

29 November 2016

Submissions  
Electricity Authority  
PO Box 10041  
Wellington 6143

VECTOR LIMITED  
101 CARLTON GORE ROAD  
PO BOX 99882  
AUCKLAND 1149  
NEW ZEALAND  
+64 9 978 7788 / VECTOR.CO.NZ

By email: [submissions@ea.govt.nz](mailto:submissions@ea.govt.nz)

## **Vector submission on the Electricity Authority's Code Review Programme 2016**

### **Introduction**

1. This is Vector's submission on the Electricity Authority's *Code Review Programme 2016* consultation paper, dated 18 October 2016. No part of this submission is confidential.
2. Vector agrees the majority of proposals are "technical and non-controversial". However, we do not believe proposal "2016-05 Removing reference to the Authority acting reasonably" is technical, or non-controversial. Rather, we believe the proposal will change the standard of review applied to the exercise of the Authority's obligation or judgment.

### **Vector does not support the proposal to remove reference to the Authority acting reasonably**

3. Vector does not support the Authority's proposal to remove reference to the Authority acting reasonably. While we agree that as a Crown Entity the Authority must act in accordance with the principles of administrative law, removing "reasonableness" references in the Code may materially alter the standard to which the Authority must discharge an obligation or precondition to act. This is because without an express obligation to act reasonably the courts will apply the *Wednesbury* standard to the Authority's decision-making. A decision will only be *Wednesbury* unreasonable if it is so unreasonable that no reasonable person acting reasonably could have made it. This is a narrower test than merely showing that the decision was unreasonable.
4. Vector is not persuaded by this proposal and is concerned that the removal of the requirement to act reasonably will result in unintended consequences, such as lowering the standard to which the discharge of the Authority's obligations under the Code are measured. This is because the provisions in the Code that qualify obligations on, or the exercise of powers by, the Authority by the term "reasonable" or "reasonably" cannot easily be typified as being of the same standard. In particular, we consider there may be a critical distinction

between the Authority exercising its power stemming from an obligation to do something, and the Authority forming an opinion as a precondition to exercise a power or making a decision.

5. For example, clause 5 of Schedule 13.4 illustrates this distinction where the “Authority may require the provision of additional information” (which could only be tested by the Wednesbury standard). However, the clause goes on to say “and, if the Authority’s requirements are reasonable, the applicant must provide that information to the Authority”. This acknowledges that a more robust standard of review was considered appropriate. Deleting this express requirement of reasonableness changes the standard of review and prerequisite of the Authority.
6. The recent Judgment of Dobson J in *NZX Limited v Ralec Commodities Pty. Limited and ors.* [2016] NZHC 2742 (Judgment 15 November 2016) appears to support this view. In that case, the question of “reasonable opinion” was raised. Judge Dobson found that reasonableness required, “something more than the administrative law threshold”, and was to be “objectively gauged” (paragraph 325). By analogy, this case suggests that a public entity entrusted with public powers cannot exercise them for its own benefit and must be held to an objective standard.
7. Vector recommends the Authority refrain from progressing this Code change proposal. The current reasonableness requirements provides a clear and objective standard. If removed, any action to challenge the Authority’s decision or action would be in judicial review, which would apply a different standard.

#### **Other Crown Entities are required to act reasonably, the Authority should be no different**

8. Other Crown Entities are required to act reasonably under their governing legislation. We do not consider the Authority should be any different or held to a lesser standard than its peers. For example, below are some examples of legislation requiring Crown Entities to act reasonably:
  - *Commerce Act 1986*: requires the Commerce Commission to act reasonably with respect to the opportunity for persons to give their views (clause 52J, 52V), reasonable exercise of information-gathering (clause 53ZA), power to search (clause 98A)
  - *Accident Compensation Act 2001*: requires the Accident Compensation Corporation to impose reasonable requirements (clause 52), make every decision on reasonable grounds (clause 54), reasonably estimate levies (clause 173), reasonable ground for deciding dependency status (clause 75)

9. If you would like to contact Vector about anything in this submission, please contact me on 09 978 8284 or [Sally.Ma@vector.co.nz](mailto:Sally.Ma@vector.co.nz).

Yours sincerely  
For and on behalf of Vector Ltd



**Sally Ma**  
Senior Regulatory Specialist