

Notice of the Authority's decision under regulation 29 of the Electricity Industry (Enforcement) Regulations 2010

Under regulation 29(1) of the Electricity Industry (Enforcement) Regulations 2010 (Regulations) the Electricity Authority (Authority) must publicise every decision made under regulation 23(3) of the Regulations, together with the reasons for the Authority's decision.

Investigations

On 6 December 2021, the Authority appointed an investigator under regulation 12 of the Regulations to investigate the alleged breaches of clause 3 of Schedule 12A.4 of the Electricity Industry Participation Code 2010 by Vector Limited, Powerco Limited and Aurora Energy Limited (the distributors).

Genesis Energy Limited alleged the distributors' Default Distributor Agreements (DDA) included certain exclusion of liability terms as recorded terms that circumvented the core terms of the DDA.

The distributors denied the alleged breaches. Contact Energy Limited and Meridian Energy Limited (Meridian)¹ joined the investigations. The parties to the three investigations were common and they could not agree to resolve the alleged breaches by way of settlement.

The investigator noted:

- during development of the DDA, and following a Court of Appeal hearing, recorded terms were a late amendment to the DDA template before being finalised. This was to enable a complete distributor agreement and allow distributors to include items not able to be regulated by the Authority.
- the Code allows distributors to include recorded terms in DDAs which are in text boxes and shaded in the DDA template.
- the Code places no restrictions on recorded terms and this contrasts with the express requirement that collateral terms and operational terms not be inconsistent with or modify the effect of core terms.
- retailers can accept or reject collateral terms and appeal to the Rulings Panel against the inclusion of any operational terms. However, the Code does not provide for the ability to object to or appeal the inclusion of recorded terms.

Accordingly, the investigator considered recorded terms have no effective restrictions and therefore to be effectively in a "safe harbour" from a Code enforcement perspective.²

The investigator also noted:

- the distributors' use of recorded terms to expand exclusion of liability provisions was considered by the Authority and the retailers as an unintended consequence of the DDA.
- On 1 September 2022, the Electricity Industry Amendment Act 2022 (Amendment Act) came into effect. The Amendment Act gave the Authority explicit jurisdiction to require a distributor and other industry participants to enter into a distribution agreement on prescribed terms. The Amendment Act also clarified that the Authority has jurisdiction to regulate for quality standards, provided they are within the context of the terms and conditions of access to the distribution network.

¹ Meridian subsequently withdrew from the investigations.

² The Authority's DDA decision paper states at paragraph 5.2 (b) "Recorded terms are not subject to the Code".

The investigator considered that although the exclusion of liability recorded terms in question may shift undue risk to retailers, this was not explicitly proscribed by the Code and therefore does not appear to be a breach of the Code.

The investigator also expected that the Authority will now amend Part 12A of Code to reflect the Amendment Act and remove unintended consequences caused by DDA recorded terms. For the above reasons the investigator recommended to the Authority that it discontinue the investigations under regulation 23(3)(a).

On 13 October 2022, the Authority received and considered the investigator's report and a recommendation to discontinue the investigations.

The Authority's decision

On 13 October 2022, the Authority decided under regulation 23(3)(a) of the Regulations to discontinue the investigations.

Reason for the Authority's decision

The reason for the Authority's decision to discontinue the investigations was that:

- The investigations found that the distributors did not breach clause 3 of Schedule 12A.4. This was because the investigator considered the recorded terms to have no effective restrictions and therefore to be effectively in a "safe harbour" from a Code enforcement perspective.

In making its decision the Authority noted a review of the DDA was on the Authority work programme in relation to changes arising from the Amendment Act.