

Improving the framework for the Authority's information gathering

Decision

5 July 2022



Executive summary

An evolving New Zealand electricity market puts increased emphasis on the Electricity Authority (Authority) being well-informed to effectively perform its functions under the Electricity Industry Act 2010 (Act). This is particularly so for the Authority's monitoring functions, which comprise industry and market monitoring, monitoring the operation and effectiveness of market facilitation measures, and compliance monitoring.

To undertake its statutory functions, the Authority collects information via a range of methods. These include voluntary requests for information from industry participants, requirements in the Electricity Industry Participation Code 2010 (Code) (including amending the Code to set information requirements), and the use of information gathering powers under the Act.

However, the Authority's experience over the past decade is that relying on its current approaches to collecting information on an ongoing basis is failing to provide the Authority with sufficient and timely information to effectively carry out its monitoring functions. It also imposes higher-than-necessary transaction costs on participants and the Authority.

There are important economic costs associated with the Authority collecting insufficient information to perform its monitoring functions effectively. In particular:

- (a) policy initiatives are less likely to be informed from a sound evidence base, which reduces their expected efficiency benefits, and increases the likelihood of revisiting the same policy settings in short order at the opportunity cost of addressing other issues
- (b) there tends to be greater policy uncertainty, which translates into investors requiring a higher rate of return on their investments in the electricity industry.

To address this issue, the Authority is amending the Code to enable the Authority to publish a notice specifying information a participant must provide to the Authority on an ongoing basis. Before publishing such a notice, the Authority must consult participants to whom the proposed notice applies and be satisfied that requiring participants to provide the information specified in the notice furthers the Authority's statutory objective and provides a net benefit.

Important aspects of the Code amendment's objective are to make it easier for industry participants to provide ongoing information to the Authority and for the Authority to engage with participants over requirements for the ongoing provision of information. Consistent with these aspects of the Code amendment's objective, participants are expected to benefit in several ways under the amendment:

- (a) an improved ability to contribute to determinations of the Authority's information requirements and what information should be collected on an ongoing basis
- (b) an improvement in the quality and design of information requests, which amongst other things, will make them easier for participants to interpret and respond to
- (c) a more standardised approach to information provision obligations, thereby enhancing regulatory certainty
- (d) improved transparency and clarity around information provision obligations
- (e) reduced transaction costs associated with the mandatory provision of information to the Authority.

Submissions on the Code amendment proposal the Authority consulted on last year have been important in informing this decision. The Authority thanks submitters for their time and input.

There was widespread agreement amongst submitters that the identified gap in the Authority's information gathering framework is an issue worthy of attention.

There was widespread support amongst submitters for the objective of the Code amendment proposal the Authority consulted on.

Submitters liked the structured, notice-based collaborative approach under the Code amendment proposal.

However, most submitters said the Authority could achieve the proposal's objective using the Authority's current information gathering powers. The preference of most submitters was for the Authority to implement the structured, notice-based collaborative approach set out in the proposed Code amendment using section 46 of the Act instead.

The Authority agrees this option has considerable merit. The Authority gave it significant consideration when preparing the Code amendment proposal consulted on last year. The option was put forward in the consultation paper as one of two alternatives to the proposal.

After carefully considering the points raised in submissions, the Authority considers the Code amendment will achieve the objective that was consulted on better than would this alternative. The reasons are set out in the main body of this decision paper – please see paragraphs 4.27 to 4.37. However, the Authority wishes to highlight here its response to what appears to be the main reason for submitters favouring this alternative — that the Code amendment will not give the same legal protections to participants for information they provide under an information provision notice as are given under the Act and under common law for information provided under a section 46 information request.

The Authority has been careful to align the protections under the Code amendment with the protections received by participants under the section 46 regime. The Code amendment provides the same protections in respect of confidentiality that apply under common law rules for information obtained by the Authority under section 46. The Authority considers the Code amendment provides the same protections to participants as they receive under section 46 of the Act in relation to legal professional privilege and self-incrimination.

The Authority acknowledges participant concerns over the treatment of confidential information under the Code amendment. This is particularly in relation to the Authority determining whether reasons exist for keeping information confidential and whether those reasons are outweighed by other considerations which render it desirable for the Authority to make all or any part of the information publicly available.

The Authority has carefully reviewed the Code amendment to ensure that the test for making confidential information publicly available is consistent with common law and statute. Following this review, the Authority has revised the test that was in the Code amendment proposal consulted on, to increase the threshold that must be met before the Authority may make confidential information publicly available. This means the test is consistent with the test the Authority must apply to the release of confidential information under the Official Information Act 1982 (OIA). It also means the test is consistent with the common law test the Authority applies to the publication of confidential information collected under section 46 of the Act. The wording of the test is modelled on the OIA.

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1 The Authority has decided to amend the Code

- 1.1 The Electricity Authority (Authority) has decided to amend Part 2 of the Electricity Industry Participation Code 2010 (Code). The amendment will:
- (a) enable the Authority to collect information for the purpose of undertaking one or more of its monitoring functions under the Electricity Industry Act 2010 (Act), by publishing a notice specifying information that a participant must, on a regular basis or because of a future event identified at the time of the notice, provide to the Authority (information provision notice)
 - (b) require the Authority, before publishing an information provision notice:
 - (i) to consult on a draft of the notice, and
 - (ii) to be satisfied that requiring participants to provide the information specified in the notice furthers the Authority's statutory objective and provides a net benefit.
- 1.2 The amendment is consistent with the Authority's strategy reset,¹ under which the Authority wants consumer centricity to guide regulation and the industry. The amendment assists the Authority to be well-informed in the pursuit of its strategic ambitions—in particular:
- (a) helping unlock the full benefits of innovation for consumers by ensuring that regulatory settings are conducive to innovation and industry success
 - (b) promoting a stable investment environment with robust rules and clear price signals to unlock the potential for more renewable generation and ensure the transition to a low carbon electricity industry is as efficient as possible.
- 1.3 For participants, the proposed amendment is expected to:
- (a) improve participants' ability to contribute to determinations of the Authority's information requirements and what information should be collected on an ongoing basis
 - (b) improve the quality and design of information requests, which amongst other things, will make them easier for participants to interpret and respond to
 - (c) provide a more standardised approach to information provision obligations, thereby enhancing regulatory certainty
 - (d) improve transparency and clarity around information provision obligations
 - (e) reduce transaction costs associated with the mandatory provision of information to the Authority.
- 1.4 There was widespread support amongst submitters for the objective of the Code amendment proposal the Authority consulted on. However, most submitters said the Authority could achieve this objective using the Authority's current information gathering powers. In particular, the preference of most submitters was for the Authority to implement the structured, notice-based collaborative approach set out under the Code amendment using section 46 of the Act instead.

¹ See <https://www.ea.govt.nz/about-us/strategic-planning-and-reporting/strategy-reset-2020/>.

- 1.5 The Authority agrees this option has considerable merit. The Authority gave it significant consideration when preparing the Code amendment proposal consulted on last year. The option was put forward in the consultation paper as one of two alternatives to the proposal.
- 1.6 After carefully considering the points raised in submissions, the Authority considers the Code amendment will achieve the objective that was consulted on better than would this alternative. The reasons are set out in paragraphs 4.27 to 4.37.
- 1.7 In summary, the Authority expects the Code amendment will:
- (a) provide more regulatory certainty and have lower transaction costs than using section 46 of the Act
 - (b) provide the same legal protections to participants for information they provide under an information provision notice as are given under the Act and under common law for information provided under a section 46 information request.

2 Background – The Authority’s information gathering framework is missing an important element

The Authority has consulted on a proposal to amend the Code

- 2.1 On 6 July 2021, the Authority published a consultation paper titled *Improving the framework for the Authority’s information gathering*.² This contained a proposal to amend the Code to enable the Authority to publish a notice specifying information that a participant must provide to the Authority either on a regular basis or because of a future event identified at the time of the notice.
- 2.2 Collecting the information specified in the notice had to be for the purpose of carrying out one or more of the Authority’s monitoring functions under the Act.
- 2.3 Before publishing such a notice, the Authority had to consult on a draft of the notice and be satisfied that requiring participants to provide the information specified in the notice furthered the Authority’s statutory objective and provided a net benefit.

The problem to be addressed

- 2.4 The reason for the Code amendment proposal was that the Authority’s information gathering framework is missing an important element, which is inhibiting the Authority’s ability to effectively undertake its monitoring functions.
- 2.5 The missing element is an effective method to efficiently gather regular or event-driven information from participants on an ongoing basis. The method needs to be efficient for both the Authority and participants.
- 2.6 The consultation paper set out why the Authority considered this problem would be addressed by the proposal. This decision paper sets out the Authority’s decision to amend the Code and gives reasons for that decision.

² <https://www.ea.govt.nz/assets/dms-assets/28/Improving-the-framework-for-the-Authoritys-information-gathering-Consultation-paper.pdf>.

3 The amendment promotes the Authority’s statutory objective

3.1 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.

The amendment promotes the three limbs of the Authority’s statutory objective

3.2 After carefully considering all submissions on the proposed Code amendment, the Authority believes the final Code amendment will deliver long-term benefits to consumers, as set out below.

3.3 The amendment—

- (a) promotes competition in and reliable supply by the electricity industry by improving the durability of market arrangements and better enabling more informed Code development, market facilitation measures, and government policy making
- (b) promotes the efficient operation of the electricity industry by:
 - (i) improving the durability of market arrangements and better enabling more informed Code development, market facilitation measures, and government policy making
 - (ii) lowering the transaction costs of mandatory regular provision of information to the Authority.

The expected benefits of the Code amendment are greater than the expected costs

3.4 The Authority has undertaken a [largely] qualitative assessment of the economic benefits and costs of the Code amendment and expects it to deliver a net economic benefit.

3.5 Table 1 summarises the expected economic benefits and costs of the Code amendment relative to the counterfactual of the Authority collecting information on an ongoing basis using its existing information gathering framework.

Table 1: Summary of the Code amendment’s expected benefits and costs

Benefit / Cost	Magnitude of benefit / cost
The benefit from improving the durability of the electricity market arrangements	Expected to be material
The benefit from more informed Code development, market facilitation measures and policy making	Expected to be material
The benefit from reducing transaction costs currently incurred through regular information collection	Expected to be modest
The cost to implement the Code amendment (Authority processes and procedures)	Expected to be negligible (less than \$1,000)

Benefit / Cost	Magnitude of benefit / cost
The ongoing cost for the Authority to operate under the Code amendment	Expected to be modest (\$10,000 – \$25,000 per information provision notice)
The ongoing cost for industry participants to operate under the Code amendment	Expected to be modest (\$50,000 – \$100,000 across all industry participants per information provision notice)
Expected net benefit	In the range of modest to material

Source: Electricity Authority

3.6 Relative to the status quo arrangements under which the Authority collects information for its monitoring functions:

- (a) the Code amendment’s expected benefits are as follows:
 - (i) enabling better informed Code development, market facilitation measures and government policy making
 - (ii) improving the durability of the electricity market arrangements
 - (iii) reducing transaction costs currently incurred through information collection
- (b) the Code amendment’s expected costs are as follows:
 - (i) the cost for the Authority to consult with interested parties on requests for participants to provide information to the Authority regularly
 - (ii) the cost for interested parties to respond to the Authority’s consultations on requests for participants to provide information regularly.

