential requirements. The draft amended code clauses 12A.16 and 12A.17 include reference to prudential requirements. DDA duplicates some provisions/terms. Should be referenced in one and detailed in the other CHECK

4.3 A.3 comments on the detailed drafting of the DDA template.

	Reference	**Issue**
		Compliance with Statutory objective
1		ENA commissioned a report by Sapere Research Group's Nives Matosin and Toby Stevenson analysing each clause of the DDA. Their report is attached to this submission. The report compares each clause in the DDA to the equivalent clause in agreements negotiated under the MUoSA arrangements and assesses which better meets the statutory objectives. Their report finds: 1. None of the agreements negotiated within the auspices of the Authority's MUoSA arrangement was detrimental to the statutory objective. The differences in the negotiated agreements reflected operational practice and management of risk for each of the businesses in a commercial setting. 2. The current arrangement of negotiated agreements has allowed for innovation in the contractual arrangements between distributors and retailers in the cases examined, and facilitates an environment for further improvement and innovation. **3.** In most cases, the clauses in the negotiated agreements that varied from the draft DDA were preferable in that they better met the Electricity Authority's statutory objective.

		Removal of Additional Services gone
2	Services were described in Schedule 2 of the MUoSA	Services were previously described in Schedule 2 of the MUoSA and are now removed in the template DDA Separating out additional services will raise transaction costs and may not encourage competition in those so called additional services. A number of activities that will fall into this category are services currently provided to traders by distributors. E.g. distribution of trust dividends. In future this could cover a range of activities that relate to distribution services such as meter functionality or battery services. All that will be achieved by removing these services from the DDA, is that contracts will have to be duplicated.
		Default v mandatory
3	DDA 19 and 19.1 (a)	The termination clause is unworkable. Clause 19 no longer allows either party to terminate on notice after an initial term. This means that; 1. The distribution agreement is effectively perpetual in nature. If the Code is subsequently amended or repealed so that it no longer controls the terms of these distribution agreements, traders and distributors could be stuck with perpetual contracts that cannot be terminated other than by agreement – and in some cases it may well suit one party to reject any attempts to agree a termination. 2. The DDA is effectively a mandatory obligation – locking in interposed arrangements. If the arrangement was truly a default arrangement, some mechanism should exist to cater for circumstances where distributors wish to terminate. For example, distributors need a mechanism to change their business model to a conveyance arrangement. The DDA needs to be amended to provide for this.
4	DDA 22 and 19	Amendment to agreement provisions not clear. There needs to be a clear mechanism for changes required to be made by law or where the Code is changed (e.g. core terms) where the parties don't agree or one party doesn't engage. There should also be a process for the distributor to change the variable provisions where necessary for operational reasons or to maintain consistency across Traders. Such a mechanism was provided in the MUoSA at 18.6, but has been removed from the default agreement. This should be reinstated in clause 22.
		GEIP and associated issues
5	DDA 2, 2.2 and 2.3	The shift away from GEIP in the 2012 MUoSA and now its critical omissions in a DDA arrangement is a major imposition by the Authority on the commercial and legal contracts between retailers and distributors. UoSAs negotiated within the Authority's MUoSA framework include an overarching standard of GEIP – an objective and well defined standard applying widely to the

		obligations of both retailers and distributors (see clause 2 and 2.2 of UoSAs). This overarching standard benefits consumers and the industry by providing certainty around the factors on which a party will be judged during its decision making. This overarching standard is consistently applied in negotiated UoSA's FM and liability clauses, providing a level of certainty around each party's liability exposure and giving certainty when 'extraordinary' situations occur. GEIP does appear in places but is not used as the standard right throughout the DDA. Where it is replaced, it is replaced by other terms that are less well defined. This will likely raise costs of compliance for distributors and traders in their pursuit to meet their requirement and may, in turn, conflict with Part 4 price-quality trade-off arrangements. It is understood that the Authority wants to add consideration of its statutory objectives into agreements between traders and distributors but the agreements still have to be commercially and operationally practicable and reflect the fact that the parties are operating and utilizing infrastructure. No case is made to drop the GEIP standard. Removing it as an overarching objective doesn't lead to greater achievement of the statutory objectives, and is more likely to lead to practices that undermine the statutory objective. The ENA suggests that at the very least 2.2 (a) should include GEIP in association with the service levels and that GEIP should similarly be used consistently throughout the DDA.
6	DDA 24.5	Specific cases where the GEIP should also be included are around distributor liability. Vector and Unison included a sub-clause in their UoSAs negotiated under the auspices of the Authority's current arrangements, and this GEIP should be included in a DDA (this is also being adopted by other distributors) : "Where such failure occurs in spite of distributor exercising GEIP". This inclusion links liability to the recognized service standard. This critical nexus is lost in the DDA, widening the scope for uncertainty and increased risk. The DDA and MUoSA introduce an additional level of uncertainty by including negligence as a trigger for the right to claim for direct damage to physical property. Where a party has breached an obligation it should be held to the standard of the clause it has breached, not for failures of other standards of care beyond the scope of the contractual obligation. The DDA's approach to liability does not adequately reflect the way the industry works. It has the effect of significantly increasing a distributor's liability with each new retailer on the market (no matter how small that retailer is). Also, each party's liability is only limited on a 'per event basis' (and not in the aggregate). This does not create fair or appropriate outcomes for either traders or distributors.
7	DDA 27.1, 27.2, 27.4	The indemnity given by the distributor in clause 27.1 is not subject to any exclusions or limitations, other than a requirement that the loss or damage suffered be "direct". The concept of "direct loss" does not have a single, settled legal meaning, and in the

