

Guidelines on Part 3 of the Electricity Industry Act 2010

Version 3.1

19 January 2016

Version control

Version	Date amended	Comments
1.0	1 Nov 2010	New role introduced by Electricity Industry Act.
2.0	3 May 2012	Updated process and appendix registers.
3.0	6 July 2012	Process updated, appendix registers removed and linked to documents on the Authority website.
3.1	19 January 2016	Corrections to links to documents on the Authority website.

Overview

These guidelines are intended to assist participants who may be affected by Part 3 of the Electricity Industry Act 2010 by:

1. summarising the key rules that participants must comply with in Part 3; and
2. describing the Electricity Authority's responsibilities under Part 3.

These guidelines are not a substitute for legal advice and, given the complex nature and scope of Part 3, any parties to whom Part 3 is likely to apply should seek specialist legal advice.

Glossary of abbreviations and terms

Authority	Electricity Authority
Act	Electricity Industry Act 2010
Part 3	Part 3 of the Electricity Industry Act 2010

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Introduction

1. The Electricity Authority is required to investigate and enforce compliance with Part 3 of the Electricity Industry Act 2010. Part 3 relates to the separation of distribution from certain generation and retailing activities.
2. The purpose of Part 3 is to promote competition in the electricity industry:
 - (a) by prohibiting a person who is involved in a distributor from being involved in a generator where that may create incentives and opportunities to inhibit competition in the electricity industry; and
 - (b) by restricting relationships between a distributor and a generator or a retailer, where those relationships may not otherwise be at arm's-length.
3. Implicit in the purpose outlined above is that the involvements to which Part 3 apply, and the relationships between parties that are involved, may inhibit competition in the electricity industry.
4. The solution, as implemented in Part 3 of the Act, is to require ownership separation, corporate separation, the implementation of other safeguards such as arm's-length rules and other requirements relating to use-of-system agreements, transfer of customers, and the payment of rebates or dividends.
5. The term "involved in" has the specific meaning given to it by section 74. To assist in determining when an interest or involvement will give rise to concerns under Part 3 of the Act, Schedule 2 of the Act lists certain types of interests and involvements that are excluded from the application of the separation rules in Part 3. Schedule 2 gives an indication of the type of involvements that are seen to give rise to the possibility of inhibiting competition.
6. Schedule 2 also lists some involvements that are not taken into account. Those involvements include interests in distributors and generators and other interests that arise only out of financial relationships, or other benign arrangements, such as an industry service provider that is only involved because of its position as a service provider.

Summary of rules applying to participants under Part 3

7. Part 3 contains three sets of rules, which deal with different levels and/or types of involvement in distributors (on the one hand) and generators or retailers (on the other). Set out below is a general summary of the relevant rules.
8. Appendix A includes a more detailed summary.

Ownership separation

9. The strictest rules in Part 3 relate to ownership separation (section 75).
10. A person involved in a distributor must not be involved in one or more generators that have a total capacity of more than 250MW that is generated by one or more generating plants that are directly connected to the national grid.

Corporate separation and arm's-length rules

11. The next set of rules relates to corporate separation and arm's-length rules for distributors and connected generators and connected retailers (section 76).
12. Section 76 defines "connected generator" and "connected retailer" for the purposes of that section as follows:
 - (a) a **connected generator** is a generator in respect of which the distributor, or any other person involved in the distributor, is involved, and that has a total capacity of more than 50 MW of generation that is connected to any of the distributor's networks; and
 - (b) a **connected retailer** is a retailer in respect of which the distributor, or any other person involved in the distributor, is involved, and that is involved in retailing more than 75 GWh of electricity in a financial year to customers who are connected to any of the distributor's networks.

Corporate separation

13. A person who carries on the business of distribution must carry on that business in a different company from the company that carries on the business of a connected generator or connected retailer.
14. That is, it is possible for a person to be in the business of distribution as well as generation or retailing. However, the generation or retailing business must be carried on in a business that is separate from the distribution business.

Arm's-length rules

15. Every person who is involved in a distributor and every person who is involved in a connected generator or connected retailer must comply with the arm's-length rules in schedule 3 of the Act.
16. Those rules require that parties that are involved with each other and transact with each other act as if they were related only by the transaction, act independently, and act in their own best interests.