3.7 Appendix B describes the expected benefits and costs of the Code amendment in more detail.

The amendment is consistent with regulatory requirements

3.8 The Code amendment is consistent with the requirements of section 32(1) of the Act.

3.9 The amendment is also consistent with the Authority’s Code amendment principles:

- (a) it is lawful
- (b) it will improve the efficiency of the electricity industry for the long-term benefit of consumers
- (c) the Authority has used a qualitative cost-benefit analysis to assess long-term net benefits for consumers.

4 The Authority considered a number of matters raised by submitters in making this decision

4.1 The Authority received submissions on its July 2021 consultation paper from the 17 parties listed in Table 2. Submissions are available on the Authority's website.³

Table 2: List of submitters

<i>Submitter</i>	<i>Category</i>
Anglican Care Canterbury/Westland	Social services
Aurora Energy	Electricity distribution
Contact Energy	Electricity generation and retailing
Electric Kiwi and Haast Energy Trading (Haast) (joint submission)	Electricity retailing and trading
Electricity Retailers Association of New Zealand (ERANZ)	Electricity retailing representation
Energy Trusts of New Zealand (ETNZ)	Electricity distribution trust ownership representation
FinCap	Financial mentoring support
Flick Electric	Electricity retailing
Genesis Energy	Electricity generation and retailing
Mercury	Electricity generation and retailing
Meridian Energy	Electricity generation and retailing
Nova Energy	Electricity generation and retailing
NZX	Market operation service provider
Transpower New Zealand	Electricity transmission
Trustpower	Electricity generation and retailing
Vector	Electricity distribution

Source: Electricity Authority

³ <https://www.ea.govt.nz/development/work-programme/operational-efficiencies/improving-the-framework-for-the-authoritys-information-gathering/consultations/#c18934>.

4.2 The Authority has carefully considered all the submissions. Issues raised by submitters generally fell into one or more of the following 10 categories:

- (a) The Code amendment's objective could be expanded
- (b) The Code amendment's objective can be achieved using the Authority's current information gathering powers
- (c) The Code amendment may be unlawful or of no effect
- (d) The Authority should consult widely
- (e) There should be limits on the amount of information collected and its uses
- (f) The necessity of information gathered should be reviewed periodically
- (g) The CBA for an information provision notice should include certain matters
- (h) There should be added emphasis on publication of information
- (i) Confidential information should be protected
- (j) The Code amendment should include a right of appeal.

4.3 These issues are discussed below. See Appendix C for a summary of submitters' issues.

Issue 1: The Code amendment's objective could be expanded

What was proposed?

4.4 The Authority consulted on the following objective for the proposed Code amendment:

- (a) to better enable the Authority to fulfil its monitoring functions by collecting the ongoing information it needs from industry participants using a more efficient approach than under the Authority's current information gathering framework, and
- (b) to require the Authority to engage with participants over the collection of ongoing information through consultation, including an obligation to be satisfied the benefits of the Authority obtaining the information outweigh the costs.

Submitters' views

4.5 There was widespread support for the proposal's objective—for example:

"ERANZ agrees with improving the Authority's decision-making through better information, and the Authority engaging with participants over the most effective way of collecting information."

"The objective of engaging with industry participants over the collection of ongoing information to be satisfied that the benefits outweigh the costs is important."⁴

"Nova agrees with improving the Authority's decision-making through better information, and the Authority engaging with participants over the most effective way of collecting information."

"The best way to ensure provision of high quality information is to ensure: (i) there are clearly defined information requirements; and (ii) the information is provided as part of regular reporting/disclosure rather than ad hoc information requests or demands."⁵

⁴ Mercury submission.

⁵ Electric Kiwi / Haast submission.

- 4.6 Some submitters believed the proposal’s objective could be expanded to be more consumer centric and to better promote consumer interests.
- 4.7 FinCap recommended the objective be expanded to include a clear focus on consumers being a key audience for information collected and being involved in the formation of what information is collected. FinCap also encouraged the Authority to broaden the scope of the proposed Code amendment, to give the Authority better oversight of ‘second tier’ businesses selling electricity in Aotearoa.
- 4.8 Energy Trusts of New Zealand submitted that the proposal’s objective should include promoting a common understanding of critical market information among consumers, the Authority and participants. Consideration could also be given to a further objective aimed at reinforcing the integrity of information provided to consumers.
- 4.9 Vector suggested the addition of a materiality threshold to the proposal’s objective. The proposed Code amendment should be focused on information that has, or is likely to have, a material impact on the electricity market and on electricity consumers. Adding this threshold would help avoid ‘scope creep’ when identifying information that could be subject to an information provision notice.

The Authority’s decision

- 4.10 The Authority has decided not to change the Code amendment’s objective from that consulted on.
- 4.11 As noted in the consultation paper, an evolving New Zealand electricity market puts increased emphasis on the Authority being well-informed to effectively perform its functions under the Act.⁶ To this end the Authority wants to retain the Code amendment’s focus on better enabling it to fulfil its monitoring functions. This in turn places the Authority in a better position to fulfil its other functions—particularly Code making and undertaking market facilitation measures.
- 4.12 As discussed below, the Authority has the option of consulting more widely on a proposed notice than only the participant or participants to whom a proposed notice applies. This could include consumers and other stakeholders. The Authority recognises that such wider consultation can be helpful in identifying the interests of consumers to achieve a focus on collecting information that advances the Authority’s objective.

Issue 2: The Code amendment’s objective can be achieved using the Authority’s current information gathering powers

What was proposed?

- 4.13 The Authority proposed to amend Part 2 of the Code to enable the Authority to publish a notice specifying information a participant must, on a regular basis⁷ or because of an identified event,⁸ provide to the Authority in a specified manner.

⁶ See the executive summary of the Authority’s consultation paper.

⁷ For example, the existing provision of:

- retail information annually, and
- the monthly provision of information on the extent to which residential and commercial customers are having difficulty paying for their electricity, and the financial impact this has on electricity retailers.

⁸ A possible example might be the provision of information by generators re-rating their generating units.

- 4.14 Any information to be collected was to be for the purpose of carrying out one or more of the following Authority statutory functions:
- (a) to undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry
 - (b) to monitor the operation and effectiveness of market facilitation measures
 - (c) to monitor compliance with the Act, the regulations made under the Act, and the Code.
- 4.15 The Authority had to consult with participants to whom a notice was proposed to apply, on the following matters:
- (a) the proposed notice
 - (b) the purpose of the information requirements in the proposed notice
 - (c) the Authority's assessment of whether there was a net benefit from the Authority obtaining the information required in the proposed notice.
- 4.16 The Authority would prepare a privacy impact assessment for any proposed notice specifying information that had the potential to be personal information.

Submitters' views

- 4.17 As noted under 'Issue 1', there was widespread support for the proposed Code amendment's objective. However, most submitters said the Authority could achieve this objective using the Authority's current information gathering powers. The preference of most of these submitters is for the Authority to implement the structured, notice-based collaborative approach set out under the Code amendment using section 46 of the Act instead of the Code.
- 4.18 ERANZ submitted that its members do not consider the drawbacks of section 46 information requests identified in the Authority's consultation paper require the establishment of a new, additional method for gathering information. If the Authority chooses to do so, improvements such as proactive engagement with the electricity industry and undertaking CBAs could be implemented instead. ERANZ supported the Authority using more data in its decision-making by looking to Option 2 in the proposed Code amendment's regulatory statement and achieving its objectives by optimising notices issued under section 46 of the Act.
- 4.19 Transpower did not believe the proposed Code amendment was required to enable the Authority to collect ongoing information. The use of section 46 of the Act could be made more efficient by implementing a structured process for issuing information requests.
- 4.20 Nova Energy submitted that, given the information gathering powers under section 46 of the Act, it was not clear the Authority needed to establish a new information gathering framework to achieve its objective. Most of the net benefit of the proposed Code amendment could be achieved without new overreaching changes to the Code.
- 4.21 Electric Kiwi / Haast said using section 46 of the Act need not be reactive – the Authority could implement a notice-based collaborative approach under the current regime.

- 4.22 Meridian Energy considered Option 2 of the proposed Code amendment's regulatory statement would better deliver on the objective of the proposed Code amendment. The Authority already has broad powers to request information under section 46 of the Act and could choose to use those powers differently or more frequently. Meridian Energy said section 46 requests of multiple participants for regular or event-driven provision of information could simply be published on a page of the Authority's website. Continued use of section 46 of the Act would also provide greater certainty for participants who are familiar with the requirements of that framework and the protections under the Act.
- 4.23 Contact Energy submitted that the Authority had not identified with any degree of specificity how the application of the three information gathering approaches under the existing information gathering framework failed to provide important information necessary for the Authority to undertake its statutory functions. Contact Energy considered that Option 2 in the proposed Code amendment's regulatory statement is the preferred approach to improving the Authority's information gathering framework.
- 4.24 Genesis Energy submitted the Authority should adopt Option 1 of the proposed Code amendment's regulatory statement if the Authority needed information regularly from participants. While acknowledging that quantifying the proposed Code amendment's costs and benefits is difficult, Genesis Energy did not find the Authority's qualitative cost-benefit analysis compelling. For example, Genesis Energy queried the Authority's view that a specific Code amendment to address a particular disclosure obligation would make it harder for market participants to find, read and understand the obligation relative to issuing an information provision notice.
- 4.25 Genesis Energy considered the Authority should also utilise section 46 of the Act better, including through guidance to participants, as described in Option 2 of the proposed Code amendment's regulatory statement. This guidance could, for example, set out expectations concerning data formatting and exchange protocols, timeliness of information provision, and early engagement by participants with the Authority where there are questions concerning the scope of the information request.
- 4.26 Mercury considered that, on balance, the Authority consulting with industry participants then using its existing information gathering powers would deliver the same benefit as the proposed Code amendment, without the cost of removing statutory protections from information providers such as legal professional privilege (section 48 of the Act). Mercury was not convinced section 46 of the Act does not lend itself easily to the use of standardised data formats and data transfer protocols.

The Authority's decision

- 4.27 The Authority considers the Code amendment will achieve the objective consulted on better than using either or both the alternatives described in the consultation paper.
- 4.28 After reviewing submissions, the Authority considers the first alternative has the following main drawbacks when compared to the Code amendment:
- (a) higher expected transaction costs, from needing to make bespoke Code amendments instead of publishing information provision notices
 - (b) the increased possibility of non-standardised information requirements being implemented over time because the Code amendments may end up addressing supplementary issues that result in some bespoke information requirements.

