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Attn Nick Crang / Danielle Consedine

By email

16 October 2019

**Proposed amendments to the Electricity Industry Participation Code:
implications of the Privacy Act 1993**

1. Thank you for your instructions on behalf of the Electricity Authority to provide advice on the Privacy Act implications of the proposed amendments to the Electricity Industry Participation Code and the EIEP Hub Terms and Conditions for Use. I understand that the amendments relate to the disclosure of customer information that is a necessary part of enabling customers to switch from one retailer to another. In broad terms, concerns have been raised:
 - 1.1. By agents on behalf of consumers, that retailers are raising unreasonable barriers to customers' access to this information and/or delaying the disclosure of information;
 - 1.2. By retailers concerned to ensure that they do not disclose information in breach of their obligations under the Privacy Act 1993.
2. I am instructed that the Authority's key priority is to ensure that there are as few barriers to switching as possible and that the switching process is as efficient as possible, in order to facilitate competition and reduce barriers to consumers taking advantage of new technologies (eg solar panels, electric vehicles) and services (eg demand response, energy management). At the same time, appropriate protections of customer data are important, and must be maintained.
3. In my opinion, the proposed amended clauses 11.32E – 11.32EE of the Code and the proposed amendments to the Hub Terms and Conditions (attached) will not conflict with retailers' obligations under the Privacy Act.

Does the Privacy Act apply?

4. While a retailer will owe obligations of confidence to all its customers, the Privacy Act obligations are only owed to individuals, that is natural persons (other than deceased natural persons). The Privacy Principles in s 6 relate only to 'personal information' which is defined in s 2 as "information about an identifiable individual".¹
5. I understand that the Authority has been approaching this issue on the basis that the Privacy Act applies to the type of information to which these clauses relate. Given that

¹ Definition of 'individual' in s 2: the Privacy Principles in s 6.

the Authority is proposing rules of general application I agree that it is appropriate for it and the retailers to take a cautious approach and proceed on the basis that all customer data is or may be personal information (if owned by individuals). However it should be noted that it is not firmly established that customer usage data of the kind at issue here does properly fall within the meaning of personal information. The majority of the Supreme Court in *R v Alford* expressed some doubt whether electricity usage data was within scope, given that such data relates to a place rather than a person.² Similar reservations have been expressed in the telecommunications sector in Australia.³

6. This advice presumes that the Privacy Act will apply to some at least of the information at issue.

The requirements of the Privacy Principles

7. The Privacy Principles in s 6 of the Privacy Act have a number of implications in the present context.

Principle 6 – the access right

8. First, there is the primary obligation on retailers under Privacy Principle 6 to comply with requests for access to information. Principle 6 is recognised as a key feature of the Act, specifically acknowledged in the long title. The access right is seen as fundamental to an individual's ability to exercise control over their own personal information, and to ensure that agencies holding their information do so in a manner that complies with the requirements of the Act.
9. The primary importance of Privacy Principle 6 is also apparent from its prominence in the Act itself. It is the only principle that is directly enforceable in the Courts (against public sector agencies),⁴ and Parts 4 and 5 of the Act set out a detailed regime prescribing the procedural obligations on agencies to whom a request is made, and specify the limited grounds for declining any such request. Contravention of Privacy Principle 6 is a 'per se' actionable interference with privacy under s 66, unlike breach of any other Principle, where a claimant must also show actual damage or significant injury to feelings to establish a claim.⁵
10. The Act requires the retailer to comply with a request regardless of the form in which it is made, and regardless of whether it refers to the Privacy Act or not.⁶ The retailer has a positive duty to provide assistance to individuals who wish to make an access request.⁷

² *R v Alford* [2017] NZSC 42, [2017] 1 NZLR 710 at [30], noting this does not fully align with the Privacy Commissioner's position set out in Case Note 251185 [2015] NZ ProvCmr 3: *Use of smart meters by utility companies*. See also the Privacy Commissioner's *Public Statement about bulk disclosure of smart meter data*, 26 May 2017 and the January 2017 advisory opinion AO001/2016 in relation to release of addresses in the context of the Fire Service. It is also well recognised that there are no 'bright line' rules around whether particular information falls within the definition of personal information, and the answer may vary depending on the facts of the situation: as discussed for example in *Taylor v Chief Executive of the Dept of Corrections* [2018] NZHRRT 35 at [75] – [123] (noting this is currently under appeal to the High Court on the issue of the meaning of 'personal information').

