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## Retailer financial stress data request consultation

Genesis Energy Limited ("**Genesis**") welcomes the opportunity to provide feedback on the Electricity Authority's ("**Authority**") proposed data request under clause 2.16 of the Electricity Industry Participation Code ("**Code**"). We understand this is the first use of information gathering powers that came into force on 1 August 2022.

Genesis favours regulation that is informed by robust data and information, and we support the Authority having access to the data necessary to enable it to achieve its statutory objective. As a general principle, Genesis is happy to release information (subject to appropriate legal safeguards) where this information supports delivery of better consumer outcomes.

This proposed information provision notice largely replicates a 23 June 2021 request under section 46 ("**s46**") of the Electricity Industry Act 2010 ("**the Act**"). That request, which expires soon, extended a series of s46 requests dating back to April 2020.

The Authority made the requests on the basis that the arrival of COVID-19 in New Zealand and the associated unprecedented public health response had the potential to place consumers and retailers under financial pressure.

However, more recent developments give rise to questions as to whether this data is still required, and, in particular, whether the Authority requires regular provision of this information in perpetuity.

For the avoidance of doubt, Genesis accepts that regular provision of the information set out in the Authority's notice may create value for consumers. But this is not clear from the Authority's request.

### Change in circumstances

Genesis considers that the Authority was justified in using s46 powers to gather information while economic activity in New Zealand was severely restricted by the public health response to the spread of COVID-19.

We agreed with the Authority that "under normal circumstances" the information sought could have been secured under a voluntary release, but:

*"...the speed and potential impact of COVID-19 has put a premium on time and the need for quick and decisive action."*<sup>1</sup>

This remained the case while the country, or regions of it, were subject to strict lockdowns under the 'COVID-19 Alert System'<sup>2</sup> that governed New Zealand's response to the pandemic. A strong argument could be made for continuation of this compulsory information provision while lockdowns remained possible/likely under the Alert Level framework.

However, this framework was superseded by the 'COVID-19 Protection Framework'<sup>3</sup> (or 'traffic light system') on 2 December 2021, marking the end of strict lockdowns. The Auckland border was lifted from 14 December 2021, followed by Northland on 20 January 2022. New Zealand's international borders opened completely to eligible travellers from all over the world on 31 July 2022.

Genesis considers that the circumstances are now sufficiently different to those that have prevailed over the past two years to revisit whether gathering the retailer financial stress data remains justified. If it is, it is not obvious that this justification is without limit in time. Accordingly, there is a case that the means for gathering this information would more appropriately be a further s46 request.

### Justification

If the Authority considers that it requires the information set out in the notice in perpetuity, it is reasonable to expect the justification for this to be made clear given the resource burden required to furnish the regulator with this data.

Absolute precision in assessing the costs and benefits of this proposal is neither necessary nor desirable given the burden producing this analysis would place on the Authority. However, the bar for a standing disclosure requirement should be sufficiently high that quality analysis of its costs and benefits is necessary.

At a minimum, Genesis would expect the Authority to have made enquiries as to the administrative/cost burden of satisfying this request in support of its proposal to exercise its

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<sup>1</sup> Letter from James Stevenson-Wallace to Marc England, 09 April 2020

<sup>2</sup> <https://covid19.govt.nz/about-our-covid-19-response/history-of-the-covid-19-alert-system/#about-the-covid-19-alert-system>

<sup>3</sup> <https://covid19.govt.nz/traffic-lights/history-of-the-covid-19-protection-framework-traffic-lights/>

powers under Clause 2.16. To the best of our knowledge, no such attempt has been made by the Authority.

Furthermore, exercise of the Authority's powers under Clause 2.16 are restricted to meeting the purposes set out in section 45(a) of the Act, which are:

- (a) monitoring compliance with the Act, the regulations and the Code under section 16(1)(c) of the Act; or
- (b) undertaking and monitoring the operation and effectiveness of market-facilitation measures under section 16(1)(f) of the Act; or
- (c) undertaking industry and market monitoring, and carrying out and making publicly available reviews, studies, and inquiries into any matter relating to the electricity industry, under section 16(1)(g) of the Act.

The Authority contends that this notice meets the criteria of (c) above. Genesis has, despite proactively enquiring on several occasions over the past two years, seen no evidence of how the information gathered under the rolling s46 requests to date has been used. We are, therefore, unable to determine if the Authority's collection of the data meets the criteria under the legislation.

To the extent that the information gathered under these requests has served a purpose, it has not been published in "publicly available reviews, studies, and inquiries" as specified in section 16(1)(g) of the Act.

### Precedent

The Authority consulted on new information gathering powers in July and August 2021<sup>4</sup>. The Authority concluded that a Code amendment granting a broad new power was justified, and this power came into force in August this year.

Many submitters, including Genesis<sup>5</sup>, supported the Authority's position that it needs access to a wide variety of data to perform its role. In our view, being well informed is a prerequisite for a regulator enjoying the confidence of those it regulates.

However, these same submitters commonly queried whether a new broad power was justified, given the existing information gathering options available to the Authority under s46 of the Act. This proposed first use of the new powers under Clause 2.16 of the Code appears to justify these concerns.

The data the Authority is seeking, as outlined in the notice which is the subject of this consultation, has been made available to the regulator for more than two years under the existing s46 facility. As outlined earlier, it is not clear why this information should now be required in perpetuity under Clause 2.16 rather than under a further time-bound request in accordance with s46 of the Act.

Accordingly, this notice sets a concerning precedent in respect of the Authority's exercise of its powers under the Code.

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<sup>4</sup> <https://www.ea.govt.nz/development/work-programme/operational-efficiencies/improving-the-framework-for-the-authoritys-information-gathering/consultations/#c19211>

<sup>5</sup> <https://www.ea.govt.nz/assets/dms-assets/28/Genesis-submission-Improving-the-framework-for-the-EAs-information-gathering.pdf>

If the Authority is to exercise powers under Clause 2.16 to impose new requirements on participants, it is reasonable to expect that the associated compliance burden would be offset by a strong justification in terms of the value this information will provide back to consumers.

### Summary

Genesis supports the Authority having ready access to the data it needs to ensure high quality regulation and informed decision making. We make considerable efforts to comply with statutory and voluntary information requests to meet this objective.

However, it is not clear why the Authority requires the information it is seeking in the notice published 2 August 2022.

In particular Genesis' concerns relate to:

- 1) the continuation of an information request made specifically in relation to the impact of the public health response to COVID-19, when this impact is now materially diminished;
- 2) the lack of robust justification for the notice in respect of the Code and the Act; and,
- 3) the precedent set by this proposal, particularly if it proceeds past the consultation stage.

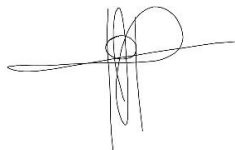
These concerns are not insurmountable, and Genesis does not consider requesting this information is necessarily unjustified.

However, for the reasons set out above, Genesis considers that providing the information specified in the notice involves a compliance burden that demands more compelling justification than the Authority has provided to date.

If the Authority considers the information specified in the notice is necessary to discharge its duties effectively, Genesis would urge the regulator to seek the data under a time-limited s46 notice while a more compelling case for seeking this information under Clause 2.16 is prepared.

Please do not hesitate to contact me with any queries regarding this submission.

Yours faithfully

A handwritten signature in black ink, consisting of a horizontal line followed by a series of loops and vertical strokes.

Matt Ritchie  
**Senior Advisor, Regulatory Affairs and Government Relations**