- 4.29 The Authority notes Genesis Energy’s query over whether the first alternative would make it harder for market participants to find, read and understand their information provision obligations when compared to an information provision notice. The Authority’s view on this matter is based on information provision notices all being on a single Authority web page.
- 4.30 There was significant support from submitters for the second alternative in the consultation paper. Two key themes appeared to underpin this support:
- (a) the second alternative achieved all the Authority’s requirements for regular information and information due to a specified event
 - (b) the use of section 46 of the Act would afford protections to participants providing information to the Authority, which the proposed Code amendment would not—particularly in relation to confidentiality, legal professional privilege, and self-incrimination.
- 4.31 In relation to the first theme, the Authority believes the Code amendment provides greater clarity and certainty than section 46 over the Authority’s ability to require the provision of regular and event-driven information by participants. Having reviewed submissions, the Authority believes participants may, under the second alternative, at times choose to query the Authority’s ability to do one or both of the following under section 46 of the Act:
- (a) set in advance regular or event-driven information provision requirements, including setting the format of information and setting the required method of providing information
 - (b) require participants to provide information they do not already hold, including collecting and/or collating information.
- 4.32 The Authority expects this could result in one or more of the following outcomes, with each outcome representing an additional cost over the Code amendment:
- (a) the Authority and stakeholders incurring transaction costs reaching a resolution on the matter at hand
 - (b) the Authority proposing a bespoke Code amendment each time the Authority wants to gather the information regularly
 - (c) regulatory uncertainty.
- 4.33 In relation to the second theme, the Authority considers the Code amendment provides the same protections to participants as they receive under section 46 of the Act in relation to legal professional privilege and self-incrimination. The Code amendment also provides the same protections in respect of confidentiality that apply under common law rules for information obtained under section 46.
- 4.34 Clause 2.20 of the Code amendment says a participant does not need to provide information under an information provision notice if the participant has legal professional privilege in respect of the information. This is the same protection provided by section 48(1) of the Act.

- 4.35 Clause 2.22 (previously part of clause 2.21) of the Code amendment requires the Authority to apply the same test in relation to making confidential information publicly available that the Authority would apply under common law⁹ for confidential information collected under section 46 of the Act. The Authority can make confidential information publicly available only if the reasons for confidentiality are outweighed by other considerations which render it desirable to do so, to give effect to the Authority's statutory objective and for the purposes of any of the Authority's statutory functions.
- 4.36 Clause 2.22 of the Code amendment requires the Authority to comply with section 48(2) and 48(3) of the Act in respect of information that is subject to privilege against self-incrimination. This is the same obligation on the Authority as when it is collecting information under section 46 of the Act.
- 4.37 In light of these considerations, the Authority considers the Code amendment achieves the objective better than using the second alternative.

Issue 3: The Code amendment may be unlawful or of no effect

What was proposed?

- 4.38 The Authority considered the proposed Code amendment to be lawful, consistent with the Authority's statutory objective, and consistent with the empowering provisions of the Act.

Submitters' views

- 4.39 Some submitters considered the proposed Code amendment to be not lawful.
- 4.40 Genesis Energy submitted that it is not clear the Authority can reasonably establish it is necessary or desirable to codify a power to require the provision of certain information from participants under the Code if the Act already confers a broad power to gather information. Genesis Energy submitted that section 46 of the Act contains the Authority's information gathering powers, and section 32 does not confer a power on the Authority to expand or amend those powers through the Code. The proposed Code amendment would effectively be amending section 46 of the Act, by adding new information-gathering powers. This would be an invalid use of the Authority's Code-making powers under section 32 of the Act.
- 4.41 Meridian Energy submitted that, even if the proposed Code amendment was lawful in principle, it may not have any effect because it conflicts and interferes with the Act. Meridian Energy listed three ways in which the proposed Code amendment did this:
- (a) The proposed Code amendment conflicts with the confidentiality of information guaranteed under the existing statutory regime. Section 46 of the Act effectively protects the confidentiality and privacy of information gathered under it.
 - (b) The statutory guarantee of a reasonable timeframe in which to provide the information under section 46(2)(a) of the Act would be abolished, and industry participants could be required to take on an information creation and analysis role through the manner and form requirements of the proposed Code amendment.

⁹ See for example, *Marcel v Commissioner of Police of Metropolis* [1992] Ch 225. *The Stepping Stones Nursery Ltd v Attorney-General* [2002] 3 NZLR 414.

- (c) The proposed Code amendment appears to anticipate the existence of wide information sharing powers (eg, to make information "publicly available" in the proposed clause 2.21(2)(b)). However, there are no such powers under the Act. The Authority is not authorised to share or publish raw information it collects from participants under section 46 of the Act.
- 4.42 Trustpower noted that section 48(3) of the Act indicates information provided under a section 46 request is not admissible as evidence in any criminal or civil proceedings. Trustpower sought assurance from the Authority that information provided under an information provision notice would receive the same protection as information provided under a section 46 information request.
- 4.43 Trustpower's submission point relates to the requirement in the Code amendment for the Authority to comply with section 48(2) and 48(3) of the Act in respect of information that is subject to privilege against self-incrimination.
- 4.44 Electric Kiwi / Haast Energy took the view that this requirement is redundant and duplicative and should be deleted as it is bad drafting practice for Code requirements to replicate legislation.

The Authority's decision

- 4.45 The Authority considers the Code amendment to be lawful.
- 4.46 Under section 32(1) of the Act, the Code may contain any provisions that are consistent with the objective of the Authority and are necessary or desirable to promote any or all of the following:
 - (a) competition in the electricity industry:
 - (b) the reliable supply of electricity to consumers:
 - (c) the efficient operation of the electricity industry:
 - (d) the performance by the Authority of its functions:
 - (e) any other matter specifically referred to in the Act as a matter for inclusion in the Code.
- 4.47 Section 32(2) of the Act says the Code may not:
 - (a) impose obligations on any person other than an industry participant or a person acting on behalf of an industry participant, or the Authority, or
 - (b) purport to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986 (other than to set quality standards for Transpower and set pricing methodologies), or
 - (c) purport to regulate any matter dealt with in or under the Electricity Act 1992.
- 4.48 The Authority considers the Code amendment:
 - (a) falls within its Code-making power under section 32 of the Act
 - (b) does not purport to amend the Act or interfere with the operation of the Act.

- 4.49 In relation to the first point, the Authority's Code-making power is broad. The Code may contain any provisions that are consistent with the Authority's statutory objective and necessary or desirable to promote any or all of the three limbs of the objective, the performance of the Authority's functions, and any other matter the Act specifies as a matter for inclusion in the Code. For the reasons set out earlier in this decision, the Authority considers the Code amendment promotes its statutory objective and is necessary for the performance of the Authority's functions.
- 4.50 In relation to the second point, the Authority notes the Code cannot repeal or interfere with the operation of the Act (or any other statute) unless authorised by express words in the Act or by necessary implication. The Code amendment does not repeal or interfere with the Act's operation. There is nothing in the Act that expressly, or impliedly, prohibits the gathering of information empowered under the Code amendment. While section 46 of the Act provides the Authority with information gathering powers, the Act does not limit the Authority's information gathering powers to those set out in section 46.
- 4.51 The Authority considers the Code amendment provides the same legal protections to participants for information they provide under an information provision notice as are provided under section 48 of the Act for information they provide under a section 46 information request. The Authority disagrees with Meridian Energy's description of the limitations on sharing and disclosure of information under section 46 and considers that the legal position on sharing and disclosure of information is no different under the Code amendment than under section 46 (as discussed under Issue 2).
- 4.52 The Authority also notes clause 2.23 of the Code amendment is not redundant and duplicative. This is because the clause applies to the provision of information to the Authority under an information provision notice, rather than in response to a request under section 46.

Issue 4: The Authority should consult widely

What was proposed?

- 4.53 The proposed Code amendment required the Authority to consult with participants to whom an information provision notice was proposed to apply, on the following matters:
- (a) the proposed notice
 - (b) the purpose of the information requirements in the proposed notice
 - (c) the Authority's assessment of whether there was a net benefit from the Authority obtaining the information required in the proposed notice.

Submitters' views

- 4.54 While there was widespread support for the Authority's proposal to consult on proposed information provision notices, several submitters said the Authority should consult more widely than required under the proposed Code amendment.
- 4.55 Electric Kiwi / Haast noted the consultation paper did not explain why it may be preferable to consult only with the disclosing market participant. They submitted that market participants are likely to have a general incentive to overstate the cost and practicability of the proposed disclosure requirements. This should be balanced against other stakeholders' perspectives.

- 4.56 FinCap submitted that consumers and their representatives should always be provided with an opportunity to be consulted about what information is proposed to be collected and the potential costs and benefits of this. So too should consumer agencies such as the Consumer Advocacy Council and the Energy Hardship Panel. This broader consultation would:
- (a) mean the information collected by the Authority was informed by consumers' experiences and priorities
 - (b) result in more efficient building / adjustment of the Authority's and participants' systems to enable the regular information provision.
- 4.57 Vector emphasised in its submission the importance of the Authority undertaking meaningful consultation with participants in the development of proposed information provision notices. Vector suggested the Authority should consult on what would be a reasonable timeframe between the date on which an information provision notice is published and when the obligation to provide the information starts.

The Authority's decision

- 4.58 The Authority has decided to retain the requirement to consult with the participant or participants to whom the proposed information provision notice applies, and not expand this requirement to apply in respect of other parties. This ensures a base level of consultation with the participant or participants directly affected without requiring a wide and potentially lengthy and costly consultation.
- 4.59 The Authority is always able to consult further, if it wishes, and has changed the Code amendment to acknowledge this. This consultation, however, is at the Authority's discretion.

Issue 5: There should be limits on the amount of information collected and its uses

What was proposed?

- 4.60 Under the proposed Code amendment, the Authority could, for an information provision notice, specify information only for the purposes set out in section 45(a) of the Act – being the Authority's monitoring functions. These monitoring functions are:
- (a) to monitor compliance with the Act, the regulations made under the Act, and the Code, under section 16(1)(c) of the Act
 - (b) to undertake and monitor the operation and effectiveness of market-facilitation measures, under section 16(1)(f) of the Act
 - (c) to undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry, under section 16(1)(g) of the Act.
- 4.61 The Authority could not specify information in an information provision notice for the purpose of investigating or enforcing compliance with the Act, the regulations made under the Act, and the Code. However, the Authority could use information obtained under an information provision notice in making a decision to appoint an investigator under regulation 12 of the Electricity Industry (Enforcement) Regulations 2010.

4.62 Before publishing an information provision notice, the Authority must have provided to the participant to whom the proposed notice applied the Authority's purpose in setting the information requirements in the proposed notice.

Submitters' views

4.63 Trustpower submitted that the scope of information collected via an information provision notice should be kept to the minimum necessary to carry out the monitoring functions specified in the notice. This would avoid participants' resources being spent gathering information that is not relevant to the Authority's monitoring function specified in the information provision notice.

4.64 In addition, the Authority's information provision notice should specify the monitoring function(s) the requested information is to address and how the information will be processed by the Authority. This would:

- (a) provide transparency regarding the purpose of the notice
- (b) provide an assurance that the notice complies with the Act and the Code
- (c) assist with preparing information that is fit for purpose and remains comparable over the duration of the notice, by helping the participants providing the information to correctly interpret the notice.

4.65 Trustpower and Transpower submitted that information collected by the Authority under an information provision notice should be used only for the monitoring functions set out in the notice, and not for other monitoring functions and purposes. Transpower said this would promote transparency and provide assurance to participants. Trustpower said that, as the scope of information gathered would be tailored for each notice, using the information for another purpose raised the risk that the information was not suitable for the new purpose. This could result in decisions that had unintended adverse consequences.