³ *Privacy Commissioner v Telstra Corporation Ltd* [2017] FCAFC 4, (2017) 249 FCR 24.

⁴ Section 11.

⁵ Contrast s 66(1) with s 66(2).

⁶ Section 30 restricts the grounds to refuse a request to those specified in the Act, and prohibits refusal on any other ground.

⁷ Section 38.

The retailer is obliged to make the information available to the customer in the way that the customer prefers, unless specified reasons not to do so exist.⁸

11. Retailers are required to respond to the access request "as soon as reasonably practicable", and at a maximum no later than 20 working days (with extensions permitted only in specified circumstances).⁹ If the request is not answered within the timeframe the agency is deemed to have refused the request, and even if the information is provided subsequently they remain liable under s 66 for breach of Principle 6.¹⁰
12. Breach of any of these obligations constitutes an interference with privacy under s 66(2).
13. In the present context, it is thus apparent that concerns about retailers raising unreasonable barriers to customer's access to their information raise issues of potential non-compliance by the retailers of their obligations under Privacy Principle 6 and s 30 of the Act.¹¹

Section 45

14. Section 45 sits within Part 5 and must accordingly be read in light of the other obligations outlined above, and in light of the purpose and objectives of Principle 6 and the Privacy Act overall.
15. Section 45 provides:

Precautions

Where an information privacy request is made pursuant to subclause (1)(b) of principle 6, the agency –

- (a) shall not give access to that information unless it is satisfied concerning the identity of the individual making the request; and
 - (b) shall ensure, by the adoption of appropriate procedures, that any information intended for an individual is received –
 - (i) only by that individual; or
 - (ii) where the request is made by an agent of the individual, only by the individual or his or her agent; and
 - (c) shall ensure that, where the request is made by an agent of the individual, the agent has the written authority of that individual to obtain the information or is otherwise properly authorised by that individual to obtain the information.
16. It is obvious from the scheme of the Act that s 45 may not be used to frustrate or hinder an access request. So, for example, an agency that had a policy of refusing to disclose personal information unless the request was made in a certain form or accompanied by certain identification requirements on the grounds that this was the only way the agency could be satisfied that the information would go to the correct individual would most likely be in breach of s 30 and Principle 6. Similarly, an agency that required an individual to go to unreasonable lengths to establish their identity or the authority of their agent before accepting a request would likely be in breach of their obligations.

⁸ Section 42.

⁹ Sections 40 and 41.

¹⁰ Section 66(3).

¹¹ Section 30 prohibits refusal of a request on any ground other than those specified.

17. Where there is also an implication that unreasonable barriers may be raised to promote the commercial interests of the retailer, and/or to inhibit the exercise of consumer market power by the customer, the potential contravention becomes more significant.¹²
18. It is also clear from the open-textured and principles-based nature of the legislation¹³ that the precautionary requirements on an agency will vary depending on the nature of the information (and in particular its level of sensitivity), and the nature of requestor and their authorised agent.¹⁴ What is reasonable precaution and what is an unjustifiable constraint on the exercise of an individual's right of access will depend on what is reasonable and proportionate in the circumstances.
19. So, for example, the level of assurance required before sending highly sensitive information to a recipient that the agency has had no prior dealings with may well be different from that required for the authorised transfer of more routine information between industry participants subject to accepted expectations of conduct,¹⁵ or the disclosure of information to a customer with which the agency has already had dealings.
20. In the present context, electricity consumption data is unlikely to be seen as having a high privacy interest or sensitivity. Nor is it an area where there is a likely risk of coerced authorisation or identity theft, and it is not information that gives access to a direct financial or other benefit.¹⁶
21. In these circumstances consumers would not expect to have to go to any extraordinary lengths to establish their identity to assure their retailer that it is safe to disclose this information. A retailer who receives a request from or on behalf of an existing customer will have customer details on file and can cross check, for example, a name against the property address held in their records. That should be sufficient to allow the retailer to be satisfied of the identity of the individual and, absent special circumstances, a retailer unlikely to be justified in requiring further verification of identity from the customer.¹⁷
22. Similar principles apply to establishing the authorisation of a customer's agent. Where the agent is a known and reputable member of the industry who routinely acts for consumers in this role, the risk of the request not being properly authorised is very low, and the consequences to the customer of a mistake are negligible: all that will have happened is that another member of the industry holds their power usage data. A consumer would reasonably expect their current retailer to accept that agent's assurance

