

16 August 2021

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By e-mail: infoframework@ea.govt.nz

Dear Matthew,

Improving the framework for the Authority's information gathering

As the Electricity Authority is aware, Electric Kiwi and Haast Energy Trading (Haast) welcome and support improved information disclosure, compliance monitoring and enforcement.

We are comfortable with the introduction of the proposed new information gathering powers. Our understanding is that the Electricity Price Review Panel faced similar types of issues that are raised in the consultation paper, with differing levels (and quality) of co-operation by the incumbent gentailers to information requests.

We support the proposal to "require the Authority to engage with participants over the collection of ongoing information through consultation" but consider this engagement should be required to be with all stakeholders and interested parties.

The requirement to consult should help address issue that some of the Authority's information reporting notices or requests have can be unclear, ambiguous and open to differing interpretations. Consultation could help ensure these issues are remedied and result in provision of higher quality and more comparable information.

Section 46 versus the proposed new information gathering powers versus information disclosure

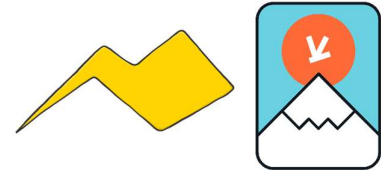
An element of the proposals we consider may warrant further consideration is establishing (and explaining) the appropriate boundaries between information that should be obtained under sections 45 and 46 of the Electricity Industry Act, versus the proposed new information gathering powers (which covers section 45(a) but not section 45(b)) versus information disclosure.

For example, the consultation paper states that "using section 46 to collect ongoing information for the Authority's monitoring functions also has shortcomings. In particular: ... typically, this approach is reactive in nature, meaning the Authority has little or no time to engage with industry participants to refine the information sought and to assess the benefits and costs of obtaining the information" but there is nothing in the Electricity Industry Act which would restrict the use of section 46 in this way.

Comments on the proposed Code amendment drafting

We have the following comments about the Authority's proposed Code amendment:

- The consultation requirement in clause 2.18 should be extended to require the Authority consult publicly and not just the minimum of the market participant that would be required to provide the disclosure information. Market participants are likely to have a general incentive to overstate the cost and practicability of the proposed disclosure requirements which should be balanced against other stakeholder perspectives. The consultation paper does not include any explanation why it may be preferable to consult with the disclosing market participant only.
- There is an inconsistency between clauses 2.18(1)(c) and 2.19(1)(a): clause 2.18(1)(c) refers to the "[likely] benefits are expected to outweigh the likely costs", whereas clause 2.19(1)(a) makes no reference



to “likely” and instead tests whether “the benefits ... outweigh the costs”. It might be better that both clauses simply refer to the “expected benefits exceeding the expected costs” or simply that the “benefits exceed the costs”.¹

- The confidentiality provisions in clause 2.21(1)(b) should not perpetuate the current disclosure loopholes; particularly given its concern about the existing confidentiality exclusion.²

We have discussed this matter in more detail in response to the Authority’s consultation on a “Permanent change to definition of disclosed information”,³ but consider the Authority should avoid the Genesis-OMV situation where “The GSA was entered into between OMV and Genesis. Genesis is a participant. OMV is not.” The Rulings Panel found: “The Panel further finds that even if the information was “disclosure information” it was subject to a confidentiality agreement and that clause 13.2A(2)(c) of the Code applied” and that “confidentiality exclusion to the disclosure requirement in clause 13.2A(1) would apply had there been an obligation to disclose”.⁴

- The statement in clause 2.22 that “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” is redundant and duplicative, and should be deleted. We consider it bad drafting practice for Code requirements to simply replicate legislation.
- Where information is not provided on the basis of section 48 the Authority should publicly report on this, including the information that was requested and the party that invoked the self-incrimination provisions.

Concluding remarks

Electric Kiwi and Haast are supportive of the Authority and market participants having access to better quality information about the operation and performance of the electricity market. 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.

Yours sincerely,

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¹ The Electricity Industry Participation Code typically refers to costs and benefits rather than expected costs and benefits.

² Electricity Authority, Review of thermal fuel informaton [sic] disclosure Decision, 26 January 2021.

³ Electric Kiwi and Haast, Wholesale market information disclosure reforms welcomed but should go further and address all the matters raised by the Rulings Panel, 21 July 2021.

⁴ Rulings Panel, Haast Energy Trading Limited v Genesis Energy Limited decision, 28 January 2021.