4.66 Trustpower submitted that, should the Authority consider information gathered under an information provision notice might be suitable for another monitoring function, the Authority should test its view by consulting with participants. Submissions should help the Authority determine whether the information is fit for the new purpose, thereby mitigating the risk of unintended adverse consequences.

4.67 Transpower submitted that participants should not have to collect information they do not already hold. Also, participants should not have to spend a disproportionate amount of resourcing on reformatting information and/or collating it from diffuse sources.

4.68 As noted earlier in this decision paper,¹⁰ Vector submitted that the focus of the Code amendment should be on information that has, or is likely to have, a material impact on the electricity market and electricity consumers. Adding this threshold to the Code amendment would help avoid 'scope creep' when identifying information to be put in an information provision notice.

4.69 Vector also submitted that the Authority should work closely with other energy regulators to avoid duplication and unnecessary compliance costs. Vector gave two examples:

- (a) the information disclosure regime for electricity distribution businesses under Part 4 of the Commerce Act 1986, administered by the Commerce Commission

¹⁰ Refer to Vector's comments on the proposed Code amendment's objective, at paragraph 4.9.

- (b) Gas Industry Company's ongoing development of an information disclosure regime for gas production and storage facility outages.

The Authority's decision

- 4.70 The Authority agrees the amount of information it collects, and its use of this information, under the Code amendment should not be unlimited. This is reflected in the purposes specified in clause 2.16(2) of the Code amendment and the prohibition on the Authority collecting information for investigation and enforcement. The Code amendment also requires the Authority to consult on its purpose in setting the information in an information provision notice.¹¹ This obliges the Authority to specify the relevant monitoring function(s) in a notice.
- 4.71 For the avoidance of doubt, and as set out in the consultation paper, a key purpose of information collected for monitoring is to inform other functions of the Authority, in particular Code making and market facilitation measures but other purposes are also specified in clause 2.16(2). The Authority also notes that the notice is not required to specify those purposes, rather this is advised by the Authority as part of the consultation on a notice under clause 2.18(1).
- 4.72 For reasons of transparency and to reduce the risk of unintended consequences, the Authority may, where the Authority considers it appropriate, inform the relevant provider if the Authority intends to use the provider's information for a purpose not consulted on with a draft information provision notice.

Issue 6: The necessity of information gathered should be reviewed periodically

What was proposed?

- 4.73 Under the proposed Code amendment, the Authority could amend an information provision notice following the same process used when first publishing the notice (ie, consult, undertake a CBA, ensure the information requirements promoted the Authority's statutory objective). The Authority did not need to consult on a proposed change to a notice if it was satisfied on reasonable grounds that—
 - (a) the nature of the change was technical and non-controversial; or
 - (b) there was widespread support for the change among the participants to whom the notice applied and to whom the proposed change would apply; or
 - (c) there had been adequate prior consultation (for instance, by or through an advisory group) so that all relevant views had been considered.
- 4.74 The proposed Code amendment did not explicitly require the Authority to periodically review the need for the information gathered.

Submitters' views

- 4.75 Several submitters proposed that information provision notices be either reviewed periodically for relevance / benefit or have an end date.

¹¹ See clause 2.18(1).

- 4.76 Nova Energy, Trustpower and Transpower submitted that each information provision notice should have an expiry date, to reduce the risk of information continuing to be collected irrespective of the value in doing so. Transpower noted that industry conditions will inevitably change over time, making it essential for the purpose and content of information provision notices to be subject to scrutiny on an ongoing basis.
- 4.77 Nova Energy submitted that the Authority should have to reassess whether the information being collected meets the test of having purpose, use and value, and provides a material benefit to consumers. Such a review should include the Authority reporting analytics demonstrating the extent to which the information collected is being used and is supporting the Authority in meeting its objective, as well as benefiting the industry.
- 4.78 Trustpower believed each information provision notice should have an expiry date that is no more than 12 months from date the notice is issued. If the Authority wished to renew a notice, it should have to consult with participants no earlier than two months and no later than one week before the expiry date of the notice. This would help ensure information provision notices remained relevant and beneficial over time and help manage the risk of a large number of information provision notices placing a significant regulatory burden on participants.
- 4.79 FinCap submitted that a review of all information gathering from the Code amendment should occur every two years, with consumers and their representatives having the opportunity to be consulted.
- 4.80 Vector encouraged the Authority to issue supporting guidelines for information provision notices, which amongst other things specified factors that could:
- (a) trigger changes to, or future reviews of, the information specified in a notice
 - (b) remove the need for a notice.

The Authority's decision

- 4.81 The Authority agrees the need for the information being collected under an information provision notice should be reviewed periodically. The Authority will do this.
- 4.82 However, the Authority wishes to note that the nature of information collected under an information provision notice (ongoing and/or event-driven) does not lend itself to collection timeframes of a year or two. The Authority's expectation is that information collected under a notice will be gathered over a minimum of several years.
- 4.83 The Authority notes it has the power under the Legislation Act 2019 to terminate an information provision notice at any time.

Issue 7: The CBA for an information provision notice should include certain matters

What was proposed?

- 4.84 Under the proposed Code amendment, before publishing an information provision notice, the Authority had to be satisfied the benefits of it obtaining the information outweighed the costs of the information requirements set out in the notice. To inform its decision the Authority had to consult with participants to whom an information provision notice was proposed to apply, on the Authority's assessment of whether there was a likely net benefit from it obtaining the information required in the proposed notice.

Submitters' views

- 4.85 Trustpower submitted that the Authority should include in the CBA for a proposed information provision notice an assessment of the costs and benefits of choosing to gather the information using this approach rather than one of the other approaches available to the Authority—being:
- (a) a Code amendment
 - (b) a voluntary information request
 - (c) a request under section 46 of the Act.
- 4.86 In addition, the Authority should maintain and make publicly available an up-to-date schedule of information provision notices and other information requests. This would help inform the Authority and the electricity industry of the total cost and benefit of complying with information provision notices and other information requests. It would show the growth in the number of information provision notices over time and the commensurate growth in regulatory cost.
- 4.87 Nova Energy submitted that proposed information provision notices should always be supported by analysis showing a material benefit from collecting the information.
- 4.88 Vector submitted that the CBA for a proposed information provision notice should be a quantitative assessment where possible. Vector also said the CBA should have to show a significant net benefit

The Authority's decision

- 4.89 To the extent practicable the Authority will use quantitative analysis in assessing whether requiring participants to provide the information specified in an information provision notice is expected to provide a net benefit. However, the Authority recognises that quantitative analysis will not always be possible, and that qualitative analysis will at times need to be relied upon. The level and accuracy of any quantitative analysis will also depend on the level of information reasonably available to the Authority.
- 4.90 The Authority does not envisage that it would issue information provision notices that have a negligible / immaterial expected net benefit but does not consider it appropriate to set a requirement for a material benefit to arise before a notice can be made.
- 4.91 The Authority plans to maintain an up-to-date schedule of information provision notices on a dedicated Authority web page.
- 4.92 The Authority notes that as a matter of general practice in deciding whether to prepare and consult on a draft information provision notice, the Authority will consider information gathering options available to it. This may include an assessment of the relative advantages and disadvantages of the different options. However, the Authority considers any such assessment to not be a necessary part of the assessment of the likely benefits and costs of the Authority obtaining the information required in the proposed notice.

Issue 8: There should be added emphasis on publication of information

What was proposed?

- 4.93 The focus of the proposed Code amendment was to better enable the Authority to collect sufficient information to perform its statutory monitoring functions more effectively. The proposed Code amendment's objective reflected this focus.

- 4.94 Recognising the potential for information collected by the Authority under an information provision notice to be disclosed, the proposed Code amendment addressed the treatment of confidential information. The proposed Code amendment required the Authority to determine whether reasons for keeping information provided under an information provision notice confidential were outweighed by other considerations rendering it desirable to make all or any part of the information publicly available—
- (a) to give effect to the Authority’s objective under section 15 of the Act
 - (b) for the purposes of any of the Authority’s functions under section 16 of the Act
 - (c) for the purposes of section 14 of the Crown Entities Act 2004.

Submitters’ views

- 4.95 Some submitters believed the proposed Code amendment should contain more emphasis on the publication of information gathered.
- 4.96 FinCap said there should be clearer requirements for the Authority to publish information in a timely manner. Information provision notices should specify the timeframe within which the Authority would make the information publicly available and name the participant the information related to. The Authority should also publicise when a participant’s provision of information is incomplete or late.
- 4.97 FinCap highlighted the importance of transparency around traders’ names in information collected by the Authority. Timely publication of these names reveals endemic trends as opposed to one business’ positive/negative conduct. This gives confidence to the community that issues will surface and be dealt with. It also means the poor behaviour of one business will not lower stakeholders’ trust in other businesses.
- 4.98 Energy Trusts of New Zealand said it would like to see changes made to the Code amendment, with the aim being to ensure:
- (a) information disclosed is in a standardised form that promotes consumer understanding
 - (b) information disclosed is reviewed and publicised by the Authority in a form that assists consumers to make efficient and informed decisions
 - (c) information disclosed is generally made publicly available unless there are clear, specific, and reasonable grounds for it not to be made public.
- 4.99 Electric Kiwi / Haast submitted that “the confidentiality provisions in clause 2.21(1)(b) should not perpetuate the current disclosure loopholes” in the Code. In addition, should information not be provided to the Authority on the basis of section 48 of the Act (self-incrimination), the Authority should publicly report on this. Such reporting should include the information requested and the party invoking the self-incrimination provisions

The Authority’s decision

- 4.100 As discussed under ‘Issue 1’, the Authority wants to retain the Code amendment’s focus on better enabling the Authority to fulfil its monitoring functions. This in turn places the Authority in a better position to fulfil its other functions—particularly Code making and undertaking market facilitation measures.

- 4.101 The Authority notes that, in undertaking some of its functions, it may publish certain information collected under information provision notices. However, this Code amendment cannot anticipate the circumstances in which the Authority may do so, what information will be published, the timing and in what form.
- 4.102 Lastly, the Authority notes the concerns raised by Electric Kiwi / Haast are unrelated to this Code amendment.

Issue 9: Confidential information should be protected

What was proposed?

- 4.103 Under the proposed Code amendment, participants could identify information for which confidentiality was sought, for one or more of the following reasons:
- (a) disclosure of the information would unreasonably prejudice the commercial position of the participant (or the person who was the subject of that information)
 - (b) confidentiality was necessary to protect information which was itself subject to an obligation of confidence
 - (c) if it were not for the Code requiring the participant to provide the information, disclosure of the information by the participant would be in breach of law.
- 4.104 If a participant identified to the Authority any such information, the Authority was required to determine whether—
- (a) there were reasons for keeping the information confidential
 - (b) if there were such reasons, they were outweighed by other considerations which rendered it desirable for the Authority to make all or any part of the information publicly available in order to give effect to:
 - (i) the Authority's statutory objective, or
 - (ii) for the purposes of any of the Authority's functions or any functions that were incidental and related to, or consequential on, these functions.
- 4.105 The Authority was not required to keep the information confidential if:
- (a) the Authority did not consider there were reasons for keeping the information confidential, or
 - (b) the Authority considered it desirable to make all or any part of the information publicly available for the reasons set out in the preceding paragraph.
- 4.106 If the Authority considered there were reasons for keeping the information confidential and did not consider it desirable to make all or any part of the information publicly available, then subject to the requirements in the following paragraph, the Authority had to keep the information confidential.
- 4.107 The obligations on the Authority in the preceding paragraph did not prevent the Authority from doing the following:
- (a) using the information identified as confidential for any purpose in connection with the Authority's statutory objective or the Authority's functions or any functions that were incidental and related to, or consequential on, these functions

- (b) disclosing the information to any person in connection with a purpose referred to in the preceding subparagraph in anonymised form or in consolidated form with other information such that the reasons for keeping the information confidential are not compromised
- (c) disclosing the information where the participant who supplied the information either:
 - (i) consented specifically to the disclosure of that information, or
 - (ii) consented generally to the disclosure, even where the participant identified the information as confidential, of:
 - 1. information specified in the published notice under which the participant supplied the information to the Authority (ie, under the information provision notice), or
 - 2. a category of information specified in the published notice under which the participant supplied the information to the Authority and the Authority reasonably considers the information that it intends to disclose comes within that category
- (d) disclosing the information as required by or under law.