Certification and publication

17. Each director of a business to which the arm's-length rules apply must provide the Authority, no later than 31 March in each year, with a statement confirming whether or not the director has complied with all of the arm's-length rules during the preceding calendar year (section 89).
18. The directors and the Authority must ensure that the statement is publicised.
19. The Authority has published on its website a template for the statement required by section 89.¹

Other rules – transparency and monitoring

20. The other rules in Part 3 are set out in sections 77 to 79, and are directed at ensuring transparency in the electricity market and enabling the Authority to monitor compliance with Part 3.
21. The rules apply when a distributor has a "connected generator" or a "connected retailer". These terms are defined for the purposes of sections 77 to 79 as follows:
 - (a) a **connected generator** is a generator in respect of which the distributor, or any other person involved in the distributor, is involved, and that has a total capacity of more than 10 MW of generation that is connected to any of the distributor's networks;
 - (b) a **connected retailer** is a retailer in respect of which the distributor, or any other person involved in the distributor, is involved, and that is involved in retailing more than 5 GWh of electricity on the distributor's local network in a financial year to customers who are connected to that network.
22. The rules impose obligations in relation to use-of-systems agreements, transfers, and rebates, as follows:
 - (a) *Section 77:* every director of a distributor in respect of which there is a connected retailer or connected generator must ensure that the distribution business has a comprehensive written use-of-systems agreement between the distributor and

¹ The template for the provision of statement's required under section 89 of the Act is available at: <http://www.ea.govt.nz/code-and-compliance/act-and-regulations/part-3/section-89/>.

the connected retailer or connected generator, and that the terms of that agreement meet certain requirements.

- (b) *Section 78*: a distributor and a connected generator or a connected retailer (and any other person involved in any one of those three entities) must not pay, or offer to pay, any consideration to a retailer in respect of the transfer to a connected retailer of any retail customers who are connected to the distributor's networks.
- (c) *Section 79*: if a distributor has a connected retailer, specified persons (including a director of the distributor, a trustee of a customer trust or community trust involved in the distributor, and every director of a customer co-operative involved in the distributor and connected retailer) must ensure that any rebates or dividends or similar payments made by the distributor do not discriminate between customers of the connected retailer and customers of other retailers where those customers are connected to the distributor's networks.

Certification and publication

- 23. Section 77 requires a distributor to publicise, and to provide to the Authority:
 - (a) each use-of-systems agreement the distributor has with each connected retailer or connected generator (as the case may be); and
 - (b) a certificate in respect of each preceding calendar year regarding the terms of the use-of-systems agreement and compliance with section 77.
- 24. The certificate template form that must be publicised and signed by the directors is available on the [Authority's website](#).
- 25. Section 88 also requires that each director of a distributor referred to in section 77(1) must ensure that the distributor discloses to the Authority the quantity of electricity sold each financial year by connected retailers to customers who are connected to its local network.
- 26. The disclosure must be made in a statement to the Authority within 2 months after the end of the financial year.
- 27. The statement must be in the form prescribed by the Authority. The Authority has prescribed a form as referred to in section 88(3). The form is available on the [Authority's website](#).
- 28. The statement must be publicised by the Authority and by the distributor.

Responsibilities of the Authority under Part 3

29. The Authority's responsibilities under Part 3 include:
- (a) receiving use-of-systems agreements and director's certificates regarding use-of-systems agreements;
 - (b) receiving and publicising electricity quantity disclosure statements;
 - (c) receiving and publicising statements of compliance with the arm's-length rules;
 - (d) processing applications for exemptions; and
 - (e) investigating and enforcing compliance with Part 3.²
30. The matters referred to in (a) to (c) above were discussed in the preceding section regarding the rules that apply to participants. Set out below is a summary of the matters referred to in (d) and (e).

Exemptions (Section 90)

31. Section 90(1) of the Act provides that the Authority may, by notice in the Gazette, exempt:
- (a) any business or involvement from the application of Part 3; or
 - (b) any person from compliance with any provisions of Part 3.
32. Section 90 recognises that the policy that Part 3 is intended to implement will not always be compromised by a person's involvement in a distributor on the one hand, and a generator or retailer on the other.
33. However, in respect of interests and involvements that are to be counted, section 90(2) provides that the Authority may grant an exemption only if it is satisfied that:
- (a) the exemption will either promote, or not inhibit, competition in the electricity industry; and
 - (b) the exemption will not permit an involvement in a distributor and a generator or retailer that may create incentives and opportunities to inhibit competition in the electricity industry.
34. The Authority may grant an exemption on any terms and conditions that it reasonably considers are necessary to give effect to the purpose of Part 3. As a general principle, the Authority's view is that any exemption should be the minimum necessary to permit an involvement that would be prohibited by Part 3, but that otherwise the application of Part 3 should be preserved.

² Section 16(1)(e) of the Act.

