24 August 2021

Submissions
Electricity Authority

By email: infoframework@ea.govt.nz

Improving the framework for the Authority's information gathering

Meridian appreciates the opportunity to provide feedback to the Electricity Authority on the consultation paper *Improving the framework for the Authority's information gathering*.

Meridian supports the Authority's acknowledgment that information requests can be a burden on industry participants and that consultation and cost benefit analysis would be appropriate when considering particularly onerous or sustained information requests.

Meridian prefers Option 2 in the consultation paper, whereby the Authority makes changes to its internal processes so that consultation occurs, and a cost benefit assessment (CBA) is undertaken ahead of certain types of information request under section 46 of the Electricity Industry Act 2010 (the Act). 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 and limitation of the Act.

In the body of this submission below, Meridian sets out why it supports Option 2 in the consultation paper and queries:

- whether the Authority has identified a problem that needs to be addressed given the information gathering powers already available to the Authority;
- the legality of the Authority's preferred option; and
- the qualitative CBA undertaken by the Authority to support its preferred option.

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The Authority's problem definition

Meridian supports the Authority making better informed, evidence-based decisions. However, the Authority has existing powers to gather information and can increase the use of those powers or refine how it uses those powers if it chooses.

The consultation paper states 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." According to the Authority, the missing element is "an effective method to efficiently gather regular or event-driven information from participants on an ongoing basis." Yet the Authority already uses section 46 notices to gather regular or event-driven information from participants on an ongoing basis. The Authority also decides from time-to-time to introduce Code provisions that include an element of information gathering on an ongoing basis. It is therefore not clear what problem the Authority is seeking to solve by introducing an additional information gathering tool – it can do everything it wants with existing tools.

Legality of the Authority's preferred option

The Authority may need to consider whether the proposed amendments to the Code would be lawful. The Authority is required to demonstrate Code amendments are necessary to promote the Code's objectives under section 32(1)(a)–(e) of the Act. The amendments may not be considered necessary given Parliament has already directly addressed information gathering for monitoring purposes and provided a specific power in primary legislation to achieve that objective in section 46. Any additional powers aiming to achieve the same objective are likely, by definition, to be considered unnecessary.

In any event, even if lawful in principle, the proposed amendments may not have any effect because they conflict and interfere with primary legislation and section 33(2) of the Act states that "if any provision of the Code conflicts with this or any other Act, or with any regulation made under this or any other Act, the Act or regulation prevails."

As noted in the legal opinion appended to this submission, the Authority's proposal likely conflicts with the Act in the following ways:

- The common law position is 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. Section 46 of the Act is not expressly qualified in this way, effectively protecting the confidentiality and privacy of information gathered under it. The Authority's proposed amendment would remove those protections and provide the Authority with a broad discretion to override the confidentiality of potentially sensitive consumer or commercial information, including wherever it considers confidentiality concerns are outweighed by other factors (see proposed clauses 2.21(3) and 2.21(2)(b)).

- The Authority's proposed amendments would create a new and more intrusive power to obtain information that circumvents the protections in section 46 and therefore interferes with the operation of the Act. The Authority would be entitled to publish notices specifying the time, manner and form in which information must be provided, on an ongoing basis (cl 2.17). The statutory guarantee of a reasonable timeframe in which to provide the information under section 46(2)(a) would be abolished, and participants could be required to take on an information creation and analysis role through the manner and form requirements. The effect is to qualify the existing statutory regime by transferring much of the administrative and cost burden of information gathering onto participants.

- At points, the Authority's proposed amendments appear to anticipate the existence of wide information sharing powers (for example to make information "publicly available" in cl 2.21(2)(b)) but there are no such powers under the Act. Under the Act, the Authority is not authorised to share or publish raw information it collects from participants under section 46. It is only permitted to make publicly available the results of its expert analysis in the reviews, studies, and inquiries it has carried out on matters relating to the electricity industry (see section 16(g)). As such the references to "publicly available" information are confusing and unhelpful. The proposed amendments could not purport to introduce a broader information sharing power – that again would conflict with the existing functions of the Authority under the Act and is clearly a matter for Parliament's determination through primary legislation.

Option 2 in the consultation paper would use the existing provisions of section 46 and therefore would not entail the same issues of inconsistency with primary legislation.

The Authority's cost benefit analysis

The Authority has assessed the economic benefits and costs of the proposed Code amendment and expects it to deliver a net economic benefit. However, the qualitative analysis does not give us any confidence that benefits will in fact result.

Addressing each of the identified benefits in turn:

- "Enabling better informed Code development and market facilitation measures" – This is not a benefit of the proposed Code amendment *per se* but rather a benefit that flows from increased provision of information regardless of the of the tool used to request that information. The Authority could request access to more information using existing tools and derive the exact same benefits.