Submitters' views

- 4.108 Trustpower submitted that the Authority should take all appropriate actions to preserve the confidential status of any commercially sensitive information the Authority receives.
- 4.109 Trustpower also said the Authority should, when consulting on an information provision notice, set out the treatment of any confidential information proposed to be required under the notice. This should include:
- (a) how widely the information will be disclosed, both within the Authority and publicly
 - (b) how the Authority will protect information that is commercially sensitive.
- 4.110 Doing this would ensure appropriate protections were in place for commercially sensitive information from the outset.
- 4.111 Meridian Energy submitted that the proposed Code amendment removed protections on confidentiality and privacy that exist for information gathered under section 46 of the Act. Therefore, the Code conflicts with the Act and the common law position that where information gathering powers apply to confidential or private information, the regulator is obliged to protect that confidentiality or privacy interest unless the relevant statute expressly provides otherwise (which the Act does not).
- 4.112 Nova Energy submitted that it was important the Authority, in exercising its information gathering powers:
- (a) did not unduly influence participant's decision-making processes by creating risks over what data might be publicly released, or how it might be used
 - (b) maintained very high standards of information security, given that a significant amount of market sensitive information may be held.

- 4.113 Transpower submitted that a major concern it had with the proposed Code amendment was the Authority having the power to decide whether information provided to it in an information provision notice was confidential, and to publish such information based on its decision. Transpower was concerned the quality and quantity of information it received “in confidence” (under both its system operator and grid owner roles) may be substantially compromised in the future, if information provision notices mandated the disclosure of information provided confidentially to Transpower.
- 4.114 Transpower considered that the proposed Code amendment provided no protection for participants if an information provision notice required the disclosure of information that would breach an obligation of confidentiality. This was in contrast with the treatment with ‘Code information’ in the clauses of Part 2 of the Code that precede the clauses in the proposed Code amendment.
- 4.115 Transpower also considered the Authority should have to notify participants if it did not believe information supplied about the participant was confidential.
- 4.116 As noted in paragraph 4.99, Electric Kiwi / Haast submitted that “the confidentiality provisions in clause 2.21(1)(b) should not perpetuate the current disclosure loopholes” in the Code.

The Authority’s decision

- 4.117 The Authority acknowledges participant concerns over the treatment of confidential information under the Code amendment. This is particularly in relation to the Authority determining whether there are reasons for keeping information confidential and whether those reasons are outweighed by other considerations which render it desirable for the Authority to make all or any part of the information publicly available.
- 4.118 The Authority has carefully reviewed the Code amendment to ensure the test for making confidential information publicly available is consistent with common law and statute. In this way the Authority is seeking to strike the most appropriate balance between promoting transparency in the electricity market and respecting the need for certain information to remain confidential / private.
- 4.119 In the Code amendment the Authority has:
- (a) revised the test for making confidential information publicly available, to increase the threshold that must be met before the Authority may make confidential information publicly available
 - (b) inserted an obligation on the Authority to inform affected parties, by giving the parties as much notice as reasonably practicable, should the Authority propose to make confidential information publicly available.
- 4.120 The Authority can make confidential information publicly available only if the reasons for confidentiality are outweighed by other considerations which render it desirable to do so, to give effect to the Authority’s statutory objective and for the purposes of any of the Authority’s statutory functions. This test is consistent with both common law and statute.

4.121 Under common law, there is the following well-established principle on confidentiality—called the *Marcel principle*:

*Where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom the information was received or to whom it relates not to use it for other purposes.*¹²

4.122 This principle has been followed in New Zealand, with the presiding judge of a case quoting with approval the following passage from the case that established the *Marcel principle*:

*In my judgment, documents seized by a public authority from a private citizen in exercise of a statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they may be used...Any such person would be entitled to expect that the authority would treat the documents and their contents as confidential, save to the extent that it might use them for purposes contemplated by the legislation.*¹³

4.123 Thus, under common law the general position is that any information of a personal or confidential nature collected by the Authority under the Code amendment will be *prima facie* confidential and the Authority will only be able to use and (as part of such use) disclose the information for the purpose of performing its statutory functions or where required by or under a statute.

4.124 Under statute, any information collected by the Authority under the Code amendment for which confidentiality is sought is subject to the OIA. Under the OIA the Authority must make information available on request unless there is a good reason for withholding it.¹⁴ In certain circumstances a good reason to withhold requested information under the OIA includes:

- (a) an obligation of confidence¹⁵
- (b) where making available the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.¹⁶

4.125 However, each of these reasons is subject to the following 'public interest' test:

*In the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.*¹⁷

4.126 The Code amendment follows the same principles as the case law described above, with the wording modelled on the OIA.

¹² See *Marcel v Commissioner of Police of Metropolis* [1992] Ch 225.

¹³ See *The Stepping Stones Nursery Ltd v Attorney-General* [2002] 3 NZLR 414.

¹⁴ See section 5 of the OIA.

¹⁵ See section 9(2)(ba) of the OIA.

¹⁶ See section 9(2)(b)(ii) of the OIA.

¹⁷ See section 9(1) of the OIA.

- 4.127 By making the revised test consistent with common law and statute, consumers' and investors' expectations around the Authority making confidential information publicly available should be similar under the Code amendment to under the Authority's other information gathering arrangements (eg, the section 46 information gathering regime).
- 4.128 The Authority has also decided to publish an information management policy alongside the Code amendment. The information management policy sets out the Authority's general policy on its collection, use and publication / disclosure of information. In its consultation the Authority proposed to prepare and publish a guideline specific to the proposed Code amendment, on its processes, procedures, and decision criteria for:
- (a) determining whether information identified by a participant is confidential
 - (b) determining whether to make confidential information publicly available
 - (c) determining whether to disclose confidential information.
- 4.129 However, after considering submissions the Authority has concluded industry participants and other stakeholders would benefit from guidance on the Authority's general treatment of all information it collects, rather than just information collected under the Code amendment.

Issue 10: The Code amendment should include a right of appeal

What was proposed?

- 4.130 The Authority did not include in the proposed Code amendment the right for a participant to appeal a decision of the Authority.
- 4.131 Under section 64 of the Act, a participant has the right of appeal to the High Court, on a question of law only, against any decision of the Authority. A participant could also bring a complaint to the Ombudsman under the Ombudsman Act 1975.

Submitters' views

- 4.132 Transpower submitted that the proposed Code amendment provides no protection for participants if an information provision notice required the disclosure of information that would breach an obligation of confidentiality. The Code amendment should provide the information provider with access to some oversight or recourse if the Authority decided to publish, in a non-anonymised way, information marked by a participant as confidential. Transpower noted the Rulings Panel is the appeal body in respect of confidential information withheld under existing Part 2 provisions relating to the supply of information.
- 4.133 NZX also submitted that the proposed Code amendment should include appeal rights pertaining to the reasoning or stated benefits set out in a decision by the Authority to collect information. The appellant could either appeal to the Authority to review its decision or appeal to the Rulings Panel to consider the merits of the request and the Authority's decision.

The Authority's decision

- 4.134 The Authority has decided not to introduce a right of appeal to the Rulings Panel.
- 4.135 In relation to the first aspect of NZX's concern, the Authority notes its statutory objective and functions do not provide for it to gather information for its own commercial benefit.

- 4.136 In relation to Transpower’s concern and the second aspect of NZX’s concern, the Authority notes that introducing a right of appeal to the Rulings Panel would be inconsistent with all other Code provisions relating to Authority decisions about information provided to the Authority. The existing right of appeal under Part 2 of the Code referred to by Transpower relates to a participant refusing to provide ‘Code information’¹⁸ to another participant. The appeal right does not apply to a decision of the Authority on whether to provide Code information to the person requesting it.
- 4.137 Including such a right of appeal specific to the proposed Code amendment would mean the Code would have internally inconsistent rights and obligations around the Authority’s information gathering. As a general principle, putting internally inconsistent rights and obligations in the Code is not good regulatory practice. It creates regulatory uncertainty, promotes ‘forum shopping’,¹⁹ and risks unintended outcomes / consequences.
- 4.138 The Authority’s decision on the right of appeal is consistent with the general policy position implicit in the Code. The Authority is a decision maker of sufficient competency and gravitas that the grounds for any appeal of an Authority decision should necessarily have a high threshold.

¹⁸ ‘Code information’ means all information that is supplied by one participant to another participant, or group of participants, under this Code (other than ‘excluded Code information’ and information that is supplied under Parts 2 to 6 and 9 of the Code).

‘Excluded Code information’ means information—

- (a) that relates to bids, offers, reserve offers, or any asset capability statement, or
- (b) that is provided to the Authority, any investigator, or the Rulings Panel and that is required to be kept confidential under this Code or the Act, or
- (c) in relation to which the Rulings Panel has prohibited publication or communication.

¹⁹ The practice of choosing the court or jurisdiction that is expected to provide the most favourable outcome for the person advocating a particular argument or position.

Appendix A Approved Code amendment

A.1 Set out below is the Code amendment.

Part 2

Availability of Code information

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...

Regular and event-driven provision of information to the Authority

2.16 Authority may specify information that participants must collect, collate and/or provide regularly or in response to events

- (1) The Authority may publish a notice specifying information that a participant must, on a regular basis or as a result of an identified event, provide to the Authority.
- (2) The Authority may specify information under subclause (1) only for the purposes set out in section 45(a) of the Act being to carry out the Authority's monitoring functions which are to—
 - (a) monitor compliance with the Act, the regulations and the Code under section 16(1)(c) of the Act; or
 - (b) undertake and monitor the operation and effectiveness of market-facilitation measures under section 16(1)(f) of the Act; or
 - (c) undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry, under section 16(1)(g) of the Act.
- (3) The Authority may not specify information under subclause (1) for the purpose of investigating or enforcing compliance with the Act, the regulations and the Code except that it may use information obtained under a notice published under subclause (1) in the course of making a decision to appoint an investigator under regulation 12 of the Electricity Industry (Enforcement) Regulations 2010.