¹² Noting that the Privacy Commissioner has already indicated a level of concern in this context: Privacy Commissioner's submission on the Multiple Trading Relationships Consultation Paper 28 February 2018.

¹³ Confirmed for example in *Taylor v Chief Executive of the Dept of Corrections* [2018] NZHRRT 35 at [91] and *Attorney-General v Dotcom* [2018] NZHC 2564, [2019] 2 NZLR 277 at [8]

¹⁴ Confirmed for example by the Privacy Commissioner at https://www.privacy.org.nz/further-resources/knowledge-base/view/221?t=179306_250218. See also more generally the NZ Govt *Evidence of Identity Standard* (2009).

¹⁵ Including the Code itself, and the Hub terms and conditions.

¹⁶ Suggestions that half hour data information could be misused by criminals who may, for example, detect patterns of behavior to inform them when to break into a property are far-fetched: the same information would be available far more readily and in more current form from observation of the property. I understand that the only potential 'misuse' of the information identified is if an unauthorized recipient used the information to undertake unsolicited marketing through door knocking or direct mail (telephone marketing would require additional information that is not included in this data). That appears to be an unlikely business model in this industry, and would presumably be quickly picked up as an abusive practice by other industry members.

¹⁷ Contrast for example the release of sensitive information in the scenarios discussed by the Privacy Commissioner at <https://www.privacy.org.nz/blog/confirming-a-requesters-identity/>

that the request is authorised by the customer, or at the most view a basic electronic or signature confirmation.

23. Requests from an unknown agent could justify a retailer asking to see a signed or electronic authorisation, but again given that the customer name is known, and the retailer can cross check their identity against their own records of the address of the property, absent unusual circumstances this should be sufficient.

Section 115 and Principle 11

24. The importance of s 45 not being applied to have the effect of hindering access to personal information is confirmed by section 115. In the usual course, an agency who makes an unauthorised disclosure of personal information will be in breach of Privacy Principle 11, unless they can show that they believed on reasonable grounds that their actions fell within one of the listed exceptions. An agency in breach of Privacy Principle 11 is liable under s 66 for interference with the individual's privacy, and liable for damages under s 88.
25. Where however the unauthorised disclosure is in response to an access request under Privacy Principle 6, the agency has an effective immunity under s 115, provided that they acted in good faith.¹⁸ The High Court has confirmed that this covers conduct that is honest and without ulterior motive, even if negligent.¹⁹
26. This means that the Act, while requiring a retailer to exercise due care under s 45, is also weighted to ensuring that they are not so risk adverse that they impose unnecessary barriers and hinder the right of access to personal information.

The proposed provisions of the Code

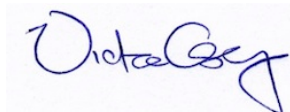
27. The proposed amended clauses 11.32E – 11.32EE (attached) are consistent with the principles outlined above. In particular they:
- 27.1. Require the retailer to grant the request unless certain grounds apply. Those grounds relate to identity or authorisation, and the more general 'catch-all' where disclosure is considered to be in breach of the Privacy Act. For all these grounds the requirement is that there is a 'belief on reasonable grounds' which is consistent with the overall obligation to meet the request under Privacy Principle 6.
- 27.2. Set out a 'safe harbour' form of request and authorisation in schedule 11.6, which brings with it tighter timeframes for compliance. The level of assurance of authorisation provided for in schedule 11.6 should be sufficient for a retailer to rely on in terms of s 45, in the absence of special circumstances.
- 27.3. Require retailers to pro-actively take steps to seek more information where any concerns with the request may be able to be remedied. This is consistent with the obligation to provide assistance under s 38.

