

10 October 2023

To

Electricity Authority CRP#5 Consultation
PO Box 10041
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From

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By online submission

Submission on Code Review Programme Number 5 Consultation Paper

1. We act for Infratil Limited (**Infratil**), and make this submission on Infratil's behalf. Infratil is not a participant. However, Infratil indirectly holds ~51% of Manawa Energy, a generator and retailer (to non-residential customers).
2. Thank you for the opportunity to comment on the Electricity Authority's (**Authority**) Code Review Programme Number 5 Consultation Paper dated 29 August 2023. This submission relates to section CRP5-022 (Part 6A dispensation scheme for specified persons) of the Consultation Paper.
3. In summary:
 - (a) The new dispensation scheme under clause 6A.9 of Part 6A of the Electricity Industry Participation Code 2010 (**Code**) provides a necessary mechanism to allow for specified persons to apply for a dispensation in respect of their involvement in both a distributor and a connected generator/retailer.
 - (b) However, the operation of the dispensation scheme could be clarified to better achieve the Authority's objectives under section 15 of the Electricity Industry Act 2010 (**Act**).

Dispensation scheme

4. We agree that there is a need for a process for specified persons to obtain an exemption from Part 6A, given only industry participants can apply for or obtain an exemption from the obligations in the Code under section 11 of the Act. The new dispensation scheme helpfully allows specified persons to apply for a dispensation, effectively exempting them from the Code in the same way as if they obtained an exemption under section 11.
5. However, in contrast to the previous position when the Part 6A provisions were in the Act, the dispensation scheme is narrowly framed, and only applies to the specified person's obligations under the Code. It does not provide for a dispensation for the person's involvement. The effect of this is that multiple additional applications in respect of the same matter may be required (ie, a dispensation application and exemption application(s) from the relevant industry participants), in circumstances where it may be desirable to treat the specified person as not having any involvement at all.

6. Further, there remains an oddity in the legislative framework in that only industry participants (and not specified persons) are subject to the obligation to comply with the Code under section 9 of the Act, and provisions relating to enforcement of the Code only apply to industry participants (and not specified persons). We acknowledge that this is a matter that would need to be addressed through legislation rather than the Code, but it demonstrates that the dispensation scheme only partially addresses issues relating to the application of Part 6A.

Recommended amendments

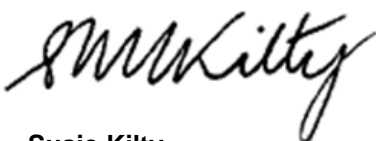
7. Infratil considers that it would better achieve the Authority's objectives and reduce the compliance and administrative burden if the dispensation scheme enabled a dispensation/exemption for an "involvement". This would support the efficient operation of the electricity industry by enabling the Authority to exclude the application of Part 6A in circumstances where compliance is not necessary or is unduly burdensome, without the inefficiency of requiring multiple applications in respect of one involvement – ie, an application for dispensation by a specified person, and an exemption application (or applications) by relevant participants.
8. The suggested change would also effectively reflect the position before the changes introduced through the Electricity Industry Amendment Act 2022 were made, which allowed an exemption for an involvement (in addition to a business or person).
9. We have included indicative drafting to give effect to this change in the appendix to this submission.
10. A minor drafting comment is that it is not clear why the term "industry participant" has been used in clause 6A.9(1), rather than just the defined term "participant".

Broader issues with Part 6A

11. While the dispensation scheme is a welcome addition to the regime, it does not go as far as required to address problems with the drafting of Part 6A following the transfer of provisions from the Act to Part 6A. This is outside the scope of the Authority's Consultation Paper, but we urge the Authority to undertake a more comprehensive review of Part 6A of the Code to ensure the regime is cohesive and effective. Issues include, for example:
 - (a) Part 6A purports to impose obligations on persons/entities who are not industry participants, persons acting on behalf of industry participants, or specified persons, such as:
 - (i) Clause 6A.3(2) applies to every person who is involved in a distributor, every person involved in a connected generator or retailer, and the person's businesses, and requires that those persons and businesses comply with the arm's length rules. The arm's length rules in Schedule 6A.1 purport to impose obligations on a range of persons/businesses, including a "parent" of a business.
 - (ii) Clause 6A.8 requires that each director of a business to which the arm's length rules apply must report compliance each year. Given the drafting of clause 6A.3(2) and Schedule 6A.1, this would appear to capture a range of non-participants.