		context of clause 27.2 is highly ambiguous. The indemnity for third party claims should cover only the third party's "actual losses" and not liabilities which a trader has voluntarily assumed by way of liquidated damages or similar payments or any other consequential losses as referred to in section 24.3. Otherwise the indemnity potentially provides a blank cheque for traders to expose distributors to unlimited liability for breaches of the default distributor agreement. The indemnity given by the distributor in clause 27.1 is not subject to any monetary limitations, despite the fact that this renders the limitations in clause 24.7 virtually meaningless. For example, if a trader were to assume unlimited liability to a customer for loss or damage arising from network events, 27.1 would allow the trader to pass that back to the distributor under the indemnity in clause 27.1, without any limitation. If this is the Authority's intention, the case should be made in the context of the statutory objectives, and that is not presented in the consultation. The proposal to not subject the distributor to any exclusions or limitations, other than a requirement that the loss or damage suffered be "direct", is especially alarming in the absence of an overarching GEIP standard.
		Losses
8	DDA 6.6	The draft DDA places an obligation on distributors to investigate adverse trends in losses. In particular: *The Distributor must use reasonable endeavours to identify the cause of the abnormal movement. If the Distributor is unable to identify the cause of the abnormal movement, the Distributor must provide relevant information to all affected traders and must, if requested by the Trader, facilitate a meeting of all affected traders to attempt to resolve the matter.* It may be more appropriate to require the distributor to investigate losses in accordance with GEIP, as for traders in clause 6.5 (Non-technical Losses: *The Trader must investigate and minimise, in accordance with Good Electricity Industry Practice, non-technical Losses).*
		No service interruption guarantee
9	DDA 4.11, 9.5 (a) (ii) , 9.10 and Schedule 1, 1.3	Distributors do not and are not required to provide service interruption guarantees. "Service guarantee payments" should not be included in the core terms. Some distributors currently provide a payment related to the timing and nature of service restoration where supply is interrupted in certain circumstances. This is variously referred to as charter payments or customer promise. Whether a distributor provides a payment and the circumstances that need to be met are bespoke to each network and depend on the unique network characteristics, as well as commercial and operational considerations and constraints. One distributor reports that none of 13 retailers on their network raised any objection to removal of any of the penalty clauses that referred to power supply not being reinstated in certain timeframes. It reports "in everyone's view it is better the distributor spent

