

19 December 2023

To

Electricity Authority
Level 7, AON Centre
1 Willis St
Wellington

From

[REDACTED]
[REDACTED]
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By Email

compliance@ea.govt.nz

Application for dispensation from Part 6A of the Electricity Industry Participation Code – Anne Urlwin

1. Under clause 6A.9 of the Electricity Industry Participation Code 2010 (**Code**), an application is hereby made to the Electricity Authority (**Authority**) for a dispensation from compliance with Part 6A of the Code.
2. This application is made by Infratil Limited on behalf of Ms Anne Urlwin (a director of Infratil). We act for Infratil Limited.
3. Please direct any correspondence or queries relating to this application to:

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Introduction and background

4. Ms Anne Urlwin was appointed to the board of Infratil on 1 January 2023. Infratil is an NZX-listed infrastructure investment company (NZX: IFT).
5. Infratil has an ~51.1% share in NZX-listed Manawa Energy Limited (NZX: MNW), through its subsidiaries Renew Nominees Limited, Infratil Energy New Zealand Limited, and Infratil

Investments Limited. Manawa is a generator, and also currently retails electricity to commercial and industrial customers.

6. Ms Urlwin is also a director of NZX-listed Vector Limited (NZX: VCT), a distributor.
7. For the reasons set out below, while there are arguments as to whether Ms Urlwin is "involved in" Manawa in the sense intended to be captured by Part 6A, this application is made to provide certainty in case the Authority takes the view that Ms Urlwin is involved in both Vector and Manawa.

Whether Ms Urlwin is "involved in" Manawa

8. Part 6A sets out the obligations that arise when a distributor has a connected retailer or connected generator.
9. As a director of Vector, Ms Urlwin is involved in Vector, a distributor, for the purposes of Part 6A.
10. A connected retailer is a retailer in respect of which a distributor, or any person involved in the distributor, is involved, which retails over a specified amount of electricity to customers connected to the distributor's network (5 GWh in some cases, and 75 GWh in others).
11. Manawa currently retails electricity in volumes over the relevant thresholds to customers connected to Vector's network. The connected generator obligations are not relevant, as Manawa does not have any generation connected to the Vector network.
12. In determining the application of Part 6A in this case, the key issue is therefore whether Ms Urlwin is "involved in" Manawa due to being a director of Infratil. If Ms Urlwin is regarded as being involved in Manawa, Manawa will be a 'connected retailer' of Vector under Part 6A – ie, because Manawa is a retailer in respect of which a person involved in Vector (Ms Urlwin) is involved, which retails over the specified thresholds to customers connected to Vector's network.
13. The relevant test for whether Ms Urlwin is "involved in" Manawa is whether she has a material influence over Manawa (section 6A(1)(c) of the Electricity Industry Act 2010 (**EIA**)).
14. Clause 7 of Schedule 2 of the EIA deems a person to have a material influence in certain cases. Specifically, under clause 7(2) of Schedule 2 of the EIA, where a person has material influence over a business under clause 7, and another person has any of the powers or controls referred to in subclause (1)(c) to (h) in relation to the first person or the majority of its directors or managers, then that other person is deemed also to have material influence over the business.
15. Clearly, Ms Urlwin is not directly involved in Manawa – indeed, as set out above, Infratil holds its interest in Manawa via three subsidiaries, and Ms Urlwin is not a director of any of those entities. Ms Urlwin is only one director of Infratil, on a board of 7 directors. Further, Infratil's investment in Manawa is managed by Morrison & Co. Under the Management Contract between Infratil and Morrison & Co, the day-to-day management responsibilities of Infratil have been delegated to Morrison & Co and the primary role of the Infratil Board is to approve proposed investments.
16. However, it appears to be the case that Infratil is deemed to have a material influence over Manawa (eg, through its related bodies corporate that hold shares in Manawa, the power to appoint or remove, or control the appointment or removal of, a director of Manawa). Therefore, if Ms Urlwin

has any of the powers or controls in clause 7(1)(c) to (h) in relation to Infratil, on its face clause 7(2) deems her to have a material influence over Manawa.

