



24/08/2021

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TRUSTPOWER SUBMISSION: IMPROVING THE FRAMEWORK FOR THE AUTHORITY'S INFORMATION GATHERING

1. Introduction

- 1.1. Trustpower Limited (**Trustpower**) welcomes the opportunity to provide the Electricity Authority (**Authority**) with a submission on its consultation paper, *Improving the framework for the Authority's information gathering*, 6 July 2021 (**Consultation Paper**).
- 1.2. The Authority proposes to introduce a new information gathering framework by adding to the Code a process for preparing a notice that would specify the requirements of an individual information request. The proposed framework is intended to be best suited for gathering information from industry participants that would support the Authority's monitoring functions under section 45(a) of the Electricity Industry Act 2010 (**Act**).
- 1.3. The Authority envisages that its new framework would complement its existing tools for gathering information, which include its information gathering powers under section 46 of the Act; bespoke amendments to the Code; and industry participants voluntarily providing information. Trustpower supports the Authority exercising its powers under section 45(a) of the Act using the best available evidence.
- 1.4. Trustpower's submission focuses on edits that would fine-tune the Authority's proposed amendments to the Code, and provide the Authority, participants and stakeholders with an assurance that:
 - (a) information gathered is fit for the purpose of carrying out the monitoring function specified in the notice;
 - (b) information gathered is necessary and remains relevant;
 - (c) compliance cost is visible and managed; and
 - (d) commercially sensitive information is protected.
- 1.5. Our submission addresses each of these points in turn. We have also attached an edited copy of the Authority's proposed amendments, which addresses most but not all of the points made in this letter.

2. Information is fit for purpose

- 2.1. Trustpower submits that the Authority's information notice should specify the monitoring

function(s) that the requested information is to address and how the information will be processed by the Authority.

- 2.2. The Authority's proposed Code amendment sets out the list of monitoring functions that the Authority can undertake:

2.16(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.*

- 2.3. The specification in notices of the monitoring function and how the information will be processed would provide transparency regarding the purpose of the notice. Second, it would provide an assurance that the notice complies with the Act and the proposed Code. Third, it would assist with preparing information that is fit for purpose.
- 2.4. This third point is a matter of practical importance as clearly stating the monitoring function and processing to be undertaken would greatly assist the process of collecting data and information from the business. When requesting information from the business it is generally not sufficient to simply send out an itemised list of the data or information being requested along with a description of each item. Requests structured in this way are in general open to interpretation. Additional formation about the purpose of the information request would improve the quality of the information provided and better ensure that it meets requirements.
- 2.5. Specifying the monitoring function and how the information will be processed is also of practical importance because notices are intended for gathering information on an ongoing basis over an extended period. Documenting the purpose and processing will help ensure that the information provided by participants and the Authority's output remains comparable over the duration of the notice.

3. Information gathered is necessary and remains relevant

- 3.1. Trustpower submits that:

- (a) Scope of gathered information should be kept to the minimum needed to carry out the monitoring functions specified in the notice;
- (b) Information gathered should only be used for the monitoring functions set out in the notice, and not used for other monitoring functions and purposes; and
- (c) Information gathered and the monitoring functions should be subject to ongoing consideration to ensure they remain relevant given market developments over time.

- 3.2. It is reasonable to expect that participants' resources are not expended on gathering information that is not relevant to the particular monitoring function included in the notice, nor that it is used for purposes that have not been communicated to participants.
- 3.3. Trustpower proposes that the scope of the gathered information is the minimum necessary to carry out the required monitoring function and that this should be identified during the Authority's consultation on a draft notice. Submissions would help the Authority to tailor the scope to fit the monitoring function.
- 3.4. As the scope of the information gathered is tailored for each notice, this means that the information gathered under one notice should not be used for another purpose. If information

gathered is used for another purpose, then this raises the risk that the information is not suitable for the new purpose, resulting in decisions that have unintended adverse consequences.

- 3.5. However, should the Authority identify information gathered under an existing notice might be suitable for another monitoring function, we submit that the Authority should test its view by consulting with participants. Submissions should help the Authority determine whether the information being gathered is fit for the new purpose, thereby mitigating the risk of unintended adverse consequences.

4. Risk of growth in compliance cost

- 4.1. Trustpower has two concerns regarding the potential for the new information framework to grow regulatory compliance costs.
- 4.2. First, in order to manage regulatory compliance costs on a case-by-case basis, we submit that the Authority should be transparent regarding the costs and benefits of choosing the new information gathering framework instead of the existing options. The Authority will have a number of information gathering tools, which include those noted above as well as the new framework. The Authority should include this assessment in the consultation on a draft notice.
- 4.3. Second, in time the Authority may have issued a large number of notices that taken together could place a significant regulatory burden on participants.
- 4.4. In order to manage this risk, we submit that each notice should have an expiry date that is no more than 12 months from date it is issued. If the Authority wishes to renew a notice, then it should consult with participants no earlier than 2 months and no later than 1 week before the notice's expiry date. A consultation with a decision to renew as each notice is about to expire would help ensure that notices remain relevant and beneficial over time.
- 4.5. Furthermore, we submit that to manage the potential for growth in the number of notices and the commensurate growth in regulatory cost, the Authority should maintain and make publicly available an up to date schedule of notices and other information requests.
- 4.6. This transparency would help inform the Authority and the industry regarding the total cost and benefits of complying with notices and other information requests.