¹⁸ The operation of s 115 in this context was confirmed by the High Court in *Ilich v Accident Rehabilitation and Compensation Insurance Corporation* [2000] 1 NZLR 380 (proceedings before the Human Rights Review Tribunal under the Privacy Act being classed as 'civil' proceedings in s 82).

¹⁹ At p 383.

- 27.4. Oblige agents who are participants to obtain and retain a record of the customer's authorisation. Non-participant agents who are subject to the Hub Terms and Conditions will be subject to the same obligations. Retailers receiving a request from such agents would be justified in relying on this obligation having been complied with as sufficient to meet their own obligations under s 45, absent special circumstances.
- 27.5. Prohibits the retailer from refusing the request from an agent on behalf of a consumer on the grounds that the request does not follow the retailer's preferred format. This is consistent with Privacy Principle 6 and s 30.
28. The proposed amendments to the Hub Terms and Conditions impose specific obligations on users to have proper authorisations in place before making a request for information, as a condition of use of the Hub. They go further to include this as an enforceable warranty to be relied on by the retailer receiving the request. More generally, they require users to be compliant with the provisions of the Privacy Act in their treatment of all personal information, providing a further level of assurance for those dealing with requests via this source.
29. In my view, the proposed amended provisions will not place retailers in breach of their obligations under the Privacy Act. I would also make the further observation that once these provisions are in place, retailers who require more onerous procedures from customers or agents are (absent special circumstances) at risk of contravening their obligations under Privacy Principle 6 and s 30 of the Privacy Act. This risk would be particularly high in relation to a request received via the Hub.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Victoria Casey', is written over a light blue rectangular background.

Victoria Casey QC

Proposed Revised Code Amendment relating to ACCES Project

The Electricity Authority is, subject to the further consultation steps it is taking and approval by the Authority Board, proposing the following revised amendments to the Code (text to be deleted is marked-up in strikethrough and new text to be added is underlined):

1. To amend clause 11.32E as marked-up:

11.32E Agents

- (1) If a **consumer** authorises an agent to request information under clause 11.32B on behalf of the **consumer**, a **retailer** must, if the agent has the written authority of the **consumer** to obtain the information or is otherwise properly authorised by that **consumer** to obtain the information, deal with any request from the agent for information about the **consumer** under clause 11.32B in accordance with:
 - (a) clauses 11.32EA and 11.32EB;
 - (b) if a request includes a statement from the agent that the agent has obtained, or the request is accompanied by, a written authority from the **consumer** in the form and containing the information required by Schedule 11.6, and the request is made through the **Registry** or the **EIEP Transfer Hub**, clause 11.32ED; and
 - (d) the Privacy Act 1993, where applicable.

2. To insert the following new clauses after clause 11.32E:

11.32EA Retailer actions on receipt of requests from agents

- (1) A **retailer**, after receiving a request under clause 11.32B from an agent on behalf of a **consumer**, must:
 - (a) make a decision on the request, and advise the agent of that decision, as soon as reasonably practicable; and
 - (b) provide the information requested within the timeframe required by clause 11.32B, unless there are grounds for refusing the request under clause 11.32EB.
- (2) If the **retailer** considers, in accordance with subclause (1), that there are grounds for refusing the request, the **retailer** must, before refusing the request:
 - (a) consider whether any further information could reasonably be provided by the agent to satisfy the **retailer**; and
 - (b) request any such further information from the agent, specifying the further information required in detail.
- (3) If further information is provided under subclause (2)(b), the **retailer** upon receiving the further information must:
 - (a) make a final decision on the request, and advise the agent of that decision, as soon as reasonably practicable; and
 - (b) provide the information requested within the timeframe required by clause 11.32B as calculated from the time the **retailer** receives the further information, unless there are grounds for refusing the request under clause 11.32EB.
- (4) If a **retailer** decides to refuse a request, in advising the agent of that decision, the **retailer** must provide the agent with the reasons (in detail) for the refusal.