- (iii) Clause 6A.6 requires directors of a distributor, and trustees of a customer or community trust that are involved in a distributor, to comply with the provisions relating to rebates and dividends.
 - (b) It is clearly highly undesirable for the Code to purport to impose obligations on persons who are not industry participants or specified persons, and who could be quite removed from involvement in the electricity industry and would not expect to be subject to the Code. This undesirability is emphasised by the fact that the legislative regime does not generally permit the Code to impose obligations on non-participants, and it is not clear how the Code could be enforced against such persons. Further, if the Authority took the view that such persons were required to comply with the Code, non-participants other than specified persons are unable to get an exemption or dispensation from doing so.
12. Clarifying the application of Part 6A is also necessary to meet the core objectives for high quality legislation identified by the Legislation Design and Advisory Committee – particularly that legislation should be fit for purpose (including by minimising unintended costs, and ensuring it is designed to provide certainty as to rights and obligations), and accessible (eg, easy to navigate and understand).¹
13. We are happy to be contacted if the Authority would like to discuss any aspect of this submission.

Yours sincerely



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¹ [Good legislative design | The Legislation Design and Advisory Committee \(ldac.org.nz\)](https://www.idac.org.nz)

APPENDIX – DRAFTING CHANGES TO CLAUSE 6A.9

6A.9 Authority may grant Part 6A dispensation ~~to specified person~~

- (1) A **specified person** or participant may apply to the **Authority** for a **Part 6A dispensation** in respect of ~~their~~the involvement of a specified person in two or more classes of ~~industry participant~~ that are the subject of this Part, or specific provisions of this Part.
- (2) The application must be submitted in the form and by the means specified by the **Authority**.
- (3) Where the **Authority** receives an application under this clause, it may grant a **Part 6A dispensation**—
 - (a) to a specified person; or
 - (b) in respect of the involvement of a specified person.
- (3A) The Authority may grant a Part 6A dispensation only if the Authority is satisfied that—
 - (a) it is not necessary, for the purpose of achieving the **Authority's** objectives under section 15 of the **Act**, for—
 - (i) the specified person to comply with this Part or the specific provisions of this Part; or
 - (ii) the involvement of the specified person to be treated as an involvement for the purposes of this Part; or
 - (b) granting a **Part 6A dispensation** in respect of the **specified person** or the involvement of the specified person would better achieve the **Authority's** objectives than requiring compliance.
- (4) The **Authority** must give reasons for its decision under subclause (3).
- (5) The **Authority** may grant a **Part 6A dispensation** on any terms or conditions that it reasonably considers are necessary.
- (5A) If a Part 6A dispensation is granted in respect of the involvement of a specified person, no account is to be taken of that involvement for the purposes of this Part.
- (6) The **Authority** may amend or revoke a **Part 6A dispensation** granted under subclause (3) by issuing a notice that identifies the **specified person** subject to the **Part 6A dispensation** and gives reasons for the amendment or revocation, but only if the **Authority**—
 - (a) has given notice of the proposed amendment or revocation to the **specified person** and affected participants subject to the **Part 6A dispensation** and given them a reasonable opportunity to comment; and
 - (b) in relation to an amendment, is satisfied that the amendment is necessary or desirable for the purpose of achieving the **Authority's** objectives in section 15 of the **Act**; and
 - (c) in relation to a revocation, is no longer satisfied of the matters in subclause (3).
- (7) The **Authority** must publish a list of all current **Part 6A dispensations** granted under this clause.