- "Improving the durability of the electricity market arrangements" – This relates to consumer and investor confidence in the market and understanding of the state of competition, reliability and efficiency in the electricity industry, which the Authority identifies will result from more well-informed decisions and the provision of high quality information and analysis to the public. Again, these are benefits that flow from increased information gathering and good use of that information regardless of the of the tool used to request that information.

- "Reducing transaction costs currently incurred through information collection" – The Authority estimates the savings in these transaction costs to be modest. Meridian agrees because:
    - Regardless of whether notices under the Code were used to issue information requests or notices under section 46 of the Act, the same or very similar costs would arise to prepare the request, answer queries, follow up on requests, and process the information received.
    - While the Authority characterises the proposal as "standardised information collection" that is not in fact the case, it would add an additional information gathering tool to a suite of tools already used by the Authority, further diversifying and complicating information requests for participants.
    - The Authority identifies that mandatory information requests are more efficient than voluntary requests, but this would not be a benefit of the proposal but rather of the Authority choosing to use one of its existing tools rather than the other.

The main benefits of the proposal are a result of consultation and CBA ahead of any request for information on an ongoing basis. Consultation and CBA are also the main drivers of cost for the proposal. This is consistent with the fact that the Authority already has information collection powers, and therefore consultation and CBA are the only novel aspects of the proposal (and of the alternative identified as Option 2). Consultation and analysis will help to refine information requests to deliver the most pertinent information to the Authority at least cost to participants and will ensure that undue costs are not placed on the industry or flow back to consumers. Meridian agrees that consultation and CBA ahead of certain information requests is likely to have net benefits. However, those net benefits apply to both the proposal and to Option 2.

As noted earlier, the Authority's preferred option would also entail costs associated with legal uncertainty and increased complexity because of the introduction of an information gathering power that would be inconsistent with the one that already exists in the Act. Option 2 would not incur these costs.

Conclusion

Meridian supports the Authority making changes to its own internal processes so that it undertakes consultation and CBA ahead of certain types of information request under section 46. Meridian considers this option (Option 2) to be preferrable because it would:

- deliver the same net benefits as the proposal;
- provide greater certainty for participants who are familiar with the requirements of the framework in the Act; and
- avoid the legal issues that could arise if an information gathering power was introduced to the Code that was inconsistent with the power in the Act.

Please contact me if you have any queries regarding this submission.

Yours sincerely

Sam Fleming
Manager Regulatory and Government Relations

Appendix A: Responses to consultation questions

	Question	Response
1.	Do you agree the issue identified by the Authority is worthy of attention?	Meridian agrees that information gathering is vital for better informed, evidence-driven decision-making. However, we do not consider the Authority's information gathering framework to be missing any element. 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. 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. Meridian supports increased consultation and CBA ahead of ongoing or more onerous information requests but does not consider it necessary or desirable to set out consultation and CBA requirements in the Code.
2.	Do you agree with the objective of the proposed amendment? If not, why not?	Yes. However, for the reasons set out in the body of this submission, we do not think the proposal would deliver on limb (a) of the objective. Option 2 would better deliver on the objective.
3.	Do you agree the benefits of the proposed amendment outweigh its costs?	No. However, as described in the body of this submission, the benefits of Option 2 likely outweigh the costs.
4.	Do you agree the proposed amendment is preferable to the other options? If you disagree, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.	No. Meridian prefers Option 2 for the reasons set out in the body of this submission.
5.	Do you agree the Authority's proposed amendment complies with section 32(1) of the Act?	No. See the body of this submission for further detail.

6.	Do you have any comments on the drafting of the proposed amendment?	No. Although as noted in the body of this submission the Authority should consider the legality of Code provisions that conflict with the information gathering powers under the Act. We also note that Option 2 requires no Code drafting.

Appendix B: Russell McVeagh opinion

Privileged and confidential

24 August 2021

To: Meridian
From: Russell McVeagh

Subject: Responses to EA's proposed information gathering amendments to the Code

Introduction

1. You have asked us to assess whether the Electricity Authority's ("**EA**") proposed amendments to the Electricity Industry Participation Code (the "**Code**") to augment its information gathering powers are permitted under the Electricity Industry Act 2010 ("**Act**").

2. Assuming the proposed amendments are drafted as promulgated, we consider they would be of no effect because they conflict in a number of respects with the existing information gathering regime under the Act. Namely, the amendments conflict with the confidentiality of information guaranteed under the existing statutory regime and purport to remove existing procedural safeguards for the benefit of participants. We examine the reasons for this view in detail below.