- (5) If a **retailer** decides to grant a request in full, the **retailer** is able to meet the obligation to advise the agent of that decision by providing the information to the agent in accordance with subclauses (1)(b) and (3)(b).
- (5) The obligations in subclauses (1)(a) and (3)(a) do not detract from the obligations in subclauses (1)(b) and (3)(b), respectively.

11.32EB Decisions on requests

- (1) A **retailer** that receives a request under clause 11.32B from an agent on behalf of a **consumer**, must grant the request and provide the information unless:
- (a) the **retailer** believes on reasonable grounds that the **consumer** has not authorised the request;
- (b) the **retailer** believes on reasonable grounds that complying with the request would otherwise cause the **retailer** to breach its obligations under the Privacy Act (where it applies); or
- (c) the **retailer** believes on reasonable grounds that:
- (i) if the request is accompanied by a written authority in the form and containing the information required by Schedule 11.6 or the agent subsequently provides a copy of such an authority, any of the information required by Schedule 11.6 is incorrect in a material way, such that the **retailer** cannot be satisfied of the matters in paragraphs (a) or (b) or is unable to identify the **consumer** the request relates to; or
- (ii) in any other situation, the **retailer** is unable to identify the **consumer** the request relates to.
- (2) A **retailer** may not refuse a request under clause 11.32B from an agent on behalf of a **consumer** on the basis that the request or any authorisation relating to the request is not in a particular form.

11.32EC Requirements for agents who are participants

- (1) This clause applies to each **participant** who wishes to make or who makes a request for information to a **retailer** under clause 11.32B as an agent on behalf of a **consumer**.
- (2) Before making the request, the **participant** must obtain an authorisation from the **consumer** for the **participant** to request the transfer of the information to the agent on behalf of the **consumer**.
- (3) The **participant** must:
- (a) retain a copy of the authorisation under subclause (2) or otherwise retain evidence that the consumer has provided the authorisation required by subclause (2); and
- (b) provide a copy of the authorisation or other evidence to the **retailer**, if requested by the **retailer**.

11.32ED Additional requirements on retailers for Authorisations in prescribed form and through the Registry or Hub

- (1) This clause applies where an agent requests information from a **retailer** on behalf of a **consumer** under clause 11.32B and:

- (a) subject to clause 11.32EE, either:
 - (i) the request includes a statement from the agent that the agent has obtained a written authority from the **consumer** in the form and containing the information required by Schedule 11.6 (being an authority that remains in force at the date the request is made); or
 - (ii) the agent separately provides a written authority in the form and containing the information required by Schedule 11.6 or a copy of such a written authority (being an authority that remains in force at the date the request is made); and
- (b) the request is made through the **Registry** or the **EIEP Transfer Hub**.
- (2) If this clause applies:
 - (a) the **retailer** must use all reasonable endeavours to take the steps in clauses 11.32EA(1)(a) and 11.32EA(2), as applicable, within 2 business days of the later of:
 - (i) receiving the request; or
 - (ii) receiving a copy of a written authority under subparagraph (1)(a)(ii); and
 - (b) where clause 11.32A(3) applies, the **retailer** must use all reasonable endeavours, within 2 business days of receiving further information from the agent, to take the steps in clause 11.32EA(3)(a).
- (3) Where clause 11.32EA(2) applies, the request may include a request that the agent provide a copy of the written authority referred to in subclause (1)(a), if not provided with the request.
- (4) If a request is made through the **Registry** or the **EIEP Transfer Hub**, but the **retailer** believes on reasonable grounds that the request does not meet the requirements of any **EIEP**, subclauses (2) and (3) do not apply but, for the avoidance of doubt, the **Retailer** must still comply with clauses 11.32B, 11.32EB and 11.32EC.

11.32EE Requirements for written authorities under Schedule 11.6

- (1) Each written authority, for the purposes of clause 11.32ED, must include or be accompanied by:
 - (a) if the **consumer** is an individual (being a natural person), an **electronic signature** or physical signature of the **consumer** or of a person on behalf of the **consumer** (in which case, evidence of that person's authority to sign on behalf of the **consumer** is required) or other evidence that the consumer has approved the authority; or
 - (b) if the consumer is not an individual (not being a natural person), an electronic signature or physical signature of an authorised representative of the **consumer** or other evidence that the **consumer** has approved the authority.
- (2) Each **electronic signature**, for the purposes of subclause (1), must meet the requirements of sections 226 and 228 of the Contract and Commercial Law Act 2017.

