

# COVID-19: Response to retailer debt issues caused by lockdown: Urgent Code

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# COVID-19: Response to retailer debt issues caused by lockdown: Urgent Code

## 1 Purpose

- 1.1 The purpose of this paper is to seek Board approval of an urgent Code change to implement the response agreed to by the Board on 30 April 2020 to retailer debt issues caused by the COVID-19 lockdown.

## 2 Recommendations

- 2.1 It is recommended the Board:
- (a) **approve:**
    - (i) the draft amendments to the Electricity Industry Participation Code 2010 (Code) that provides electricity retailers facing liquidity problems as a result of the COVID-19 pandemic, but who are otherwise sound, an additional 60 days for payment of distribution charges to the six largest distributors (including passed through transmission charges) for a period of up to nine months (appendix A)
    - (ii) the draft amendments coming into force on 15 May 2020
  - (b) **delegate** authority to the Chair, or to any other Board member if the Chair is unavailable, to finalise and sign:
    - (i) the draft amendments
    - (ii) the *Gazette* notice.

## 3 Rationale

- 3.1 The Board should approve the recommendations because:
- (a) issues raised by the Board on 30 April 2020 have been reflected in the amendment
  - (b) the Authority has followed the correct process for amending the Code
  - (c) the amendment promotes the statutory objective, and it is necessary or desirable in the public interest that the proposed amendment be made urgently.

## 4 Next steps

- 4.1 The next steps are contained in the recommendations.

## 5 The revised draft urgent Code has been amended

- 5.1 At its meeting on 30 April 2020, the Board:
- (a) endorsed the:
    - (i) framing of the competition problem arising from the potential for multiple electricity retailer defaults due to non-payment of customer bills during and after the COVID-19 lockdown

- (ii) proposed solution to this problem, being for the largest distributors to offer debt deferral to qualifying retailers, with urgent Code requiring this debt deferral to operate as a backstop
- (b) **agreed** in principle to implementing urgent Code for this purpose subject to the draft being amended to:
  - (i) include the six largest distributors, namely
    1. Orion New Zealand Limited:
    2. Powerco Limited:
    3. Unison Networks Limited:
    4. Vector Limited:
    5. Wellington Electricity Lines Limited:
    6. WEL Networks Limited
  - (ii) Preclude:
    1. publicly listed companies
    2. subsidiaries of a company determined by an independent accountant to have capacity to provide additional capital or loans sufficient to address debt problems caused by the COVID-19 situation
  - (iii) provide that assessment of whether a retailer met the criteria to qualify for deferred payment terms would be by an independent accountant appointed by Authority.

5.2 The draft Code has been amended to reflect this.

5.3 In addition, following advice from KPMG, who have been appointed to advise the Authority on retail debt issues, the following amendments have been made to the draft Code:

- (a) The percentage increase in overdue receivables for a retailer to qualify for the scheme has been increased to 25 percent (previously 15 percent) to better ensure that qualification excludes fluctuations in overdue receivables that would occur under business as usual (see clause 12A.5B(2)(a))
- (b) The test for solvency has been expanded to reflect the test under the Companies Act 1993, on the basis that this better ensures only retailers with liquidity problems qualify for the scheme.

5.4 Finally, we draw to the Board's attention that the draft Code requires retailers applying for the scheme to pay for the costs of the Authority-appointed independent accountant to assess whether the retailer qualifies for the scheme. KPMG have indicated that this is likely to take 10-15 hours per applicant. This could be perceived as a barrier by smaller applicants.

## 6 The Authority has followed the correct process for amending the Code

6.1 The Authority has met the requirements of the Act to make urgent Code. In particular, the Board decided at its 30 April 2020 Board meeting that:

- (a) it is necessary or desirable in the public interest that the proposed amendment be made urgently as required by section 40(1)(a) of the Act

- (b) the proposed amendment would promote the statutory objective, and the competition limb in particular, by protecting and promoting retail competition.

6.2 Staff consider that the revised draft continues to meet these requirements.

6.3 Further, section 40(1)(b) of the Act requires that the Authority publishes a statement of the reasons why the urgent amendment is needed when the notice of the amendment is published in the Gazette under section 38(3)(b) of the Act. The Authority published in Market Brief on 5 May 2020 the reasons for the urgent Code.