		money on getting the customers re-connected". Further, there is no requirement for the retailer to pass the payment through to the customer. It is not appropriate to refer in core terms to a "payment" in relation to service interruptions. It is also inappropriate to use the schedules (in this case schedule 1) to introduce a non-core point into the core terms. We consider the form of any payment and the reference to such is a matter that is more appropriately dealt with in operational terms. Whether a distributor offers a payment and how it can practicably deliver it is dependent on a number of factors and cannot be "standardised" across all networks without ultimately increasing costs, which are inevitably passed on to consumers. Further, the obligation created by service levels should be clearly linked to GEIP. There should be no liability where the distributor operates to GEIP but an FM event occurs.
		Core v operational terms
10	DDA 24.7	The basis for the split between what is core terms and what is operational seems arbitrary. No guidelines or principles are provided to show the decision(s) on which way a clause is treated. This is particularly the case with DDA 24.7. Liability amounts should be agreed between the parties and included in operational terms. Further, clause 24.7 does not provide for an annual cap. Liability should be subject to an annual amount provided in the operational schedule. Annual caps provide certainty for both the distributor and the trader. The Authority has not offered any justification for providing a 'per event cap'. For example, the VUoSA applies liability and caps on the basis of ICPs per retailer. So the liability is proportionate to the level of activity on that network. This approach was accepted through commercial negotiations. It is more appropriate approach than what is proposed. This provision should not be able to be overridden by 27.2.
11	DDA 9	Billing should be an operational term. Each trader has its preferences according to their systems and unique requirements. Likewise, billing methods differ significantly among distributors – particularly Vector, which operates differently across its Northern and Auckland networks and its retailers (some are billed the same across both, others have a preference for each network). In principle, variations in the operational terms of the DDA should reflect differences in operational approaches across distributors.
		Registry settings and electricity information exchange
12	DDA 7.7	Should be reciprocal. Either party able to identify an error. Also, the inclusion of the material effect is an unreasonable standard to place on the distributor. Materiality would have to be relative to the size of the retailer. Otherwise

		this creates an exemption from the impact of an error for smaller retailers.
13	DDA 8.2	Clause 8.2 provides for price categories to be changed on request. The VUoSA provides a qualifier so that such requests should be made no more frequently than annually, preventing traders from being able to arbitrage prices.
14	DDA 8.3 – 8.5	The goal for pricing practices is for the right price code to be entered into the registry and for file data exchange to have integrity. Situations where customers do not have the correct price category or price option may be the result of distributor action or trader actions. The provision of the distributor issuing a credit note to the trader in these circumstances should either be waived or be reciprocated for traders and distributors, depending on where the fault for the misallocation lies. 8.3 establishes that there will be price options. MUoSA, and now DDA (8.4), allow that a trader can request category allocation. If there is a correction under 8.5 the distributor needs to change the price (and billing) that applies to the customer and issue a credit note where back dating applies. This suggests that the distributors will compensate the trader for the error, but the error may have come from the trader. (i.e., under the Code the responsibility for the meter categorisation in the registry and the determination of the price category lies with the trader.)
15	DDA 8.5, 8.6, 8.7	The DDA is written in a way that is biased against distributors. If a distributor makes an error they pay a penalty, but this is asymmetric. This provision should apply to both traders and distributors, depending on the source of the correction. Also 12A. Principles reflect reasonable requirements on everyone except distributors. Where a Customer has been allocated to a price category on the basis of information from the Customer or Retailer that is subsequently proven to be misleading or incorrect, the Distributor should be able to apply the correct price category either to the applicable change date or to a maximum of 15 months, whichever is the lesser. The Distributor should also be able to apply the Price Category in the month following notification to the Trader.
16	DDA 9.3, 9.7, 9.8	These clauses are inconsistent on what constitutes an error on an invoice and when the use of money should be paid by way of compensation. They should be consistent. Also, parties should be liable for default payments where there has been notification of a dispute and a ruling against one of the parties. This is not the case under 9.7 and 9.8 at present.
		Electricity Information Exchange Protocols
17	DDA 31	Issues covered in a number of places could be bundled up under this clause. For example VUoSA's 6.10, 29.2 and S1.7 could be captured in wording along the following lines, as suggested by one retailer: Consumer information: The Retailer will on reasonable written request from the Distributor, and within a reasonable timeframe, provide the Distributor with such