Section 90(1)(a)

35. Section 90(1)(a) of the Act provides that the Authority may exempt "any business or involvement" from the application of Part 3. That is, the exemption relates to a business, generally, or an involvement, generally.
36. The effect of an exemption under section 90(1)(a) is that the business or involvement is not taken into account in determining whether any of the provisions in Part 3 apply to a business or to a person (such as a director of a distributor): clause 4(1)(a) of Schedule 2 of the Act provides that no account is to be taken of a person's business or involvement if the business or involvement is exempted under section 90.
37. Because the involvement is not taken into account for the purposes of determining whether the Part 3 obligations apply to other persons (such as directors of a distributor with a connected generator or connected retailer, as referred to in section 77 of the Act), the consequence of an exemption being granted in respect of an involvement (or business) in section 90(1)(a) is that other persons may obtain the benefit of the exemption in terms of being excused from complying with particular provisions in Part 3.

Section 90(1)(b)

38. Section 90(1)(b) provides that the Authority may exempt any person from compliance with any provisions of Part 3.
39. The effect of such an exemption is that the person to whom the exemption applies is not required to comply with the relevant provisions of Part 3.
40. Clause 4(1) of Schedule 2 of the Act provides that no account is to be taken, for the purposes of Part 3, of a person's business or involvement if the business or involvement is exempted by the Authority under "section 90". That is, clause 4(1) does not, on its face, differentiate between an exemption under section 90(1)(a) and an exemption under section 90(1)(b).
41. However clause 4(1) clearly refers to an exemption of "a business or involvement". Only section 90(1)(a) provides for the exemption of a business or involvement. In contrast, section 90(1)(b) refers to an exemption for a person "from compliance with any provisions of" Part 3.
42. The Authority's view is that, if a person is exempted under section 90(1)(b) of the Act from compliance with certain provisions, his or her involvement must still be taken into account in determining whether the provisions of Part 3 of the Act apply to other persons, businesses, or involvements.

Process for exemptions

43. Applicants must provide sufficient and specific information to enable the Authority to understand the nature of the exemption sought and the reasons why an exemption should be granted.

44. Guidance for exemption applications can be found on the [Authority's website](#). The quality and clarity of information provided will be a factor in the time taken by the Authority to consider the application.
45. The Authority encourages participants to inform the Authority as early as possible about a potential application for exemption. Participants are also welcome to discuss a proposed exemption. Such discussions can speed up the process for determining an exemption.
46. The Authority will follow the following process when it receives an application for an exemption:
 - (a) register the application, including publishing the application on the Authority's website. (The Authority will not publish confidential information);
 - (b) investigate the application (which may include interviewing and seeking comment from relevant parties);
 - (c) determine to grant, or decline to grant, an exemption.
47. Before making a decision, the Authority will request the applicant to provide a declaration regarding the information provided by the applicant to the Authority.
48. In most cases, the Authority may also publish a draft decision, including any proposed conditions, and seek comments on the draft, prior to making a final decision.
49. The Authority will provide written reasons for its decisions. When an exemption is granted, the Authority will also, as required by section 90(1), publish notice of the exemption in the *Gazette*.

Information gathering and other powers

50. The Authority has powers to gather information from participants for the purpose of monitoring compliance with Part 3.³
51. The Authority has the power to require an industry participant to:
 - (a) provide information, papers, recording, and documents that are in the possession or under the control of the industry participant;
 - (b) permit its officers or employees to be interviewed;
 - (c) give all other assistance that may be reasonable and necessary to enable the Authority to carry out its functions and exercise its powers.
52. The processes that the Authority will apply in respect of those information gathering powers are described in the Authority's Guidelines on Information Gathering Powers for Compliance Purposes.

³ Section 45(a)(i) and 46 of the Act.

53. In exercising its powers under Part 3, the Authority also has the powers given to the Commerce Commission in Part 7 of the Commerce Act 1986.⁴ These powers include the power to:
- (a) require, by notice, a person to:
 - (i) provide any information or class of information specified in the notice;
 - (ii) produce any document or class of document specified in the notice;
 - (iii) appear before the Authority to give evidence and produce any document or class of document specified in the notice;
 - (b) receive in evidence any statement, document, information, or matter that may assist the Authority to deal effectively with a matter before it;
 - (c) search under a warrant, any place named in the warrant for the purpose of ascertaining whether a person has contravened a provision of Part 3 of the Act;
 - (d) inspect and take copies of any documents or extracts from any documents obtained under a search warrant;
 - (e) make an order prohibiting the publication or communication of any information;
 - (f) state a case for the opinion of the Court on any question of law arising in any matter before the Authority;
 - (g) to prescribe forms for applications, notices, and other documents required for the purposes of Part 3.

