

Electricity Authority
Level 7, Harbour Tower
2 Hunter Street
Wellington, 6143

Sent via email: infoframework@ea.govt.nz

24 August 2021

Re: Improving the framework for the Authority's information gathering

Transpower appreciates the opportunity to respond to the Electricity Authority's (the Authority's) consultation on *Improving the framework for the Authority's Information Gathering* published on the 6th of July 2021.

We support a transparent and structured process for information-gathering. As we transition to a more decentralised, digitised, and decarbonised electricity system we consider information (including the data that generates the information) will be crucial to better understanding consumer needs, market operations, and creating evidence for regulatory development and evaluation.

As the Authority has noted in its consultation document, currently it can request the information it considers it requires to carry out its duties under the Electricity Industry Act 2010 (the Act). The power to request information for the purposes of Section 45, derives from Section 46 of the Electricity Industry Act 2010 (the Act). We do not consider there are any barriers to the Authority setting guidelines on what information it intends to collect, and how and when it will do this.

We support the Authority's intent of creating transparency around how it will use its powers to collect additional information to promote the efficient operation of the industry. We however have a few concerns with the Code amendment drafting.

A major concern with the proposal is that the Authority will have the power to decide whether the information provided is confidential or not, and publish it based on its decision. As grid and system operator we rely on information provided by third parties in confidence.

If the information request from the Authority mandates information provided confidentially to us to be disclosed, then the quality and quantity of information we receive "in confidence" may become substantially compromised in the future. We consider where the Authority deems information claimed as "in confidence" is not confidential that its request for that information should go to the information source (i.e. to those who have provided the data/information to Transpower) and not via Transpower.

In addition, the proposed framework contains no constraint on the Authority that the information provided will only be used for that purpose and not for any other purpose. For participant assurance, the framework could provide that constraint.

We have responded to the questions and to the code drafting in the Appendices to this submission. We have suggested some drafting changes that would help mitigate our concerns. We are happy to discuss our concerns and proposed drafting changes with the Authority if required.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Joel Cook', is positioned below the closing text.

Joel Cook

Head of Regulation

Appendix 1: Response to questions

Question	Transpower response
1 Do you agree the issue identified by the Authority is worthy of attention?	Yes.
2 Do you agree with the objective of the proposed amendment? If not, why not?	<p>We support transparency about the content of and need for structured information-gathering. However, as the Authority noted in Option 2, we do not believe this code change is required to enable the EA to collect ongoing information. The use of Section 46 could be made more efficient by implementing a structured process for issuing information requests.</p> <p>We support the second objective to require the Authority to engage with participants and to ensure the benefit of collecting information outweighs the costs. While we recognise the code change is designed to align with these objectives, we also believe these objectives could be met by improving processes around the use of Section 46.</p>
3 Do you agree the benefits of the proposed amendment outweigh its costs?	<p>The two options appear to have similar costs and benefits; the benefits of a more transparent process are realised in both approaches.</p> <p>The Authority indicate that creating a streamlined process for information gathering could reduce the need for individual code changes for information gathering purposes.</p> <p>We are supportive of the Authority freeing up resources to, among other things, address Code change proposals from the industry.</p> <p>The additional requirement the Code change would impose is the requirement for the Authority to consult with participants on proposed notices. We believe the benefits of such consultation would be outweigh the costs, as the resulting notices will be easier to comply with and deliver more meaningful information.</p>

<p>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.</p>	<p>We believe the objectives could also be achieved by improving processes and guidance around gathering information under Option 2. We consider both approaches have similar costs and benefits. From a compliance perspective there is not a significant difference between the two options, other than the requiring consultation on notices under the proposed Code change, rather than leaving it optional.</p>
<p>5. Do you agree the Authority's proposed amendment complies with section 32(1) of the Act?</p>	<p>Yes, we consider the Act section 32 (1) (d) is the most relevant.</p> <p>Yes, the amendment complies with section 32(1) of the Act, as long as all information notices issued can be justified under one or more of the purposes listed under sections 32(1)(a)-(3).</p>
<p>6. Do you have any comments on the drafting of the proposed amendment?</p>	<p>Yes, see Appendix 2.</p> <p>We view it as essential that any notice should be subject to scrutiny in terms of purpose and content, not just when it is initially published, but also on an ongoing basis as conditions in the industry will inevitably change over time.</p> <p>All notices should include an end date at which the notice will expire. If the Authority still has a need for the information a new notice can be published.</p> <p>We also believe there should be some level of oversight or recourse if the Authority deems it can publish (in a non-anonymised way) information marked by a participant as confidential.</p> <p>We also note that the Code amendment provides no protection for participants if a notice requires the disclosure of information that would breach an obligation of confidentiality.</p> <p>In the case of code information, a participant may refuse to supply information under clause 2.6(2)(c) if disclosure would breach an obligation of confidentiality. This refusal can be</p>