		Consumer information, including Consumers' demand and consumption information (where such information has been obtained from such Consumers), as is reasonably available to the Retailer and necessary to enable the Distributor to exercise its rights or fulfil its obligations under this agreement.
		Load management
18	DDA 5.1	1. Under the DDA, the provision for load management relies on the distributor providing a Price Category or Price Option and the retailer to provide a corresponding price-tariff that the customer takes up. Distributors have no control over retailer tariffs and, under interposed arrangements such as the DDA, do not have a direct relationship with the customer. Therefore, the articulation of clause 5.1(a) does not reflect how distributors provide for a non-continuous level of service. A distributor provides a Price Category or Price Option and "charges the retailer on the basis of the Controlled Load Option with respect to the Consumer". (See Vector's UoSA clause 6.1(a)). Clause 5.1 of the DDA should similarly provide for the reality of interaction between the retailer and distributor. 2. Some distributors do not provide a controlled load option in order to provide a load control service. To this end, Vector's UoSA clause 6.1(b) should be adopted in the DDA to cater for such services that are not provided under a controlled load price option.
19	DDA 5.6 and Schedule 8	Clause 5.6 provides that: *Trader to make controllable load available to the Distributor for management of system security.* System security is a defined term and the applications for controllable load are listed in Schedule 8 S8.1. As written there is an ambiguity in that s5.6 may not capture what is referred to separately from system security being S8.1 (b) (i). *Network management:* *managing Network system security;* This category should also be excluded from S 5.6. It should read: *Trader to make controllable load available to the Distributor for management of system security and Network system security.* The other categories referred to in S8.1 would remain the subject of s5.6
20	DDA 5.9	DDA 5.9 is an example of how the approach taken in the DDA is not necessarily future proofed and has the potential to discourage innovation. ***Assignment of load control rights**: A party that has obtained the right to control a Customer's load in accordance with clauses 5.1 or 5.2* This clause presupposes that every party who accesses load control will be a trader or a distributor. Clause 5.3 introduces a party described as an "entrant" seeking access to load control that is otherwise accessed by an "incumbent" who has access to control load in accordance with 5.1 and 5.2 (i.e. a retailer or a distributor). What this clause does not envisage is where this entrant has obtained rights through an assignment from the Customer to control load that is not already subject to control by an incumbent who

		has access to control load in accordance with 5.1 and 5.2. For instance, a non-trader aggregator could access non-traditional forms of load control (such as discretionary heating and cooling) accessed by non-traditional and innovative means (such as a smart-phone app) and sell that directly to a trader. This could be the case where the load was destined for the instantaneous reserves market through the aggregator's trader customer or where it is made available for scheduled control to coincide with wholesale market prices on behalf of the aggregator's trader customer. If the circumstances described above occurred, it would highlight the possibility that load control could take place without the knowledge of the distributor. The load control provisions need to be future proofed, and cater for instances where distributors' visibility and controllability for network and system security could be compromised.
		Medically dependent
21	DDA 17.4	Clause 17.4 is a broadly worded, vaguely defined obligation on the distributor to co-operate with the Trader in relation to medically dependent/vulnerable customers. This clause should stop at the point where the parties acknowledge the Authority's guidelines exist. This provision has to reflect the interests of medically dependent and vulnerable customers with the potentially significant impact on planning and execution of planned works on the network, or in isolating temporarily for safety. The only co-operation that should be necessary from the distributor is to provide the trader with advance notice of Temporary Disconnection – which is set out in the service interruption provisions and compliance with the guidelines. No justification under the statutory objectives is provided for the introduction of a new requirement on the parties to work together (i.e., consult and negotiate in relation to temporary disconnection). Nor is there any evidence of failing to account for the two related objectives provided.
		Amendments to the DDA
22	DDA 22.1	Amendments to the DDA. There is a lack of clarity about clause 22.1 A change may be made to this Agreement. It is not clear whether: – clause 22.1(a) means that <u>any</u> part of the agreement can be amended by the agreement of the parties; or whether – clauses 22.1(b) (c) (d) (e) are sub-clauses of clause 22.1(a). In that there are only certain aspects of the agreement that can be changed. The Authority should clarify its intention in this regards. ENA would have it that that <u>any</u> part of the agreement can be amended by the agreement of the parties.
		Consumer Guarantee Act
23	DDA 25	Clause 25 of the draft DDA has been amended to reflect the distributor indemnity included in section 46A of the Consumer Guarantees Act 1993. Unison's equivalent provision simply refers to relevant sections of the Consumer Guarantees Act. Unison *UoSA clause 26.8Distributor indemnity: Notwithstanding any other provision of this agreement, the Retailer is entitled to be indemnified by the Distributor in accordance with, but subject to the terms of, section 46A ("Indemnification of gas and electricity*

		retailers") of the Consumer Guarantees Act 1993. The DDA does not need to repeat provisions that are already covered in other legislative instruments.

5. Appendix

The Electricity Networks Association makes this submission along with the explicit support of its members, listed below.

1. Alpine Energy
2. Aurora Energy
3. Buller Electricity
4. Counties Power
5. Eastland Network
6. Electra
7. EA Networks
8. Horizon Energy Distribution
9. Mainpower NZ
10. Marlborough Lines
11. Nelson Electricity
12. Network Tasman
13. Network Waitaki
14. Northpower
15. Orion New Zealand
16. Powerco
17. PowerNet
18. Scanpower
19. The Lines Company
20. Top Energy
21. Unison Networks
22. Vector
23. Waipa Networks
24. WEL Networks
25. Wellington Electricity Lines
26. Westpower