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Genesis Energy
Limited
155 Fanshawe Street
Auckland 1010
New Zealand

T. 09 580 2094

Submissions Administrator
Electricity Authority
Level 7, Harbour Tower
2 Hunter Street
WELLINGTON 6143

By email: infoframework@ea.govt.nz

Improving the framework for the Authority's information gathering

Genesis Energy Limited (**Genesis**) welcomes the opportunity to provide feedback on the Electricity Authority's (**Authority**) consultation paper *Improving the framework for the Authority's information gathering* dated 6 July 2021.

The Authority acknowledges that the existing information-gathering powers it has under the Electricity Industry Act 2010 (**Act**), coupled with specific reporting obligations under the Electricity Industry Participation Code 2010 (**Code**), provides the Authority with a significant amount of information concerning the wholesale electricity market. However, it considers that it does not have the same level of information concerning the retail electricity market. As a consequence, the Authority feels that its ability to monitor the retail electricity market is impaired.[1] It proposes to address this by amending the Code to grant itself the power to compel a participant to provide information to the Authority on a regular basis or as a result of an identified event.

The existing framework should be used to address any perceived shortcomings

We agree that it is important for the Authority to review its information-gathering powers and processes to ensure that they allow the Authority to obtain the information necessary to fulfil its statutory obligations. We also agree that this information should be provided in a timely way, and in a cost-effective manner for both the Authority and the information provider.

However, we do not believe that the perceived shortcomings with the Authority's existing information-gathering powers merit the introduction of a new and broad information gathering framework.

We recommend instead that these shortcomings are addressed by:

(a) Better utilising section 46 of the Act, including through guidance to market participants, as described in Option 2 of the consultation paper. This guidance could, for example, set out expectations concerning data

[1] Electricity Authority Consultation Paper, *Improving the framework for the Authority's information gathering*, July 2021, at paragraph 2.23.

formatting and exchange protocols, timeliness of provision and early engagement with the Authority where there are questions concerning the scope of the information request.

(b) To the extent that a category of information is required from a defined group of market participants regularly, seeking a specific Code amendment in relation to that information and those participants, and undertake the usual consultation process, as set out in Option 1 of the consultation paper. As with recent proposals to improve information disclosure,[2] the consultation would include the format, interface and reporting timeframes to address standardisation and timeliness concerns.

We note that:

(a) The consultation paper does not provide detailed information concerning the perceived shortcomings of the current framework.

(b) While we acknowledge that quantifying the costs and benefits of the proposed amendment is difficult, the qualitative cost-benefit analysis set out in the paper is not compelling. For example, we query the assertion that a specific Code amendment to address a particular disclosure obligation would make it harder for market participants to find, read and understand it relative to the issue of notices by the Authority to participants under the proposal. This concern can be addressed by appropriate drafting, consultation and awareness initiatives by both the Authority and the relevant participant. Further, ensuring that all disclosure obligations are contained in a single document rather than a series of documents, assists with the cohesiveness of a disclosure regime.

Not clear that the Authority can give itself the new information-gathering powers

The Authority has very broad powers conferred to it under the Act to require participants to, among other things, provide it with information, papers, recordings, and documents, provided it is for the one of the purposes authorised expressly under section 45 of the Act.

However, the consultation paper notes that:[3]

> *Section 46 of the Act is a useful method to collect information. This includes supporting one-off requests from the Authority for participants to provide information voluntarily. However, using section 46 to collect ongoing information for the Authority's monitoring functions also has shortcomings.*

[2] Electricity Authority Consultation Paper, *Internal transfer prices and segmented profitability reporting*, April 2021.
[3] Electricity Authority Consultation Paper, *Improving the framework for the Authority's information gathering*, July 2021, at 2.23.

To rectify the perceived shortcomings of the statutory powers under the Act, the consultation paper states that "the Authority's view is that amending the Code to insert an additional element in the Authority's information gathering framework would promote the Authority's statutory objective."[4]

The passages from the consultation paper quoted above suggest that the Authority is adding to or expanding its already broadly defined statutory information-gathering powers, rather than putting processes in place to exercise that power or specifying how it will be exercised (which would be appropriate for a Code amendment). However, if the Authority is only intending for the proposed amendment to enable the Authority to exercise its information gathering powers under the Act, then a Code amendment should not be required as it already has the necessary powers under section 46.

We are therefore concerned that the Authority is purporting to give itself new information-gathering powers. To do so would amount to an invalid use of the Authority's code-making powers under the Act. As the Supreme Court has noted in respect of the Commerce Commission: [5]

> *A public body like the Commission must not exercise a power conferred upon it by statute for a purpose that is not within the contemplation of the enabling statute.*

The concern with the Authority's proposal is that it would effectively be amending section 46, by adding new information-gathering powers. It is a well-established principle that statutory provisions empowering the making of secondary legislation do not include a power to amend the primary act – unless clear and express wording is used to that effect.