11.32EF Revocation of authority

- (1) If a **retailer** receives notification from a **consumer** that the **consumer** has revoked an authority, the **retailer** must notify the agent within 2 **business days** that the authority is revoked.
- (2) If an agent that is a **participant** receives notification from a **consumer** that the **consumer** has revoked the agent's authority, the agent must notify the **retailer** within 2 **business days** that the authority is revoked.
3. To insert the following new schedule after Schedule 11.5:

Schedule 11.6

Forms for authorisation of an Agent to request consumption information

1. Form for authorisation by an individual (being a natural person)

Consumer: [Consumer full name]

Property: [property address]

Current customer number: [customer number]

Installation Control Points (ICP(s)) Identifier(s): [List if known and relevant]

Current Retailer: [name of current retailer]

Agent: [full name of Agent and contact details]

Period of authority: [enter period of authorisation to Agent]

I (being the Consumer named above)[confirm that I own or reside at the Property identified above or otherwise am responsible for the consumption of electricity at that Property.

I confirm that I am a customer of the Current Retailer identified above in relation to the Property and (if relevant) the ICP(s) identified above.

I authorise:

- (a) the Agent identified above to request, receive and hold information on my behalf about electricity consumption for the Property) or the ICPs; and
- (b) the current Retailer to transfer information on my behalf about electricity consumption for the Property or ICP(s) to the Agent.

[Signature/electronic signature of Consumer or of a person on behalf of the Consumer (in which case, evidence of that person's authority to sign on behalf of the Consumer is required) or other evidence of Consumer's agreement]

2. Form for authorisation by a non-individual (not being a natural person)

Consumer: [Consumer full name]

Authorised Representative of Consumer: [Full name and title/position with Consumer]

Property: [property address]

Current customer number: [customer number]

Installation Control Points (ICP(s)) Identifier(s): [List if known and relevant]

Current Retailer: [name of current retailer]

Agent: [full name of Agent and contact details]

Period of authority: [enter period of authorisation to Agent]

The Consumer identified above owns or occupies the Property identified above or otherwise is responsible for the consumption of electricity at the Property.

The Consumer is a customer of the Current Retailer identified above in relation to the Property and, if relevant, the ICP(s) identified above.

The Consumer authorises:

- (a) the Agent identified above to request, receive and hold information on the Consumer's behalf about electricity consumption for the Property or the ICP(s); and
- (b) the Current Retailer to transfer information on the Consumer's behalf about electricity consumption for the Property or ICP(s) to the Agent.

In signing this form as the Authorised Representative of the Consumer, I warrant that I am authorised to sign this form and agree to the matters above on behalf of the Consumer.

[Signature/electronic signature of Authorised Representative]

4. To insert the following new definitions in clause 1(1) of the Code, in alphabetical order:

electronic signature has the meaning given to it in section 209 of the Contract and Commercial Law Act 2017.

EIEP Transfer Hub means the web portal operated by the **Authority** that is used to request and transfer, using the EIEPs, **consumption information** of a **consumer** from a **retailer**.

Appendix A Revised EIEP Hub Terms and Conditions for Use

1. THESE TERMS OF USE

1.1 Applicability: By using the EIEP Transfer Hub, you accept these Terms of Use and are bound by them. If you do not accept these Terms of Use, you must not use the Hub. The Hub and these Terms of Use are governed by the laws of New Zealand and by using the Hub you submit to the exclusive jurisdiction of the New Zealand courts.

1.2 Definitions: In these Terms of Use:

"We", "us", and "our" are references to the Electricity Authority.

"EIEP Transfer Hub" or "Hub" means the web portal that is used to request and transfer consumer consumption information from a retailer using our Electricity Information Exchange Protocols.

"Party" means an industry participant (as defined in the Electricity Industry Act 2010 or a non-participant user of the Hub.

"You" and "your" are references to you.