2.17 Requirements that the Authority must or may set in a notice under clause 2.16

- (1) In a notice published under clause 2.16, the Authority must specify the following information requirements:
 - (a) the participant who must provide the information;
 - (b) the information the Authority requires the participant to provide, to a reasonable level of detail;
 - (c) either:
 - (i) the time and/or the frequency at which the participant must provide the information to the Authority; or
 - (ii) the event following which the participant must provide the information to the Authority and the time by which the participant must provide the information;
 - (d) the manner in which the participant must provide the information to the Authority;
 - (e) the date from which the notice applies, which can be different dates for different participants.
- (2) In a notice published under clause 2.16, the Authority may specify 1 or more standard formats in which the participant must provide the information to the Authority.

2.18 Authority must consult before publishing notice

- (1) Before publishing a notice under clause 2.16, the Authority must provide to the participant to whom the proposed notice applies—
 - (a) the proposed notice; and
 - (b) the Authority's purpose in setting the information requirements in the proposed notice; and

- (c) the Authority's assessment of the likely benefits of the **Authority** obtaining the information required in the proposed notice and whether those benefits are expected to outweigh the likely costs.
- (2) The Authority must give that **participant** a reasonable opportunity to make submissions to the **Authority** on the proposed notice and take into account those submissions in deciding whether to:
 - (a) make any reasonable changes to the information requirements to be included in the **published** notice; and
 - (b) **publish** the notice.
- (3) The **Authority** may, but is not required to, consult with any other person the **Authority** wishes, following whatever consultation process the **Authority** considers appropriate.
- (4) If, following the consideration of submissions under subclause (2), the **Authority** proposes to extend the number of **participants** to whom it proposes the notice will apply, the **Authority** must consult with those additional **participants** following the process in subclauses (1) and (2) if it has not already.

2.19 Factors the Authority must consider before publishing notice

- (1) Before **publishing** a notice under clause 2.16, the **Authority** must be satisfied that—
 - (a) the benefits of the **Authority** obtaining the information outweigh the costs of the information requirements set out in the proposed notice; and
 - (b) the information requirements set out in the proposed notice promote the **Authority's** objective set out in section 15 of the Act.
- (2) Before publishing a notice under clause 2.16, the **Authority** must consider the impact of the proposed information requirements on each **participant** to whom it is proposed the notice apply.

2.20 Participants must provide information to Authority

- (1) If the **Authority** publishes a notice under clause 2.16, each **participant** to whom the notice applies must—
 - (a) collect and record the information specified in the notice; and
 - (b) collate from its own systems, records and/or information the information specified in the notice; and
 - (c) provide to the **Authority** the information specified in the notice; and
 - (d) meet the other information requirements specified in the notice.
- (2) A **participant** does not need to provide any information to the **Authority** under subclause (1)(c) if—
 - (a) the **participant** has legal professional privilege in respect of the information; or
 - (b) it is not reasonably possible for the **participant** to obtain that information, including because the person that holds the information may lawfully refuse to provide the information to the **participant**.

2.21 Participants may identify confidential information

In supplying information under clause 2.20, a **participant** may identify any information for which confidentiality is sought by reason that—

- (a) disclosure of the information would unreasonably prejudice the commercial position of the **participant** or the person who is the subject of that information; or
- (b) confidentiality is necessary to protect information which is itself subject to an obligation of confidence; or
- (c) if clause 2.20 did not apply, disclosure of the information by the **participant** would be in breach of law.

2.22 Authority dealing with information identified as confidential

- (1) If a **participant** identifies to the **Authority** any information under clause 2.21, the **Authority** will determine whether—

 - (a) there are reasons for keeping the information confidential; and
 - (b) if there are reasons to keep the information confidential as determined by the **Authority**, those reasons are outweighed by other considerations which render it desirable for the **Authority** to make all or any part of the information publicly available in order to give effect to the objective of the **Authority** in section 15 of the **Act** and for the purposes of any of the **Authority**'s functions in either:
 - (i) section 16 of the **Act**; or
 - (ii) section 14 of the Crown Entities Act 2004.
- (2) If the **Authority** does not consider under subclause 1(a) that there are reasons for keeping the information confidential, the **Authority** is not required to keep the information confidential.
- (3) If the **Authority** considers that it is desirable under subclause 1(b) to make all or any part of the information publicly available, the **Authority**—

 - (a) is not required to keep the information confidential; and
 - (b) will inform the **participant** of that decision, provided that doing so is reasonably possible in the circumstances and does not compromise the reasons for making the information publicly available.
- (4) If the **Authority** considers under subclause 1(a) that there are reasons for keeping the information confidential and does not consider that it is desirable under subclause 1(b) to make all or any part of the information publicly available, subject to subclause (5), the **Authority** must keep the information identified by a **participant** under clause 2.21 confidential.
- (5) Subclause (4) does not prevent the **Authority** from—

 - (a) using the information identified under clause 2.21 for any purpose in connection with the objective set out in section 15 of the **Act** or the **Authority**'s functions in section 16 of the **Act** or section 14 of the Crown Entities Act 2004; and
 - (b) disclosing the information to any person in connection with a purpose referred to in paragraph (a) in anonymised form or in consolidated form with other information such that the reasons for keeping the information confidential are not compromised; and
 - (c) disclosing the information where the **participant** who supplied the information or the person who is the subject of the information (if different from the **participant**) either:
 - (i) has consented specifically to the disclosure of that information; or
 - (ii) has consented generally to the disclosure, even where the **participant** identifies the information as confidential under clause 2.21, of:
 - (A) information specified in the notice **published** under clause 2.16 under which the **participant** supplied the information to the **Authority**; or
 - (B) a category of information specified in the notice **published** under clause 2.16 under which the **participant** supplied the information and the **Authority** reasonably considers the information that it intends to disclose comes within that category; and
 - (d) disclosing the information as required by or under law.

2.23 Privilege against self-incrimination

The Authority must comply with section 48(2) and 48(3) of the Act in respect of information that is subject to privilege against self-incrimination.

2.24 Authority may amend notice

- (1) The Authority may amend a notice published under clause 2.16 following the procedure set out in clause 2.18 and complying with clause 2.19.
- (2) The Authority does not need to consult under clause 2.18 on a proposed amendment to a notice if it is satisfied on reasonable grounds that—
 - (a) the nature of the amendment is technical and non-controversial; or
 - (b) there is widespread support for the amendment among the participants to whom the notice applies and to whom the proposed amendment will apply; or
 - (c) there has been adequate prior consultation (for instance, by or through an advisory group) so that all relevant views have been considered.

Appendix B Analysis of costs and benefits

- B.1 The Authority has assessed the economic benefits and costs of the Code amendment relative to the status quo arrangements under which the Authority collects information for its monitoring functions.

The Code amendment's benefits

- B.2 The Authority has assessed the following economic benefits of the Code amendment relative to the status quo arrangements under which the Authority collects information for its monitoring functions:
- (a) enabling better informed Code development and market facilitation measures
 - (b) improving the durability of the electricity market arrangements
 - (c) reducing transaction costs currently incurred through information collection.

Efficiency benefits are expected through better informed Code development, market facilitation measures and government policy making

- B.3 The Authority expects the Code amendment will mean better-informed Code development, market facilitation measures, and policy making. This benefit is expected to stem from the Authority collecting improved and more consistent information under the Code amendment than currently.
- B.4 Information collected through the Authority's monitoring functions informs market development by helping to answer two questions:
- (a) Are changes to the market arrangements needed?
 - (b) Is a change to the market arrangements delivering the necessary competition, reliability and efficiency outcomes (eg, monitoring retail market performance)?
- B.5 New Zealand's electricity industry rules / arrangements need to evolve over time as changes occur to the structure of the industry and to the technologies used in the industry. The Code amendment will facilitate the Authority having the information necessary for it to better understand what market arrangements are not fit-for-purpose as the electricity industry evolves, and therefore not delivering long-term benefits to consumers through competition, reliability and efficiency.
- B.6 The Code amendment will reduce the risk of the Authority progressing initiatives that are imperfectly targeted or have consequences that go unrecognised.
- B.7 Improved access to quality information on the electricity industry provides the Authority and electricity industry stakeholders a basis upon which to:
- (a) identify areas where Code amendments or market facilitation measures may be needed to improve competition, reliability, and/or efficiency
 - (b) assess and prioritise Code amendment proposals and market facilitation measures
 - (c) have a better understanding of how consumers might respond to, or be affected by, Code amendments or market facilitation measures
 - (d) identify areas where government policy change is desirable.
- B.8 In this way the Code amendment promotes all three limbs of the Authority's statutory objective.

Efficiency benefits are expected from improved durability of market arrangements

- B.9 The Authority expects the Code amendment will also improve the durability of New Zealand's electricity market arrangements.
- B.10 The durability of these arrangements rests on them operating for the long-term benefit of consumers. This requires well-informed Code development, market facilitation measures, and policy making, as discussed under the preceding benefit. The durability of New Zealand's electricity market arrangements also requires consumers to be confident the market arrangements are benefiting them. Investors in the electricity industry also need to be confident they are operating on a level and competitive playing field.
- B.11 Under its functions of industry and market monitoring and the monitoring of market facilitation measures, the Authority publishes reports, analyses, and various information (eg, through its EMI website²⁰) on the state of the electricity market.
- B.12 Objective, high quality, timely information is important in assisting consumers, investors, policy makers and other interested parties to understand the state of competition, reliability, and efficiency in the electricity industry. High quality information, monitoring, and commentary is also important in enabling electricity industry stakeholders to make well-informed decisions.²¹ The more well-informed such decisions are, the greater the expected economic value attached to the decisions.
- B.13 The Code amendment facilitates the ongoing collection of higher quality information. This would better enable the Authority to provide consumers, participants, and market observers²² with a more accurate analysis of the state of the electricity market and its performance. The Authority will also be better able to:
- (a) accurately answer questions about the extent to which the electricity market arrangements are working
 - (b) better prioritise areas where the electricity market arrangements can be improved.
- B.14 More generally, with better information the Authority will be able to communicate with consumers, participants, and industry observers in a way that:
- (a) is easier for them to understand and more meaningful to them
 - (b) provides them with confidence in the electricity market arrangements, increasing their willingness to engage in industry matters and helping inform their electricity-related decisions.

Efficiency benefits are expected from reducing transaction costs currently incurred in the collection of information

- B.15 The Authority considers the Code amendment will reduce, by a modest amount, the transaction costs currently incurred by the Authority and participants through the collection of information—particularly information collected on an ongoing basis.

²⁰ Refer to <http://emi.ea.govt.nz/>.

²¹ Better-informed rules and market facilitation measures made by the Authority also result in participants making decisions that are more economically beneficial. This is because many decisions made by participants are in response to the rules and market facilitation measures made by the Authority.

²² Market observers include academics, consultancies, research institutions, politicians, and energy services businesses.

- B.16 This lowering of transaction costs is expected to be driven in part from the Code amendment improving participants' ability to contribute to determinations of the Authority's information requirements and what information should be collected on an ongoing basis. This is expected to improve the quality and design of the Authority's information requests, which amongst other things, will make them easier for participants to interpret and respond to.

