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Submission from Energy Trusts of New Zealand

ETNZ - The Energy Trusts Association - represents the Trust owners of electricity distribution businesses throughout New Zealand, the largest of which is Entrust (formerly the Auckland Energy Consumer Trust) and the smallest of which is the Buller Electric Power Trust. The majority of the Trustees of these energy trusts are elected by electricity consumers who are the beneficiaries of the Trusts.

As the organisation representing consumer and community owners of EDBs, ETNZ has both an asset owner and a consumer perspective in addressing this topic. In particular our views in this case reflect that consumer perspective, and relate to the proposed amendment (2016-05) to remove the reference to the Authority *acting reasonably* and the associated proposals to remove references to the Authority acting "*within a reasonable period of time*", and "*to use reasonable endeavours*".

ETNZ does not have a view on the other proposed Code changes.

Assurance that Authority must act reasonably because it is a Crown entity not consistent

We do not accept the Authority's assurance that these requirements are redundant because, as a Crown entity, it will necessarily be reasonable and behave reasonably. Current legislation specifically requires a number of Crown entities and related agencies to be reasonable or to act reasonably. For example:

- A parallel can be drawn with the 1987 Court of Appeal clarification that the Treaty of Waitangi put in place a partnership, and the partners have a duty to act reasonably and in good faith.¹ (The Treaty is an agreement rather than a piece of legislation, not unlike the relationship the Code establishes between the Authority and Participants.) The fact that the Court needed to make this clarification, applying to the Crown, indicates that there was no implicit guarantee that principles of good faith would otherwise be adhered to.

¹ www.parliament.nz/media/1835/y9-10-card-8.pdf

- Under the guidelines for ‘Surrender of property and searches’ established under the Education Act, schools must comply with “Principle 3: ... schools must act reasonably, in good faith...”.
- Section 82A of the Local Government Act 2002 requires that local authorities, in exercising their quasi-regulatory powers through setting by-laws, must provide “(b) an analysis of the reasonably practicable options...”

The view that Crown entities may require specific requirements to be reasonable/act reasonably remains current Parliamentary thinking. Thus, the *Local Government Act 2002 Amendment Bill (No 2)* as reported back in July 2016, specifically provides for the Local Government Commission and local authorities, and even the Minister, to adhere to principles of reasonableness. A few excerpts from the Local Government & Environment Committee’s report (and mirrored in the Bill itself):

A local authority intending to develop a reorganisation plan under this clause must ensure that written notice of that intention is given to the Commission as soon as is **reasonably practicable**.

(2) The Commission must approve the reorganisation plan to which the local authority-led reorganisation application relates unless— (a) the reorganisation plan is not accompanied by the documentation required by clause 22B; or (b) the Commission considers, **on reasonable grounds**, that— 15 (i) the provisions in clause 11 and subpart 1 of this Part were not complied with in developing the plan, as required by clause 22A(2); or ...

(2) Despite subclause (1)(e), this subpart does not apply to a transfer of responsibilities, duties, and powers described in that subclause if the Commission is satisfied, **on reasonable grounds**, that the transfer—...

New section 25(2) provides that the Minister must recommend an Order in Council to implement a reorganisation plan unless the Minister is satisfied, **on reasonable grounds**, that the process to develop the plan was not in accordance with the Act.

Electricity Authority’s unusual role

As a body with quasi-regulatory authority through the Code amendment process, the EA has unusual powers, contrasting with most Crown agencies that can only achieve regulatory changes through recommendations to their Ministers. Accordingly, electricity consumers deserve the protection that specific requirements for the EA to be reasonable and to act reasonably provide.

Further erosion of consumer-focussed requirements

ETNZ considers that the replacement of the Electricity Commission’s *principle objective* by the Authority’s *statutory objective* reduced the protections that consumers might reasonably expect:

The Commission’s principle objective (s 172N) was *to ensure that electricity is generated, conveyed, and supplied to all classes of consumers in an efficient, fair, reliable and environmentally sustainable manner*.

In contrast, the Authority's statutory objective is to *promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.*

This change in primary regulatory focus was a concern for us, as:

- (a) scope was created for the Authority to promote the long-term benefit of some consumers without promoting benefits to all classes of consumers (for example, a net consumer benefit might be sought through a Code change that disadvantaged, say, domestic consumers);
- (b) The word "fair" was omitted, reinforcing our first concern; and
- (c) The wording "environmentally sustainable manner" was lost.

Retaining the various provisions in the Code that require the Authority to *act reasonably* takes on additional importance because of the additional exposures created by the shift away from the Commission's principle objective. In our view, the proposal to remove those provisions would further erode the consumer focus of the regulatory regime.

Conversely, the proposal to remove the formal requirements for the EA to act reasonably carries an implication that the Authority may consider it necessary to act unreasonably from time-to-time, in the interests of pursuing its statutory objective. The explanation provided that this proposal is simply removing redundant wording overlooks the reality that ETNZ, along with many consumers, may well take comfort from those formal requirements and will be discomforted by their removal.

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Chair
ETNZ