17. The drafting of clause 7 does not directly contemplate the issue of a director who is once or more removed from the relevant business. However, the Commerce Commission previously took the view that a director of Infratil had a material influence over Trustpower (which was the predecessor of Manawa prior to its electricity retail business being sold to Mercury).
18. In [Decision No. 682](#), under the predecessor to clause 7 of Schedule 2 (under the Electricity Industry Reform Act 1998), the Commission found that Infratil had a material influence over Trustpower and that Mr Mark Tume, as a director of Infratil, had a material influence over Trustpower. The Commission found that Mr Tume would be expected to direct or instruct managers of Infratil (the first person) (paragraph (c)), exercise the powers of a director of Infratil (paragraph (d)), control the appointment or removal of managers of Infratil (paragraph (e)), and have the power to influence a decision of Infratil that would ordinarily require more than 10% of the control rights (paragraph (f)). This is explained in paragraphs 33 to 34 of the Commission's decision.
19. While this was a conclusion open to the Commission, we consider the Authority is not bound by the Commission's interpretation and that it is open to the Authority to depart from the Commission's previous interpretation. This is because:
 - (a) It is not clear from the drafting of clause 7 of Schedule 2 that it is intended to capture a person in Ms Urlwin's situation. For example, the reference to "or the majority of its directors or managers" in clause 7(2) suggests that it was intended to apply where a person exercises de facto control over a business or its directors/managers, and not to an individual director of an investor in an industry participant. As one of a number of directors of Infratil, Ms Urlwin does not individually have the power to direct managers, control the appointment or removal of managers, or influence a decision of Infratil that would ordinarily require the holding of more than 10% of the control rights.
 - (b) A broad interpretation would mean that Part 6A would have an unexpected wide-ranging application, and purport to impose obligations on a range of non-participants (with the result that Part 6A would purport to apply to individuals and businesses who would not expect to be caught by the Code and who could be quite removed from the electricity industry – such as investors that have a number of investments across a range of industries and no direct involvement in the electricity industry).

Dispensation from Part 6A

20. For the reasons outlined above, we think that the Authority could conclude that there is no relevant involvement, and that the Authority could read the provisions purposively to not apply to Ms Urlwin.
21. However, on the basis that the Authority takes the view that Ms Urlwin is involved in Manawa, a Part 6A dispensation is sought in respect of Ms Urlwin's involvement in Vector and Manawa, to provide for an exclusion from compliance with Part 6A to the extent it applies to Ms Urlwin.
22. The following clauses of Part 6A are particularly relevant to Ms Urlwin:

- (a) Clause 6A.3(2), which requires every person who is involved in a distributor, and every person who is involved in a connected generator or a connected retailer, to comply, and ensure that the person's businesses comply, with the arm's-length rules.
 - (b) Clause 6A.4(1), which requires a director of a distributor in respect of which there is a connected retailer or a connected generator to ensure certain matters in respect of the distribution agreement, and certify matters relating to the distribution agreement.
 - (c) Clause 6A.5(1), which requires that certain persons (including a person involved in a distributor and connected generator/retailer) must not pay, or offer to pay, any consideration to a retailer in respect of the transfer to a connected retailer of any retail customers who are connected to the distributor's networks.
 - (d) Clause 6A.6(2), which requires that certain persons (including a director of a distributor) must ensure that any rebates or dividends or other similar payments do not discriminate between customers of the connected retailer and customers of other retailers where those customers are connected to the distributor's networks.
 - (e) Clause 6A.7, which requires directors of a distributor in respect of which there is a connected retailer or connected generator to disclose the quantity of electricity sold each financial year by connected retailers to customers who are connected to its local network.
 - (f) Clause 6A.8, which requires a director of a business to which the arm's length rules apply to provide a statement confirming the director has complied with all of the arm's length rules during the preceding year.
 - (g) Schedule 6A.1, which sets out the arm's length rules.
23. Vector and Manawa, and Vector and Infratil, are completely separate and independent companies (that already clearly operate at arm's length), and Ms Urlwin is not directly involved in Manawa. Vector, Manawa, and Infratil are also listed companies, subject to corporate governance requirements including the NZX listing rules. Given Ms Urlwin is two steps removed, it is not necessary, for the purpose of achieving the Authority's objectives under section 15 of the EIA, to require Ms Urlwin to comply with Part 6A. To do so would impose an unnecessary compliance and administrative burden, and would not promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers (or protect the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers).
24. Consistent with Authority decisions under the previous section 90 exemption regime, the potentially relevant markets for the purposes of this application are the national electricity generation and wholesaling market, the electricity retailing markets, and the local electricity distribution market that corresponds with Vector's electricity distribution network. In respect of those markets:
- (a) Manawa's generation is not connected to Vector's distribution network. Competition in the national generation and wholesaling market will therefore not be impacted by Ms Urlwin's

directorships, and the dispensation would not create incentives or opportunities to inhibit competition in the market.