	<p>appealed under section 2.15 by notice of appeal to the Rulings Panel.</p> <p>The Code, in this case, sets the Rulings Panel, rather than the Authority, as the appropriate party to decide a dispute regarding whether disclosure would breach an obligation of confidentiality. The proposed Code amendment would place this power with the Authority, without any oversight from the Rulings Panel or another body.</p> <p>We have added further comment on the Code amendment drafting in Appendix 2. We have also suggested changes to achieve the following:</p> <ul style="list-style-type: none">• Require the Authority to state the purpose of the notice in the notice. This is to achieve transparency and ensure the notice aligns with the requirements 2.16(2).• Requiring that the Authority may only use the information collected for the purpose stated in the notice. This is also to achieve transparency and ensure the notice aligns with the requirements 2.16(2).• Avoid participants having to collect information they do not already hold.• Avoid participants having to spend a disproportionate amount of resourcing on reformatting information and/or collating it from diffuse sources.• Require the Authority to notify participants if it does not believe information supplied about the participant is confidential.• Allow the Authority to withdraw a notice.
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Appendix 2: Comment on Code amendment drafting

<p><u>2.16 Authority may specify information that participants must collect, collate and provide regularly or in response to events</u></p> <p>(1) <u>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.</u></p> <p>(2) <u>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:</u></p> <p>(a) <u>monitor compliance with the Act, the regulations and the Code under section 16(1)(c) of the Act; or</u></p> <p>(b) <u>undertake and monitor the operation and effectiveness of market-facilitation measures under section 16(1)(f) of the Act; or</u></p> <p>(c) <u>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.</u></p> <p>(3) <u>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.</u></p>	<p>No comment.</p>
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2.17 Requirements that the Authority must or may set in a notice under 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**.

These requirements should include the reason for the Authority's request and how it intends to use the information.

The use of 'may' implies that the Authority can choose not to follow these requirements.

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

(1) In a notice **published** under clause 2.16, the **Authority** must specify the following information requirements:

(a) ~~the **Authority's** purpose for the information; and~~

(a) the **participant** who must provide the information; ~~and~~

(b) the information the Authority requires the **participant** to provide, to a reasonable level of detail; ~~and~~

(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; ~~and~~

(d) the manner in which the **participant** must provide the information to the **Authority**; ~~and~~

(e) the date from which the notice applies, which can be different dates for different **participants**; ~~and~~

	<p><u>(f) the end date when the notice will expire and the requirement for a participant to provide information will end.</u></p> <p><u>(2) The Authority may only use the information collected for the purpose stated in the notice.</u></p> <p><u>(2)(3) 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.</u></p>
<p>2.18 Authority must consult before publishing notice</p> <p><u>(1) Before publishing a notice under clause 2.16, the Authority must provide to the participant to whom the proposed notice applies:</u></p> <p><u>(a) the proposed notice; and</u></p> <p><u>(b) the Authority's purpose in setting the information requirements in the proposed notice; and</u></p> <p><u>(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.</u></p> <p><u>(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:</u></p>	<p>We support these steps although consider it is not necessary to Codify them rather, as proposed by the Authority under Option 2, we consider Guidelines could be more useful in supporting industry understanding on how the Authority will execute its Section 46 information-gathering requests.</p> <p>We consider that if the notice is going to be 'published' for all participants to see then the Authority should be required to consult with all participants, and not just the participant type that the information is sought from.</p> <p>2.18 Authority must consult before publishing notice</p> <p><u>(1) Before publishing a notice under clause 2.16, the Authority must publish and provide to the participant to whom the proposed notice applies:</u></p> <p><u>(a) the proposed notice; and</u></p> <p><u>(b) the Authority's purpose in setting the information requirements in the proposed notice; and</u></p>

<p>(a) <u>make any reasonable changes to the information requirements to be included in the published notice; and</u></p> <p>(b) <u>publish the notice.</u></p> <p>(3) <u>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 subclause (1) if it has not already.</u></p>	<p>(c) <u>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.</u></p> <p>(2) <u>The Authority must give that participants a reasonable opportunity to make submissions to the Authority on the proposed notice and take into account those submissions in deciding whether to:</u></p> <p>(a) <u>make any reasonable changes to the information requirements to be included in the published notice; and</u></p> <p>(b) <u>publish the notice.</u></p> <p>(3) <u>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 subclause (1) if it has not already.</u></p>
<p><u>2.19 Factors the Authority must consider before publishing notice</u></p> <p>(1) <u>Before publishing a notice under clause 2.16, the Authority must be satisfied that—</u></p> <p>(a) <u>the benefits of the Authority obtaining the information <u>outweigh the costs of the information requirements set out in the proposed notice; and</u></u></p>	<p>We agree that the Authority should consider the costs and benefits of the information and how the information will promote the statutory objective.</p> <p>This clause should come before clause 2.18. The Authority needs to consider these aspects before, and after, consulting with participants.</p> <p>We consider the Authority should articulate the way in which it is satisfied that the benefits outweigh the cost (we accept that a qualitative assessment is more likely than a quantitative assessment).</p>

