

29 November 2016

Carl Hansen
Chief Executive
Electricity Authority
PO Box 10041
Wellington 6143
New Zealand

RE: Code review programme - 2016

Dear Carl,

This letter is in response to the Electricity Authority's 18 October 2016 consultation on the Review Programme of the Electricity Industry Participation Code that the Authority.

ENA members note that there are a range of proposed changes to the Code but the ENA does not intend to comment on all of them. One of the proposed changes quickly caught member's attention so it is the focus of this submission.

Reference number 2016-05: Removing references to the Authority acting reasonably

Members have read the stated reasons for the Authority wanting to remove all references to the requirement for it to act reasonably but they have serious concerns as to whether the Authority's approach is reasonable in this regard.

While we acknowledge that the Authority is a Crown Entity, members disagree that the Authority can remove the reference purely by virtue of it being a Crown Entity. Further, while we do not think its reasons for doing so are well founded, we are seriously concerned that the Authority would even consider this proposal.

The requirement for the Authority to act reasonably in relation to its powers and duties under the Code was included when the Code was drafted, presumably for good reasons. At that time the reasonableness principle existed in administrative law, but nevertheless, those drafting the Code saw fit to include references to the Authority acting in a reasonable manner throughout the Code (36 instances by our reckoning).

When considering what has changed since the time the Code was drafted that would warrant removal of the requirement of a reasonable approach by the Authority, we are struggling to find circumstances to support this change.

Members are therefore opposed to this Code change because:

- Without the reasonableness standard, any challenge would be left to administrative law, which would hold the decision to a different standard than one with express reference to reasonableness in regulation;
- It changes the status quo; the change will introduce significant uncertainty for industry participants and is not in the long-term benefits of consumers who will wear the effects of ambiguous decision-making;
- ENA members find it strange that the Authority considers it does not require rules to act reasonably while other crown entities do – such as the Commerce Commission.

We recommend the Authority not progress this proposal. It is neither “technical” nor “non-controversial” and should not have been included in the omnibus consultation paper seeking to make such amendments.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Graeme Peters', written in a cursive style.

Graeme Peters

Chief executive

Appendix A

Reference: 2016-05

Question 1: Do you agree with the Authority's problem definition? If not, why not?

No, ENA members do not agree with the Authority's view that there is a problem associated with having it act in a reasonable manner. The Authority should be required to act reasonably and having this requirement directly related to specific Code rules is important for a regulator to be seen as credible.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

No, members do not agree with the solution. The requirement to act reasonably should be left within the Code.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

This is not relevant given member's responses to Q1 and Q2 above.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

Members do not consider this change to be technical and non-controversial as claimed by the Authority – there is likely to be widespread opposition to this proposal. There needs to be a balance between the various objectives.