Guidance from the Legislation Design Advisory Committee puts the matter in the following way:

> *Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power.*
>
> *The nature of secondary legislation is that it generally takes effect subject to all primary legislation. It is possible, however, for secondary legislation to amend or override an Act. This requires that Parliament enact an empowering provision expressly authorising secondary legislation with that effect. Empowering provisions of this nature are sometimes called "Henry VIII clauses".*

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[4] Electricity Authority Consultation Paper, *Improving the framework for the Authority's information gathering*, July 2021, at 2.24.
[5] *AstraZeneca Ltd v Commerce Commission* [2009] NZSC 92, at [29].

> *By virtue of the fact that this type of empowering provision enables the Executive to override Acts of Parliament, these provisions create a risk of undermining the separation of powers.*[6]

Additional caution should be exercised to ensure that this principle is observed when dealing with powers that compel the production of information, which by nature, involves an intrusion into private property rights. We note that:

(a) Such powers are within the spectrum of search, seizure and surveillance powers, which are recognised as invasive powers that should only be conferred by primary legalisation (section 47 of the Act contains the Authority's search powers). The Regulations Review Committee made this point when it specifically identified "search and seizure" as an area for which Parliament should not delegate the power to legislate.[7] Similarly, the Legislation Design and Advisory Committee states that matters that should be reserved for primary legislation include "the creation of significant public powers such as search and seizure or confiscation of property".

(b) A court would readily find that section 46 (and section 47) of the Act confers all the information gathering powers required by the Authority, and that section 32 does not empower the Authority to expand those invasive and extensive powers by delegated legislation.

(c) It is therefore not surprising that there are no other regulatory authorities in New Zealand that have sought to amend their information gathering powers through delegated legislation.

In summary:

(a) There is nothing in section 32 of the Act to suggest that Parliament intended the fundamental principles discussed above to be overridden. 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.

(b) If the Authority does not consider its information-gathering powers under the Act are sufficient for it to perform its functions or statutory objective, then an amendment to the Act is required, not the Code.

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[6] Legislation Design Advisory Committee, *Legislation Guidelines: 2018 Edition,* at Chapter 15.
[7] Regulations Review Committee Inquiry into principles determining whether delegated legislation is given the status of regulations (30 June 2004) [2002–2005] AJHR I.16E at 25.

The proposed power is inconsistent with section 32 of the Act

Even if it was accepted that the Authority could use the Code to give itself new information-gathering powers, the proposal remains problematic.

The consultation paper correctly notes that the Code may only contain provisions that are "necessary or desirable" to promote one or all of the outcomes specified under section 32(1). However, it is not clear that the Authority can reasonably establish that 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.

We observe that:

(a) The interpretation of the Commerce Commission's information gathering powers is relevant here. Under section 98 of the Commerce Act 1986, the Commission similarly has a broad power to require information from any person where it "considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under [the Commerce] Act".[8]

(b) The High Court in *AstraZeneca Ltd v Commerce Commission* noted that "although the power is couched in terms of what the Commission considers it necessary or desirable, that formulation does not render its exercise immune from review. In the end the subjective consideration of the Commission must also be capable of withstanding objective scrutiny."[9]

(c) The proposed new clause 2.16 contemplates requiring participants to provide information "on a regular basis". Also, it is not clear from the drafting of clause 2.16 whether an "identified event" needs to be one that has already occurred. In effect, the Authority would be requiring participants to provide information on a forward-looking basis instead of information that is in the possession of, or under control of, the participant at the time the information is sought (as contemplated under section 46).

The risk for the Authority is that at the time that the request is made, it will not be able to reasonably establish that the information to be gathered is consistent with section 46 – because the information does not yet exist and/or it has not been decided what function that information is necessary or desirable to fulfil.

We also note that if clause 2.16 is adopted as currently drafted (i.e. establishing a standing request for information to be provided), the Authority would have information gathering powers that are unique, and broader, when compared to the powers conferred on other regulatory authorities. This includes the Commerce Commission and the Financial Markets Authority, even though these regulatory authorities

[8] Commerce Act 1986, s 98.
[9] *AstraZeneca Ltd v Commerce Commission* (2008) 12 TCLR 116 (HC), at [50].

respective empowering statutory provisions broadly mirror the power conferred under the Act.[10]

In summary, when reading sections 32 and 46 of the Act together, we suggest that it would be difficult for the Authority to establish that it is necessary or desirable to give itself new information-gathering powers in the manner proposed.

Summary

We agree with the principle that the Authority should be provided with the information necessary to allow it to fulfil its obligations, and in a timely and cost-effective manner.

The existing information gathering framework under the Act and the Code has been used to improve information disclosure in the wholesale market. Where necessary, the Authority and the industry have worked together to incorporate specific disclosure obligations to improve the information made available to wholesale market participants. This experience serves as a roadmap for the Authority and the industry to substantiate, and then address, specific information adequacy concerns in the retail market. Further, it is not clear that the Authority has the power to grant itself the proposed information gathering powers, or that the proposed powers are consistent with section 32 of the Act. We recommend, therefore, that the existing framework be used, and improved where necessary, to address the Authority's concerns.

Please don't hesitate to contact me should you wish to discuss our response further.

Yours sincerely

Warwick Williams
Senior Regulatory Counsel and Group Insurance Manager

[10] For example, section 25 of the Financial Markets Authority Act 2011 enables the Financial Market Authority to require information if it "…considers it necessary or desirable for the purposes of performing or exercising its functions, powers, or duties under this Act…".