Lower transaction costs due to better-designed and more standardised information collection

- B.17 Under the Code amendment, the Authority and participants will incur lower transaction costs than under the Authority's current approach to collecting information under section 46 of the Act.
- B.18 For the Authority, these lower transaction costs will relate to one-off and ongoing costs associated with section 46 information requests, including:
- (a) preparing and making each individual information request
 - (b) answering queries from participants about the information request
 - (c) following up each individual information request
 - (d) clarifying, collating and processing data provided in different formats by respondents.
- B.19 For participants, these lower transaction costs will relate to one-off costs associated with interpreting and clarifying section 46 information requests that are not as well specified as they could be due to the typically ad-hoc and reactionary nature of information requests made under section 46 of the Act. Some participants will also face lower transaction costs under the Code amendment through the data provision channels used for information provision notices being more efficient (ie, standardised and automated) than the data provision channels used for section 46 information requests.
- B.20 The Authority estimates the saving in these transaction costs would be modest. This is based on the Authority's experience with the current section 46 information request relating to the collection from industry participants of information on the extent to which residential and commercial customers are having difficulty paying for their electricity, and the financial impact this has on electricity retailers.

Lower transaction costs due to mandated regular information provision

- B.21 Requests the Authority makes for information to be provided regularly on a voluntary basis typically have higher associated transaction costs than mandated requirements to provide information regularly. With the former, industry participants must decide whether to provide the information voluntarily, which typically requires, amongst other things, more consideration and upward delegation in a participant's organisation. These transaction costs are not present under information provision mandated by the Act, regulations made under the Act, or the Code.
- B.22 Mandated and standardised approaches encourage automation and other efficiency improvements in the collection of information. Voluntary approaches to collecting information often fail to provide sufficient certainty and stability in relation to the request to support investment in improved processes or automation.

- B.23 If participants do not voluntarily provide the requested information, the Authority faces transaction costs associated with following up the request, with multiple follow ups sometimes required.
- B.24 Based on its experience and discussions with participants over time, the Authority estimates the benefit from participants and the Authority incurring lower transaction costs under mandated ongoing information provision would be modest.
- B.25 The Authority considers the proposed amendment will also reduce transaction costs by providing participants, and potential new entrants, with greater transparency and certainty of the information participants are asked to provide the Authority. Participants looking to change their systems and processes to accommodate the Authority's existing voluntary information requests should have greater confidence the Authority will not cease these requests in an ad-hoc manner.

The Code amendment's costs

- B.26 The Authority has assessed the following economic costs of the proposed Code amendment relative to the status quo arrangements under which the Authority collects information for its monitoring functions:
 - (a) the cost for the Authority to implement the Code amendment
 - (b) the cost for the Authority to consult with interested parties on requests for participants to provide information to the Authority on an ongoing basis
 - (c) the cost for interested parties to respond to the Authority's consultations on requests for participants to provide information on an ongoing basis.

Implementation costs

- B.27 Under the Code amendment the Authority will incur implementation costs. These will arise from amending the Authority's processes and procedures to provide for the Authority to consult on draft information provision notices.
- B.28 The Authority expects these to be negligible (less than \$1,000).

Ongoing operating costs associated with consulting on information provision notices

- B.29 The Code amendment will require the Authority to consult with at least those participants to whom an information provision notice is proposed to apply, on the following matters:
 - (a) the purpose of the information requirements in the proposed notice
 - (b) the proposed notice that sets out the information requirements (who must provide what, how often, when, and using what manner of provision)
 - (c) the Authority's assessment of whether there is a net benefit from the Authority obtaining the information required in the proposed notice.

- B.30 The Authority estimates the average incremental cost of these consultations for the Authority and participants would be modest (for the Authority, approximately \$10,000 – \$25,000 per information provision notice; for participants, approximately \$50,000 – \$100,000). In reaching this conclusion, the Authority has considered:
- (a) the costs the Authority incurred under the following two requests for the ongoing provision of information:
 - (i) the first couple of the voluntary annual retail market information requests
 - (ii) the two relatively recent requests under section 46 of the Act for the ongoing provision of information by electricity retailers on the extent to which residential and commercial customers are having difficulty paying for their electricity, and the financial impact this has on electricity retailers
 - (b) the number, type, and estimate cost of submissions the Authority has received on consultations it considers to be of a reasonably similar nature to a consultation on an information provision notice.²³

Dynamic efficiency costs are not expected

- B.31 The Authority recognises the need to carefully balance making too much and too little information publicly available. Getting this balance wrong can discourage investment and innovation in the electricity industry and/or cause consumers to lose confidence that prices in the electricity market reflect underlying demand and supply conditions. This has an economic cost – particularly from a dynamic efficiency standpoint where investment and innovation are important.
- B.32 The Authority has sought to get the balance of information provision under the Code amendment right by making the test for the publication of confidential information given to the Authority consistent with common law and statute. This means the test is consistent with the test the Authority must apply to the release of confidential information under the OIA. It also means the test is consistent with the common law test the Authority applies to the release of confidential information collected under section 46 of the Act.
- B.33 As a result, consumers' and investors' expectations around the public release of confidential information by the Authority under the Code amendment should be similar to under the status quo arrangements for the Authority's collection of information for its monitoring functions. Therefore, the Authority is satisfied there are unlikely to be any economic costs, particularly dynamic efficiency costs, associated with the Code amendment's test for the publication of confidential information given to the Authority.

²³ Being consultations on: the consumer care guidelines; the electricity information exchange protocols (EIEPs); the operational review of registry content codes; the review of metering and related registry processes; the switch process review; access to the registry and the wholesale information and trading system (WITS); and integrating hosting capability into Part 6 of the Code.

The range of estimated costs is based on the following assumptions:

- (a) 5 stakeholders each incur \$5,000 – \$10,000 in cost
- (b) 5 stakeholders each incur \$2,500 – \$5,000 in cost, and
- (c) 10 stakeholders each incur \$1,000 – \$2,500 in cost.

Appendix C Summary of key issues raised in submissions

C.1 This appendix provides a summary of the key issues raised in submissions and the Authority's response.

Table 3: Summary of key points from consultation

Submitter	Submitter point	Authority response
<i>The proposed Code amendment may be unlawful or of no effect</i>		
Electric Kiwi / Haast	Clause 2.22 is redundant and duplicative and should be deleted as it is bad drafting practice for Code requirements to simply replicate legislation.	<p>The Code amendment is lawful—it:</p> <ul style="list-style-type: none"> a) falls within its Code-making power under section 32 of the Act b) does not purport to amend the Act or interfere with the operation of the Act. <p>The Code amendment provides the same legal protections to participants for information they provide under an information provision notice as are provided under section 48 of the Act for information they provide under a section 46 information request.</p>
Genesis Energy	<p>It is not clear the Authority can reasonably establish it is necessary or desirable to codify a power to require the provision of certain information from participants under the Code if the Act already confers a broad power to gather information.</p> <p>The proposed Code amendment would effectively be amending section 46 of the Act, by adding new information-gathering powers. This would be an invalid use of the Authority's Code-making powers under section 32 of the Act.</p>	
Meridian Energy	<p>Even if the proposed Code amendment was lawful in principle, it may not have any effect because it conflicts and interferes with the Act, in three ways:</p> <ul style="list-style-type: none"> a) The proposed Code amendment conflicts with the confidentiality of information guaranteed under the existing statutory regime. Section 46 of the Act effectively protects the confidentiality and privacy of information gathered under it. b) The statutory guarantee of a reasonable timeframe in which to provide the information under section 46(2)(a) of the Act would be abolished, and industry participants could be 	

Submitter	Submitter point	Authority response
	<p>required to take on an information creation and analysis role through the manner and form requirements of the proposed Code amendment.</p> <p>c) The proposed Code amendment appears to anticipate the existence of wide information sharing powers (eg, to make information "publicly available" in the proposed clause 2.21(2)(b)). However, there are no such powers under the Act. The Authority is not authorised to share or publish raw information it collects from participants under section 46 of the Act.</p>	
Trustpower	Information provided under an information provision notice must receive the same protection as information provided under a section 46 information request.	
<i>The proposed Code amendment's objective could be expanded</i>		
ETNZ	<p>The proposal's objective should include promoting a common understanding of critical market information among consumers, the Authority, and participants.</p> <p>Consideration could also be given to a further objective aimed at reinforcing the integrity of information provided to consumers.</p>	
FinCap	<p>Expand the objective to include a clear focus on consumers being a key audience for information collected and being involved in the formation of what information is collected.</p> <p>Broaden the scope of the proposed Code amendment, to give the Authority better oversight of 'second tier' businesses selling electricity in Aotearoa.</p>	<p>An evolving New Zealand electricity market puts increased emphasis on the Authority being well-informed to better achieve its objective and effectively perform its functions under the Act.</p> <p>To this end the Authority wants to retain the Code amendment's focus on better enabling it to fulfil its monitoring functions. This in turn places the Authority in a better position to fulfil its other functions—particularly Code</p>

Submitter	Submitter point	Authority response
Vector	<p>Add a materiality threshold to the proposal's objective to help avoid 'scope creep' when identifying information that could be subject to an information provision notice.</p> <p>The proposed Code amendment should be focused on information that has, or is likely to have, a material impact on the electricity market and on electricity consumers.</p>	<p>making and undertaking market facilitation measures.</p> <p>The Authority does not consider it necessary to add a materiality threshold. Under the Code amendment, the Authority will need to consider whether an information provision notice promotes the specified purposes.</p>
<p><i>The proposed Code amendment's objective can be achieved using the Authority's current information gathering powers</i></p>		
Contact Energy	<p>The Authority has not identified with any degree of specificity how the application of the three information gathering approaches under the existing information gathering framework fail to provide important information necessary for the Authority to undertake its statutory functions.</p> <p>Option 2 in the proposed Code amendment's regulatory statement is the preferred approach to improving the Authority's information gathering framework.</p>	<p>The Authority considers the Code amendment will achieve the objective consulted on better than will using either or both the alternatives described in the consultation paper.</p> <p>The first alternative has the following main drawbacks when compared to the Code amendment:</p> <ul style="list-style-type: none"> d) higher expected transaction costs, from needing to make bespoke Code amendments instead of publishing information provision notices e) the increased possibility of non-standardised information requirements being implemented over time because the Code amendments may end up addressing supplementary issues that result in some bespoke information requirements. <p>The Code amendment provides greater clarity and certainty than section 46 over the Authority's ability to</p>
Electric Kiwi / Haast	<p>Using section 46 of the Act need not be reactive. The Authority could implement a notice-based collaborative approach under the current regime.</p>	
ERANZ	<p>ERANZ members do not consider the drawbacks of section 46 information requests identified in the Authority's consultation paper require the establishment of a new, additional method for gathering information.</p> <p>Improvements such as proactive engagement with the electricity industry and undertaking CBAs could be implemented instead.</p> <p>Supports the Authority using more data in its decision-making by looking to Option 2 in the proposed Code amendment's regulatory statement and achieving its objectives by optimising notices issued under section 46 of the Act.</p>	