5. Protection of commercially sensitive information

- 5.1. Trustpower submits that the Authority should set out in the notice how it will protect commercially sensitive information. A notice should also specify how widely the information will be disclosed within the Authority and publicly, such as whether:
 - (a) Authority staff can only access the information on a need-to-know basis;
 - (b) Authority staff, government departments, and the public can request access to the information;
 - (c) Information would be made public or not; and
 - (d) Information would be made public in aggregate in a way that guarantees participants cannot be identified.
- 5.2. We submit that the Authority should consult on the level of intended public disclosure during its consultation on a draft notice. Clause 2.21 of the Authority's proposed Code amendments suggests that the Authority would consider how it will treat confidential information once it has been provided by participants.
- 5.3. We consider that the decision regarding public disclosure can and should be made as the Authority is preparing the notice. It should then be published in the notice prior to any

information being gathered so as to ensure that appropriate protections are in place for commercially sensitive information from the outset

- 5.4. As the Authority noted in its consultation paper on *Internal transfer prices and segmented profitability reporting*, 20 April 2021, paragraph 3.80

“Requiring the disclosure of information which is commercially sensitive could undermine confidence and result in reduced investment and competition, thereby forgoing the attendant consumer benefits that implies.

- 5.5. As Trustpower noted in reply, this statement correctly highlights the risks and issues associated with publicly disclosing commercially sensitive information. It is for this reason that we expect the Authority to set out in the notice how it will treat any commercially sensitive information that it receives, taking all appropriate actions to preserve its confidential status.

- 5.6. In paragraph 3.11 of Consultation Paper the Authority states that it would prepare and publish a guideline on its processes, procedures and decisions 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*

- 5.7. We consider that an appropriate guideline should facilitate the process of preparing a notice. However, this should not be a substitute for specifying the treatment of confidential information in a notice prior to its issuance.

- 5.8. The Authority, in paragraph 2.22 of its proposed Code amendments, states:

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.

- 5.9. Trustpower notes that the section 48(3) of the Act states:

*... any self-incriminating statement or document made or given by an officer or employee, or an industry participant that is an individual, is not admissible as evidence in **any** criminal or civil proceedings against that person. [emphasis added]*

- 5.10. In other words, section 48(3) indicates that information provided under a section 46 request is not admissible as evidence in any criminal or civil proceedings, but not just proceedings brought by, say, the Authority.

- 5.11. Trustpower seeks an assurance from the Authority that the information provided under the proposed Code amendment would receive the same level of protection as information provided under a section 46 information request. To the extent that this broader assurance cannot be fully provided, then further engagement with the industry would be appropriate given the changes would potentially dilute a fundamental protection that was provided by Parliament to participants.

For any questions relating to the material in this submission, please contact me on 027 305 8802.

Regards,



Antony Srzich PhD.
Advisor, Strategy & Regulation

Annex - Trustpower edits to Authority proposed Code amendment

Set out below is Trustpower's marked-up edits to the Authority's proposed Code amendment.

Part 2 **Availability of Code information**

Contents

Power to request Code information

2.1 Requests for Code information

Information held by the Authority

2.2 Information held by Authority

Information held by other participants

2.3 Information not held by Authority

2.4 Authority must contact participant believed to hold requested information

2.5 Participant must consider request

2.6 Code information should be made available to all participants unless good reason

2.7 Other reasons

2.8 Transfer of requests

2.9 Participants must not enter contracts that prejudice supply of Code information

2.10 Decision about supplying information

2.11 Process if participant agrees to supply information

2.12 Charges payable

2.13 Documents may include deletions

2.14 Process if participant refuses to supply information

2.15 Appeal

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

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

2.18 Authority must consult before publishing notice

2.19 Factors the Authority must take into account before publishing notice

2.20 Participants must provide information to Authority

2.21 Participants may identify confidential information

2.22 Authority may amend notice

...

Regular and event-driven provision of information to the Authority

2.16 Authority may specify information that participants must collect, collate and 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.**
 - (f) the expiry date for the notice, which is to be no greater than one year from the publication of the notice**
 - (g) the Authority's purpose for setting the information requirements in the notice**
 - (h) the Authority's assurance that will use the information provided for the stated purpose**
 - (i) the level of public disclosure of the information, such as whether: all information provided by participants will be made public; information is made public in aggregate in a way that guarantees a participant cannot be identified; or the information is not to be made public**
- (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; and
 - (d) how the Authority intends to utilise the information; and
 - (e) the proposed level of public disclosure of the information, such as whether: all information provided by participants will be made public; information is made public in aggregate in a way that guarantees a participant cannot be identified; or the information is not to be made public.
- (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) 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.

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 and address issues and concerns raised by each participant during the consultation on the draft notice under clause 2.18.

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

- (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.
- (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—

 - (a) using the information identified under subclause (1) for any purpose in connection [the purpose for the information as stated in the notice](#), in accordance 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, [pursuant to the level of public disclosure set out in the notice](#), 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
 - (d) disclosing the information as required by or under law.

2.22 Privilege against self-incrimination

For the avoidance of doubt, 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. Furthermore, any self-incriminating statement or document made or given by an officer or employee, or an industry participant that is an individual, is not admissible as evidence in any criminal or civil proceedings against that person.

2.23 Authority may amend and renew 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.
- (3) The Authority may renew a notice published under clause 2.16 prior to its expiry following the procedure set out in clause 2.18 and complying with clause 2.19. It is to initiate the procedure for renewal no earlier than 2 months and no later than 1 week prior to its expiry.