- (b) In respect of electricity retailing markets, the conditions proposed below, which would prevent Ms Urlwin being involved in any discussions or decision-making relating to electricity supply by Manawa on Vector's network or provision of electricity lines services by Vector to Manawa, would ensure that she would not have any ability to impact competition in the retail market. They would also mean that any relationship between Vector and Manawa would remain at arm's length. Further, even without the conditions, Ms Urlwin's directorships would not provide the ability to impact competition in the retail markets given:
- (i) Vector and Manawa operate at arm's length as separate independent companies.
 - (ii) Ms Urlwin is not directly involved in an electricity retailer (but rather is a director of a parent company of an electricity retailer). She does not have any involvement in the operational details of Manawa's business, such as Manawa's distribution agreement with Vector. As outlined above, the primary role of the Infratil Board is to approve proposed investments, and Morrison & Co performs the day-to-day responsibilities of Infratil.
 - (iii) When exercising powers or performing duties in respect of Vector, Ms Urlwin has an obligation under the Companies Act 1993 to make decisions in the best interests of Vector. Vector's [Code of Conduct & Ethics](#) and [Board Charter](#) also require directors to avoid or manage conflicts of interest. Likewise, when exercising powers or performing duties in respect of Infratil, Ms Urlwin has an obligation to make decisions in the best interests of Infratil. As a single director of Vector, she does not have the ability to influence Board decisions in favour of Manawa or against competitors of Manawa. For example, Ms Urlwin would not have any ability to require Vector to discriminate in favour of Manawa or customers of Manawa, or require Vector to pay for the transfer of customers to Manawa.
 - (iv) Distributor agreements entered into by Vector (and variations to the agreements) are governed by Part 12A of the Code and provided to the Authority under Part 12A of the Code. Vector therefore trades on the same default distributor agreement for all retailers, unless an alternative agreement is entered into (in which case the Authority will be notified).¹
 - (v) Vector also has disclosure obligations under the Commerce Commission's Electricity Distribution Information Disclosure Determination 2012, and publishes information at [Prescribed terms and conditions of contracts | Vector Limited](#). Further, Vector's pricing methodology (published annually under the Electricity Distribution Information Disclosure Determination 2012) is agnostic as to the identity of the retailer (ie, does not

¹ Currently all distributor agreements are required to be provided to the Authority. Under changes proposed in the Authority's consultation paper dated 3 October 2023, *Proposed changes to the default distributor agreement template, consumption data template, and related Part 12A clauses*, a requirement to notify the Authority of any alternative agreement and provide it on request is proposed so that the Authority can monitor the uptake of alternative agreements.

provide for Vector to discriminate in Manawa's favour, or against Manawa's competitors), and requires Vector to make disclosures in respect of non-standard contracts. There is therefore no benefit in imposing additional requirements and disclosure obligations in respect of the distributor agreement under clause 6A.4 in these circumstances.

- (c) In respect of the electricity distribution market corresponding to Vector's network, as Vector's network is a local natural monopoly, granting the dispensation cannot affect the level of existing competition or the scope for potential competition in this market.

25. Further, granting a dispensation in respect of Ms Urlwin would better achieve the Authority's objectives than requiring compliance. It will better promote the efficient operation of the electricity industry for the long-term benefit of consumers by alleviating the regulatory burden on Ms Urlwin, and the costs of the Authority monitoring compliance, in circumstances in which there is no benefit in requiring compliance because of the remoteness of Ms Urlwin's involvement.

Conditions

26. Given Ms Urlwin is not a director of Manawa (but rather is two steps removed), standard conditions that the Authority imposes on exemptions are not strictly necessary.

27. However, consistent with the approach that has been taken in other exemptions granted by the Authority under section 90 of the Act, the following conditions are proposed:

- (a) While Ms Urlwin is a director of both Infratil and Vector:
 - (i) Ms Urlwin must not participate in any discussions or decision-making by Infratil and/or Vector regarding matters that:
 - (1) relate to, or could affect or favour, the supply of electricity by Manawa on Vector's electricity distribution network or the provision of electricity lines services by Vector to Manawa;
 - (2) involve supply, or intended supply, of electricity by Manawa to any new or existing consumer on Vector's electricity distribution network;
 - (3) disadvantage any other business selling or generating electricity on Vector's electricity distribution network or the provision of electricity lines services by Vector to any other electricity generator or retailer; and
 - (ii) Ms Urlwin will not disclose the outcome of any discussions or decision-making by Vector to Infratil (and vice versa) on the matters referred to in paragraph (a).

Other matters

28. For completeness, Manawa's generation does not currently exceed the 250 MW threshold set out in section 73 of the EIA, so the ownership separation requirement is not applicable.

Confidentiality

29. The fact and content of this application are not confidential.

Yours sincerely



Susie Kilty
Partner

[Redacted]



Anna Parker
Special Counsel

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