Submitter	Submitter point	Authority response
Genesis Energy	<p>The Authority should adopt Option 1 of the proposed Code amendment's regulatory statement if the Authority needs information regularly from participants.</p> <p>The Authority should utilise section 46 of the Act better, including through guidance to participants, as described in Option 2 of the proposed Code amendment's regulatory statement.</p> <p>The Authority's qualitative cost-benefit analysis is not compelling.</p>	<p>require the provision of regular and event-driven information by participants. Participants may, under the second alternative, at times choose to query the Authority's ability to do one or both of the following under section 46 of the Act:</p> <ul style="list-style-type: none"> a) set in advance regular or event-driven information provision requirements, including setting the format of information and setting the required method of providing information b) require participants to provide information they do not already hold, including collecting and/or collating information.
Mercury	<p>On balance, the Authority consulting with industry participants then using its existing information gathering powers would deliver the same benefit as the proposed Code amendment, without the cost of removing statutory protections from information providers such as legal professional privilege (section 48 of the Act).</p> <p>Not convinced section 46 of the Act does not lend itself easily to the use of standardised data formats and data transfer protocols.</p>	<p>This could result in one or more of the following outcomes, with each outcome representing an additional cost over the Code amendment:</p> <ul style="list-style-type: none"> a) the Authority and stakeholders incurring transaction costs reaching a resolution on the matter at hand b) the Authority proposing a bespoke Code amendment each time the Authority wants to gather the information regularly c) regulatory uncertainty.
Meridian Energy	<p>Option 2 of the proposed Code amendment's regulatory statement would better deliver on the objective of the proposed Code amendment.</p> <p>The Authority already has broad powers to request information under section 46 of the Act and could choose to use those powers differently or more frequently.</p> <p>Continued use of section 46 of the Act would provide greater certainty for participants who are familiar with the requirements of that framework and the protections under the Act.</p>	<p>The Code amendment provides the same protections to participants as they receive under section 46 of the Act in relation to legal professional privilege and self-incrimination. They also provide the same protections in respect of confidentiality that apply under common law rules for information obtained under section 46.</p>
Nova Energy	<p>Given the information gathering powers under section 46 of the Act, it is not clear the Authority needs to establish a new information gathering framework to achieve its objective. Most of the net benefit of the proposed Code amendment could be achieved</p>	

Submitter	Submitter point	Authority response
	without new overreaching changes to the Code.	
Transpower	The proposed Code amendment is required to enable the Authority to collect ongoing information. The use of section 46 of the Act could be made more efficient by implementing a structured process for issuing information requests.	
<i>The Authority should consult widely</i>		
Electric Kiwi / Haast	Why may it be preferable to consult only with the disclosing market participant? Market participants are likely to have a general incentive to overstate the cost and practicability of the proposed disclosure requirements. This should be balanced against other stakeholders' perspectives.	<p>The Authority has decided to retain the requirement to consult with the participant or participants to whom the proposed information provision notice applies, and not expand this requirement to apply in respect of other parties. This ensures a base level of consultation with the participant or participants directly affected without requiring a wide and potentially lengthy and costly consultation.</p> <p>The Authority is always able to consult further, if it wishes, and has changed the Code amendment to acknowledge this. This consultation, however, is at the Authority's discretion.</p>
FinCap	<p>Consumers and their representatives should always be provided with an opportunity to be consulted about what information is proposed to be collected and the potential costs and benefits of this. So too should consumer agencies such as the Consumer Advocacy Council and the Energy Hardship Panel. This broader consultation would:</p> <ul style="list-style-type: none"> a) mean the information collected by the Authority was informed by consumers' experiences and priorities b) result in more efficient building / adjustment of the Authority's and participants' systems to enable the regular information provision. 	
Vector	The Authority should undertake meaningful consultation with participants in the development of proposed information provision notices. The Authority should consult on what would be a reasonable timeframe between the date on which an information provision notice is	

Submitter	Submitter point	Authority response
	published and when the obligation to provide the information starts.	
<i>There should be limits on the amount of information collected and its uses</i>		
Transpower	<p>Information collected by the Authority under an information provision notice should be used only for the monitoring functions set out in the notice, and not for other monitoring functions and purposes.</p> <p>Participants should not have to collect information they do not already hold, and participants should not have to spend a disproportionate amount of resourcing on reformatting information and/or collating it from diffuse sources.</p>	<p>The Authority agrees the amount of information it collects, and its use of this information, under the Code amendment should not be unlimited. This is reflected in the purposes specified in clause 2.16(2) of the Code amendment and the prohibition on the Authority collecting information for investigation and enforcement. The Code amendment also requires the Authority to consult on its purpose in setting the information in an information provision notice. This obliges the Authority to specify the relevant monitoring function(s) in a notice.</p> <p>For the avoidance of doubt, and as set out in the consultation paper, a key purpose of information collected for monitoring is to inform other functions of the Authority, in particular Code making and market facilitation measures but other purposes are also specified.</p>
Trustpower	<p>Information collected by the Authority under an information provision notice should be used only for the monitoring functions set out in the notice, and not for other monitoring functions and purposes.</p> <p>If the Authority considers information gathered under an information provision notice might be suitable for another monitoring function, the Authority should test its view by consulting with participants.</p>	
Vector	<p>The focus of the Code amendment should be on information that has, or is likely to have, a material impact on the electricity market and electricity consumers.</p> <p>The Authority should work closely with other energy regulators to avoid duplication and unnecessary compliance costs.</p>	
<i>The necessity of information gathered should be reviewed periodically</i>		
FinCap	A review of all information gathering from the Code amendment should occur every two years, with consumers and their representatives having the opportunity to be consulted	

Submitter	Submitter point	Authority response
Nova Energy	Each information provision notice should have an expiry date and the Authority should have to reassess whether information being collected meets the test of having purpose, use and value, and provides a material benefit to consumers. Such a review should include the Authority reporting analytics demonstrating the extent to which the information collected is being used and is supporting the Authority in meeting its objective, as well as benefiting the industry.	The Authority agrees the need for the information being collected under an information provision notice should be reviewed periodically. The Authority will do this.
Transpower	Each information provision notice should have an expiry date.	The nature of information collected under an information provision notice (ongoing and/or event-driven) does not lend itself to collection timeframes of a year or two. The Authority's expectation is that information collected under a notice will be gathered over a minimum of several years.
Trustpower	Each information provision notice should have an expiry date that is no more than 12 months from date the notice is issued. If the Authority wished to renew a notice, it should have to consult with participants no earlier than two months and no later than one week before the expiry date of the notice.	The Authority notes it has the power under the Legislation Act 2019 to terminate an information provision notice at any time.
Vector	The Authority is encouraged to issue supporting guidelines for information provision notices, which amongst other things specify factors that could: <ul style="list-style-type: none"> a) trigger changes to, or future reviews of, the information specified in a notice b) remove the need for a notice. 	
<i>The CBA for an information provision notice should include certain matters</i>		
Nova Energy	Proposed information provision notices should always be supported by analysis showing a material benefit from collecting the information.	To the extent practicable the Authority will use quantitative analysis in assessing whether requiring participants to provide the information specified in an information provision notice is expected to provide a net benefit. However, quantitative analysis will not always be possible, and so qualitative analysis will at times need to be relied upon.
Trustpower	The CBA for a proposed information provision notice should include an assessment of the costs and benefits of choosing to gather the information using this approach rather than one of: <ul style="list-style-type: none"> a) a Code amendment 	The Authority does not envisage that it would issue information provision

Submitter	Submitter point	Authority response
	<p>b) a voluntary information request</p> <p>c) a request under section 46 of the Act.</p> <p>Maintaining and publishing an up-to-date schedule of information provision notices and other information requests would help inform the Authority and the electricity industry of the total cost and benefit of complying with information provision notices and other information requests.</p>	<p>notices that have a negligible / immaterial expected net benefit, but does not consider it appropriate to set a requirement for a material benefit to arise before a notice can be made.</p> <p>The Authority plans to maintain an up-to-date schedule of information provision notices on a dedicated Authority web page.</p> <p>As a matter of general practice in deciding whether to prepare and consult on a draft information provision notice, the Authority will consider information gathering options available to it. This may include an assessment of the relative advantages and disadvantages of the different options. However, any such assessment is not part of the assessment of the likely benefits and costs of the Authority obtaining the information required in the proposed notice.</p>
Vector	The CBA for a proposed information provision notice should be a quantitative assessment where possible and should have to show a significant net benefit.	
<i>There should be added emphasis on publication of information</i>		
Electric Kiwi / Haast	The confidentiality provisions in the Code amendment should not perpetuate current disclosure loopholes.	
ETNZ	<p>Changes should be made to the Code amendment so that information disclosed is:</p> <p>a) in a standardised form that promotes consumer understanding</p> <p>b) reviewed and publicised by the Authority in a form that assists consumers to make efficient and informed decisions</p> <p>c) generally made publicly available unless there are clear, specific, and reasonable grounds for it not to be made public.</p>	The Authority wants to retain the Code amendment's focus on better enabling the Authority to fulfil its monitoring functions. This in turn places the Authority in a better position to fulfil its other functions—particularly Code making and undertaking market facilitation measures.
FinCap	There should be clearer requirements for the Authority to publish information in a timely manner.	

Submitter	Submitter point	Authority response
	It is important to have transparency around traders' names in information collected by the Authority	
<i>Confidential information should be protected</i>		
Electric Kiwi / Haast	The confidentiality provisions in the Code amendment should not perpetuate current disclosure loopholes.	<p>The Authority has:</p> <ul style="list-style-type: none"> revised the test for making confidential information publicly available, to increase the threshold that must be met before the Authority may make confidential information publicly available inserted an obligation on the Authority to inform affected parties should it propose to make confidential information publicly available published the Authority's general policy on its collection, use and publication / disclosure of information.
Meridian Energy	The proposed Code amendment removed protections on confidentiality and privacy that exist for information gathered under section 46 of the Act.	
Nova Energy	<p>In exercising its information gathering powers the Authority—</p> <ol style="list-style-type: none"> must not unduly influence participant's decision-making processes by creating risks over what data might be publicly released, or how it might be used maintain very high standards of information security, given that a significant amount of market sensitive information may be held. 	
Transpower	<p>The quality and quantity of information Transpower receives "in confidence" (under both its system operator and grid owner roles) may be substantially compromised in the future, if information provision notices mandate the disclosure of information provided confidentially to Transpower.</p> <p>The proposed Code amendment provided no protection for participants if an information provision notice required the disclosure of information that would breach an obligation of confidentiality.</p> <p>The Authority should have to notify participants if it does not believe information supplied about the participant is confidential.</p>	

Submitter	Submitter point	Authority response
Trustpower	The Authority should take all appropriate actions to preserve the confidential status of any commercially sensitive information the Authority receives	
<i>The proposed Code amendment should include a right of appeal</i>		
NZX	The Authority could utilise these provisions to access proprietary information or commercially sensitive datasets held by participants. The Authority could use these for its own commercial benefit or make them available to the wider public (including competitors) to the financial detriment of the information supplier.	<p>Including a right of appeal specific to the proposed Code amendment would mean the Code would have internally inconsistent rights and obligations around the Authority's information gathering. As a general principle, putting internally inconsistent rights and obligations in the Code is not good regulatory practice. It creates regulatory uncertainty, promotes 'forum shopping', and risks unintended outcomes / consequences.</p> <p>The Authority notes its statutory objective and functions do not provide for it to gather information for its own commercial benefit.</p>
Transpower	The Code amendment should provide the information provider with access to some oversight or recourse if the Authority decided to publish, in a non-anonymised way, information marked by a participant as confidential. For example, the Rulings Panel is the appeal body in respect of confidential information withheld under existing Part 2 provisions relating to the supply of information.	

Source: Electricity Authority