<p>(b) <u>the information requirements set out in the proposed notice promote the Authority's objective set out in section 15 of the Act.</u></p> <p>(2) <u>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.</u></p>	
<p>2.20 Participants must provide information to Authority</p> <p>(1) <u>If the Authority publishes a notice under clause 2.16, each participant to whom the notice applies must—</u></p> <p>(a) <u>collect and record the information specified in the notice; and</u></p> <p>(b) <u>collate from its own systems, records and/or information the information specified in the notice; and</u></p> <p>(c) <u>provide to the Authority the information specified in the notice; and</u></p> <p>(d) <u>meet the other information requirements specified in the notice.</u></p> <p>(2) <u>A participant does not need to provide any information to the Authority under subclause (1)(c) if—</u></p> <p>(a) <u>the participant has legal professional privilege in respect of the information; or</u></p>	<p>We consider this notice mechanism should not be a means for compelling participants to collect new data.</p> <p>If the Authority's information need requires changes to the way a participant records and stores information then in our view the information need should be tied to a specific policy process and the costs of any format change should be identified in the cost benefit analysis for a Code change.</p> <p>2.20 Participants must provide information to Authority</p> <p>(1) <u>If the Authority publishes a notice under clause 2.16, each participant to whom the notice applies must—</u></p> <p>(a) <u>collect and record the information specified in the notice; and</u></p> <p>(b) <u>collate from its own systems, records and/or information the information specified in the notice; and</u></p> <p>(c) <u>provide to the Authority the information specified in the notice; and</u></p>

(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**.

(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) the **participant** does not collect or hold the data or information specified in the notice; or

~~(b)(c)~~ 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

(1) In supplying information under clause 2.16, 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.

We do not consider that the Authority should have unilateral powers to determine if information should be kept confidential or not. We have suggested changes to the proposed Code amendment below to allow for the participant to respond to the Authority's view.

2.21 Participants may identify confidential information

(1) In supplying information under clause 2.16, 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

(2) If a **participant** identifies to the **Authority** any information under subclause (1), 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**, these reasons are outweighed by other considerations which render it desirable, in order to give effect to the objective of the **Authority** in section 15 of the Act or for the purposes of any of the **Authority's** functions in section 16 of the Act or section 14 of the Crown Entities Act 2004, for the **Authority** to make all or any part of the information publicly available.

(3) If the **Authority** does not consider under subclause 2(a) that there are reasons for keeping the information confidential or it considers that it is desirable under subclause 2(b) to make all or any part of the information publicly available, the **Authority** is not required to keep the information confidential.

(4) If the **Authority** considers under subclause 2(a) that there are reasons for keeping the information confidential and does not consider that it is desirable under subclause 2(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 subclause (1) confidential.

(5) Subclause (4) does not prevent the **Authority** from—

(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) If a **participant** identifies to the **Authority** any information under subclause (1), 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**, these reasons are outweighed by other considerations which render it desirable, in order to give effect to the objective of the **Authority** in section 15 of the Act or for the purposes of any of the **Authority's** functions in section 16 of the Act or section 14 of the Crown Entities Act 2004, for the **Authority** to make all or any part of the information publicly available.

(3) If the **Authority** does not consider under subclause 2(a) that there are reasons for keeping the information confidential or it considers that it is desirable under subclause 2(b) to make all or any part of the information publicly available, the **Authority**:

(i) will notify the **participant** that it does not consider the information is required to be kept confidential.;

(ii) allow the **participant** reasonable time to provide an opinion on why the information is required to be kept confidential. If the **participant** is not the source of the information (i.e. the information

(a) using the information identified under subclause (1) 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 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(1), 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; or

is not generated from the **participant's** own data or information) then the **Authority** must give the source of the information reasonable time to respond; and

(iii) determine if it is not required to keep the information confidential.

(4) If the **Authority** considers under subclause 2(a) that there are reasons for keeping the information confidential and does not consider that it is desirable under subclause 2(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 subclause (1) confidential.

(5) Subclause (4) does not prevent the **Authority** from—

(a) using the information identified under subclause (1) 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 either:

<p>(d) disclosing the information as required by or under law.</p>	<p>(i) _____ has consented specifically to the disclosure of that information; or</p> <p>(ii) _____ has consented generally to the disclosure, even where the participant identifies the information as confidential under clause 2.21(1), of:</p> <p style="padding-left: 40px;">(A) information specified in the notice published under clause 2.16 under which the participant supplied the information to the Authority; or</p> <p style="padding-left: 40px;">(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; or</p> <p>(d) _____ disclosing the information as required by or under law.</p>
<p>2.22 Privilege against self-incrimination</p> <p>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.</p>	<p>No comment.</p>
<p>2.23 Authority may amend notice</p>	<p>We note this drafting for amending a notice mirrors the drafting in the Electricity Industry Act for amending the Code (section 32). We consider the conditions at 2(b) and 2(c) are unlikely to be readily applicable to a notice change, because both conditions imply a level</p>

(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.

of engagement or consultation has already occurred. We consider 2(b) could only hold if all participants have been consulted on as part of Clause 2.19. We do not consider that 2(c) will apply in this case.

Any substantive change in the notice should again be subject to consultation.

2.23 Authority may amend or withdraw a 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

(c) there has been adequate prior consultation (for instance, by or through an advisory group) so that all relevant views have been considered.

(3) The Authority may withdraw a notice if it determines that it is no longer required or that the benefits no longer outweigh the costs.