1.3 Amendments: We may amend these Terms of Use at any time. Amendments will be effective immediately when posted on our website. You are responsible for ensuring you are familiar with the latest Terms of Use. By continuing to use the Hub, you agree to be bound by the Terms of Use as amended. You can always find the current Terms of Use here on our website.

2. ACCEPTABLE USE OF THE HUB

2.1 You may not use the Hub unless you have submitted an application in the form specified by us and we have accepted your application. Existing users are required to apply for continuing use within 3 months of this clause coming into effect or their use of the Hub will be terminated. We may require you to provide information with that application form to prove that you are able to meet the requirements of these Terms of Use, and are a fit and proper person to manage data.

2.2 If you use the Hub to request or transfer consumer consumption information from a Party, you must use the regulated Electricity Information Exchange Protocols (EIEPs) 13A, 13B or 13C on the EIEP page of our website. If you are not an industry participant (as defined in the Electricity Industry Act 2010), you must comply with the obligations under the EIEPs on parties who request information as a contractual obligation under these Terms of Use despite the fact that the Electricity Industry Participation Code 2010, which the EIEPs are issued under, does not apply to non-participants.

2.3 You may only use the information you receive using the Hub for the benefit of the consumer to whom that information relates.

2.4 You must:

- (a) before requesting the transfer of any consumption information relating to a consumer, have an authorisation from the consumer for:
 - (i) you to request the transfer of the information on behalf of the consumer;
 - (ii) you to hold the information;
 - (iii) the Authority and any contractor to the Authority to hold any information relating to the consumer for the purposes of operating the Hub.
- (b) if you are a participant, as defined in the Electricity Industry Participation Code 2010, ensure that the authorisation under paragraph (a)(i) complies with all relevant parts of the Electricity Industry Participation Code 2010;
- (c) retain a copy of the authorisation under paragraph (a)(i) or otherwise hold evidence that the consumer has so authorised you; and
- (d) provide a copy of the authorisation or and any other evidence under sub-paragraph (c) to the Party you have requested the information from, if required by that Party.

2.5 In making a request, you warrant to the Authority and the Party to whom a request is made through the Hub that you hold the authority required by clause 2.4. This warranty may be enforced by the other Party under section 12 of the Contract and Commercial Law Act 2017.

2.6 If requested by the person to whom any request for consumer information is made, you must provide to the requester a copy of the authorisation under clause 2.4(a)(i) or other evidence that the consumer has so authorised you.

2.7 You must use the unique participant identifier or a four character identifier provided by us when requesting or transferring consumer consumption information.

2.8 You must use the username provided by us to use the Hub, and must safeguard the password from unauthorised access or use.

2.9 You must protect the integrity and security of the Hub, and not do anything that will damage, harm, or compromise the integrity or security of the Hub or any connected network or system, or impede the use of the Hub by other users.

2.10 You agree to use the Hub in a manner that complies with all applicable laws, regulations and these Terms of Use and that does not infringe our rights, or the rights of anyone else, or restricts or inhibits their use and enjoyment of the Hub.

2.11 You agree not to:

- (a) damage or harm the Hub, or any underlying or connected network or system;

- (b) use a harvesting bot, robot, spider, scraper, or other unauthorised automated means to access the Hub or content featured on it for any purpose;
- (c) introduce any viruses, content or code to the Hub which is technologically harmful;
- (d) do anything that could disable, overburden, or impair the proper working of the Hub, such as a denial of service attack;
- (e) upload or post any content on the Hub (or use the Hub to transmit any communication) which is in our view illegal, obscene, defamatory, threatening, infringing of intellectual property rights, invasive of privacy or otherwise objectionable;
- (f) send or otherwise post unauthorised commercial communications (such as spam) on the Hub;
- (g) engage in unlawful multi-level marketing, such as a pyramid scheme on the Hub;
- (h) solicit log in information or access an account belonging to someone else;
- (i) collect more consumption data than is reasonably needed in order to provide goods or services consented to by the consumer.
- (j) use the collected data in a way not consented by the consumer, or in order to provide goods and services that the consumer has not agreed to.
- (k) bully, intimidate, or harass any user of the Hub, or attempt to do any of the above.