Enforcement and penalties

54. The Authority has the power to bring proceedings under Part 3 for a breach of a provision of Part 3, and is the only body that may bring proceedings for pecuniary penalties for a breach of Part 3 (see section 80 of the Act).
55. If a person breaches Part 3, the Authority can apply to the High Court for an order requiring the person to pay a fine of up to \$500,000 per act or omission. For a body corporate, the fine can be up to the greater of \$10 million, three times the commercial gain of the contravention, or 10% of the turnover of the body corporate and all of its interconnected bodies corporate. The penalties are based on the penalties in the Commerce Act.
56. The High Court may also grant injunctions or damages.
57. The Authority's approach to compliance with Part 3 is consistent with its general approach to all compliance matters.
58. Finally, there additional offences, and related fines, that apply to a failure to comply with sections 77 to 79 (use-of-systems agreements, transfer of customers, and

⁴ Section 85 of the Act.

rebates and dividends), 88 (disclosure of information to the Authority), and 89 (reporting compliance with arm's-length-rules.

Appendix A Summary of participant responsibilities

A.1 A summary of participant responsibilities under Part 3 is set out in Table 1.

Table 1 Responsibilities of participants under Part 3

Participant with obligation	Responsibilities of participant under Part 3
A person involved in a distributor.	Must not be involved in 1 or more generators that have a total capacity of more than 250MW generated by 1 or more generating plants that are directly connected to the national grid.
A person who carries on the business of distribution.	Must carry on that business in a different company from the company carrying on the business of a connected generator (>50 MW connected to distributor's network and is involved in the distributor or person involved in distributor) or connected retailer (>75GWh/pa sold over the distributor's networks and is involved in the distributor or a person involved in the distributor).
<p>Every person involved in a distributor.</p> <p>Every person involved in a connected generator (>50 MW connected to distributor's network and is involved in the distributor or person involved in distributor).</p> <p>Every person involved in a connected retailer (>75GWh/pa sold over the distributor's networks and is involved in the distributor or a person involved in the distributor).</p>	Must comply with the arm's-length rules set out in schedule 3 of the Act.
Directors of a business to which the arm's length rules apply.	<p>Must provide to the Authority a statement confirming whether or not the director has complied with all of the arm's-length rules during the preceding calendar year, no later than 31 March in each year.</p> <p>Must (with the Authority) ensure the statement is publicised.</p>

Participant with obligation	Responsibilities of participant under Part 3
<p>Director of a distributor with a connected generator (>10 MW connected to distributor's network and is involved in the distributor or person involved in distributor) or connected retailer (>5GWh/pa sold over the distributor's networks and is involved in the distributor or a person involved in the distributor).</p>	<p>Must ensure that the distribution business has a comprehensive written use-of-systems agreement between the distributor and the connected generator or connected retailer, and that the terms of that agreement meet the requirements in section 77.</p> <p>Must provide copy of use-of-systems agreements to Authority.</p> <p>Must publicise and provide to the Authority a certificate signed by directors that states whether or not, in the preceding calendar year, the terms of the use-of-systems agreement are a true and fair view of the terms on which line function services and information were supplied, and whether or not section 77 was otherwise fully complied with.</p>
<p>Distributor.</p> <p>Connected generator (>10 MW connected to distributor's network and is involved in the distributor or person involved in distributor).</p> <p>Connected retailer (>5GWh/pa sold over the distributor's networks and is involved in the distributor or a person involved in the distributor).</p> <p>Persons involved in a distributor, connected retailer or connected generator.</p>	<p>Must not pay, or offer to pay, any consideration to a retailer in respect of the transfer of retail customers connected to the distributor's networks to connected retailers (>5GWh/pa sold over the distributor's networks and is involved in the distributor or a person involved in the distributor).</p>
<p>Directors of a distributor.</p> <p>Trustees of any community or customer trust involved in a distributor and connected retailer (>5GWh/pa sold over the distributor's networks and is involved in the distributor or a person involved in the distributor).</p> <p>Directors of any customer co-operative that is involved in the distributor and connected retailer.</p>	<p>Must ensure that any rebates or dividends or similar payments do not discriminate between customers of a connected retailer (>5GWh/pa sold over the distributor's networks and is involved in the distributor or a person involved in the distributor).and customers of other retailers on its network.</p>

Participant with obligation	Responsibilities of participant under Part 3
<p>Director of a distributor in respect of which there is a connected generator (>10 MW connected to distributor's network and is involved in the distributor or person involved in distributor) or connected retailer (>5GWh/pa sold over the distributor's networks and is involved in the distributor or a person involved in the distributor).</p>	<p>Must disclose to Authority the quantity of electricity sold each financial year by connected retailers to customers who are connected to its local network, within two months after the end of the financial year.</p> <p>The statement must be in the form prescribed by the Authority, and must also be publicised by the distributor and the Authority.</p>