The proposed amendments are of no effect because they conflict with pre-existing statutory information gathering powers

3. Section 33(2) provides that if any provision of the Code conflicts with the Act or any other Act or regulation, that Act or regulation prevails. Similarly, s 34(2)(a) provided that the initial Code had to be consistent with the Act. These provisions reflect a general administrative law principle that subordinate legislation cannot repeal or interfere with the operation of a statute.[1] Interference includes an attempt to impose conditions which purport to qualify existing criteria, imposing an overriding qualification upon the statutory criteria, or where delegated powers overlap with existing statutory powers.[2] In our view, because the proposed powers purport to overlap with and extend the powers already contained under the Act, while failing to protect interests protected by those existing powers, they are in conflict with the Act and will be of no effect.

4. We consider there are two key ways in which the proposed amendments purport to extend the s 46 powers:

   (a) the confidentiality of information gathered is no longer guaranteed under the proposed new information gathering regime; and

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1 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at [87]; and *Combined State Unions v State Services Co-ordinating Committee* [1982] NZCA 88, [1982] 1 NZLR 742 at 745.

2 *Combined State Unions v State Services Co-ordinating Committee* [1982] NZCA 88, [1982] 1 NZLR 742 at 745.

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(b) the amendments purport to remove procedural safeguards for the benefit of, and impose the administrative burden of information gathering on, participants.

Confidentiality of information is no longer guaranteed under the new amendments

5. Under the Act, the EA is not empowered to publish or share information it collects under s 46. It is only permitted to make reports or reviews publicly available under s 16(g), not raw data or information collected under the information gathering provisions. A potential reason the EA is not empowered to share the information is that it can collect highly confidential and sensitive information about consumers. The common law position is that where information gathering powers apply to confidential or private information a regulator is obliged to protect that confidentiality / privacy interest unless the relevant statute expressly provides otherwise.[3] No such express limitation on confidentiality or privacy appears in s 46.

6. By contrast, the proposed amendment would remove those protections and provide the EA with a broad discretion to override the confidentiality of potentially sensitive consumer (or indeed confidential commercial) information. Under cl 2.21 participants must identify information in respect of which confidentiality is sought for specified reasons. The EA can nevertheless decide to make the information publicly available if it is not satisfied there are reasons for the information to be kept confidential (cl 2.21(2)(a) and (3)). Even if the EA is satisfied there are reasons favouring confidentiality, it can still make the information publicly available if those reasons are outweighed by "other considerations which render it desirable" in order to give effect to the EA's objective or functions (cl 2.21(2)(b) and (3)).

7. In our view, the proposed amendments involve an extension of powers which purport to remove or intrude upon existing confidentiality interests and protections and are therefore in conflict with the Act.

The amendments purport to remove procedural safeguards for the benefit of, and impose the administrative burden of information gathering on, participants

8. The proposed amendments in our view also represent a significant policy shift as to the ways in which the EA obtains information from participants. The information gathering regime under the Act entitles the EA to request information from participants for monitoring purposes as the need arises (ss 45 and 46). Participants are then required to provide information within a reasonable timeframe as specified by the EA (s 46(2)(a)).

9. Under the proposed amendments, however, a number of existing procedural safeguards are removed:

(a) First, the EA is entitled to publish notices specifying the time at which information must be provided (cl 2.17(1)(c)). While the EA must undertake a cost benefit assessment before publishing a notice with such requirements (cl 2.19), the existing statutory guarantee of a reasonable timeframe in which to provide the information no longer holds.

(b) Second, the EA can require information to be provided in a specified manner and form (cl 2.17(1)(d) and (2)). Participants may be required to standardise the

[3] *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2018] NZCA 590 at [35]ff.

reporting of information according to the EA's analytical needs. As a result, participants are no longer providers of existing information but could be required to take on an information creation and analysis role.

(c) Third, the EA can require information to be provided on an ongoing basis rather than in response to requests as they arise.

10. These changes involve a potentially significant administrative and cost burden, as well as an intrusion into commercial autonomy. We consider the proposed amendments create a new, more intrusive power to gather information. That power involves a method of information-gathering that circumvents s 46 (and its protections) and thus impermissibly interferes with the operation of a statute. Indeed, save perhaps in unforeseen and truly reactive situations,[4] we see little need for the EA to resort to s 46 in the future given the proposed regime represents a more powerful and wide-ranging alternative.

[4] This limited ongoing scope of operation for s 46 itself depends on a reading of the new amendments that confines the "event" to which a new cl 2.16 notice may apply to future events only. That is not as an express condition on the proposed power.