6.4 The amendment complies with section 32 of the Act, which stipulates what the Code may contain and imposes limits as to what it may purport to do.

## **7 Attachments**

7.1 The following items are attached to this paper:

- (a) Appendix A: Draft Code amendment

## Appendix A Draft Code amendment

### 12A.5B Application of clause 12A.5C

- (1) Clause 12A.5C applies to a **trader's** agreement with a **distributor** for the provision of **distribution** services if—
  - (a) an accountant appointed by the **Authority** has certified that the criteria specified in subclause (2) are met in relation to the **trader**; and
  - (b) the **distributor** is one of the following:
    - (i) Orion New Zealand Limited;
    - (ii) Powerco Limited;
    - (iii) Unison Networks Limited;
    - (iv) Vector Limited;
    - (v) Wellington Electricity Lines Limited;
    - (vi) WEL Networks Limited; and
  - (c) the **trader** was not, as at [23 March 2020],—
    - (i) a listed company or a **subsidiary** of a listed company; or
    - (ii) a **subsidiary** of a company that has capacity to provide additional capital or loans sufficient to address the situation described in subclause (2)(b)(i) so that the criteria in subclause (2) would not be met, as determined by an accountant appointed by the Authority.
- (2) The criteria referred to in subclause (1) are—
  - (a) the value of receivables invoiced by the **trader** to **consumers** for **electricity** but not paid to the **trader** by the due date for payment (“overdue receivables”) in a month is at least 25% greater than—
    - (i) the **trader's** overdue receivables in the same month in 2019; or
    - (ii) if the **trader** was not trading in the same month in 2019, or the **trader's** revenue has increased by more than 25% since the same month in 2019, the **trader's** overdue receivables in March 2020; and
  - (b) in the opinion of the accountant giving the certificate—
    - (i) the **trader** is facing or is likely to face significant liquidity problems in the 6 months immediately following the date of the certificate as a result of the impact of the COVID-19 pandemic on any one or more of the **trader**, the **trader's** creditors, and the **trader's** debtors; and
    - (ii) the **trader** satisfied the solvency test as set out in section 4 of the Companies Act 1993 as at 31 December 2019; and
    - (iii) it is more likely than not that the **trader** will be able to pay its debts as they fall due within 12 months.
- (3) For the purposes of this clause—
  - (a) “accountant” means a chartered accountant as defined in section 2 of the New Zealand Institute of Chartered Accountants Act 1996; and
  - (b) “listed company” means a company whose shares are quoted on NZX Limited or on an official list of a recognised exchange in New Zealand or overseas.
- (4) The costs of an accountant appointed by the Authority under this clause must be paid by the **trader** requiring a certificate.

### 12A.5C Amendments to payment terms for COVID-19 response

- (1) Subject to subclause (2), any requirement under a **trader's** agreement with a **distributor** to which this clause applies, that the **trader** pay an amount to the **distributor** in respect of the supply by the **distributor** of **distribution** services by a date, is deemed to be amended so that the payment is due 60 days after that date.

- (2) Subclause (1) does not prevent the **distributor** and the **trader** from agreeing that the payment is due on any other date.
- (3) If an agreement to which this clause applies requires a **trader** to provide security based on an estimate of the **distribution** services charges that the **trader** will be required to pay to the **distributor** in respect of a particular period, the agreement is deemed to be amended so that the estimate must be made disregarding any amount payable in respect of **distribution** services charges incurred in a previous period, where the amount is payable because of the operation of subclause (1).
- (4) If an agreement to which this clause applies provides for a **distributor** to require a **trader** to provide additional security, the **distributor** must not—
  - (a) increase the amount of the additional security required, if the **trader** is required to provide additional security as at [date]; or
  - (b) require the **trader** to provide additional security, if the **trader** is not required to provide additional security as at that date.

#### **12A.5D Revocation of clause 12A.5B and 12A.5C**

Clauses 12A.5B, 12A.5C, and this clause are revoked on [date that is 9 months after the clauses come into force].