2.12 Specific prohibitions: Without limiting clause 2.7, you agree not to:

- (a) use the Hub to do anything unlawful, misleading, malicious, or discriminatory; or
- (b) facilitate or encourage any violations of these Terms of Use.

2.13 We may temporarily suspend or reduce full use of the Hub without notice to you if it is necessary to maintain the Hub or protect the integrity of the Hub.

2.14 You agree to:

- (a) have an internal dispute resolution process in place in regards to consumption data received via the Hub;
- (b) be a member of Utilities Disputes;
- (c) have adequate insurance or a comparable guarantee to compensate consumers for loss that may occur in light of the risk arising from the collection, storage, use or disclosure of consumption data received via the Hub;
- (d) have adequate practices, procedures, and systems in place to manage consumption data and information security risks received via the Hub, including in

respect of any decision to use a third party to provide services to you in respect of any such information and in the provision of those services by the third party;

- (e) comply with the Privacy Act 1993 in the use of the Hub and ensure that the practices, procedures and systems under paragraph (d) comply with the Privacy Act;
- (f) advise us immediately if any data breach occurs in respect of information obtained by you through the Hub and the steps you are taking to mitigate the effects of that breach and avoid it from occurring again, and keep us informed of any developments in respect of such a data breach; and
- (g) notify us immediately, if there are material changes in circumstances that may affect your ability to comply with these Terms of Use.

3. PROVISION OF INFORMATION AND AUDITING

3.1 We have the right to:

- (a) request evidence from you in relation to any matter relating to these Terms of Use;
- (b) require you to provide us with access to your records, systems and premises in order to carry out an audit of your compliance with these Terms of Use.

3.2 You must comply with any request under clause 3.1 within the time reasonably specified by us.

3.3 We reserve the right to log details of each request under EIEP 13C sent by you and every transfer made by you under EIEP 13A, and 13B via the EIEP hub.

4. LIST OF USERS OF HUB

4.1 Your name will be published on our website whilst you have access to the Hub.

5. TERMINATION OF USE

5.1 If we consider that you have breached these Terms of Use, we may suspend or terminate your access to the Hub immediately by ~~giving~~ advising you ~~notice~~ in writing or by electronic means.

6. LIABILITY AND INDEMNITY

6.1 To the maximum extent permitted by law, we disclaim and exclude all implied conditions, guarantees and warranties and ~~accept no responsibility or liability whatsoever for any~~ are not responsible or liable for any loss, costs or expenses incurred by you, whether such liability arises in contract, tort (including negligence), equity, breach of statutory duty or otherwise (including any losses, costs or expenses resulting from or in connection with your use of, or the inability to use, the Hub or any information provided to you through the Hub (including in relation to the accuracy of the information transferred to you through the

Hub and any conclusions or assumptions derived from the information provided transferred to you through the Hub).

6.2 You agree that:

- (a) we will not be liable for any direct, indirect, incidental, special, consequential or exemplary loss or damages, including but not limited to, damages for loss of profits, goodwill, use, data or other intangible losses, under or in connection with these Terms of Use or resulting from your use of, or the inability to use, the Hub (including in relation to the accuracy of the information transferred to you through the Hub and any conclusions or assumptions derived from the information provided through the Hub), and for the avoidance of doubt, including under any claim in negligence; and
- (b) without prejudice to clauses 6.1 or paragraph 4.1 or 4.2(a) of this clause and to the extent our liability to you is not regulated under the Electricity Industry Participation Code 2010, our total liability under or in connection with these ~~terms and conditions~~ Terms of Use or resulting from your use of, or the inability to use, the Hub (including in relation to the accuracy of the information transferred to you through the Hub and any conclusions or assumptions derived from the information provided through the Hub), will not exceed NZ\$100 in any circumstances, and for the avoidance of doubt, including under any claim in negligence.

6.3 You agree to indemnify us for any loss to us arising from your use of the Hub, including any indirect, incidental, special, consequential or exemplary loss or damages (including but not limited to, damages for loss of profits, goodwill, use, data or other intangible losses). This indemnity applies even if you have not you have breached these Terms of Use, acted negligently, in bad faith or unlawfully. For the avoidance of doubt, this indemnity does not apply to the normal costs of operating the Hub.