

Electricity Industry Participation Code 2010

Part 6A

Separation of distribution from certain generation and retailing

Part 6A: inserted on 1 September 2022, by the Electricity Industry Amendment Act 2021

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Schedule 6A.1 Arm's-length rules

6A.1 Purpose and outline of this Part

- (1) The purpose of this Part is to promote competition in the electricity industry by restricting relationships between a distributor and a generator or a retailer, where those relationships may not otherwise be at arm's length.
- (2) In general terms, this Part imposes rules in respect of distributors as follows:
 - (a) corporate separation and arm's-length rules, if a person is involved both in a distributor and in either or both of—
 - (i) a generator that generates more than 50 MW of generation connected to the distributor's network:
 - (ii) a retailer that retails more than 75 GWh per year to customers connected to the distributor's network:
 - (b) distribution agreement rules, if—
 - (i) a connected retailer retails more than 5 GWh per year to customers connected to the distributor's local network; or
 - (ii) a connected generator has a capacity of more than 10 MW of generation that is connected to any of the distributor's networks:
 - (c) rules preventing persons involved in distributors from paying retailers in respect of the transfer of retail customers:
 - (d) no-discrimination rules that apply when distributors, or electricity trusts or customer co-operatives involved in distributors, pay dividends or rebates.
- (3) Subclause (2) is intended only as a guide to the general scheme and effect of this Part.
Compare: 2010 No 116 s 72

6A.2 Interpretation

In this Part, unless the context otherwise requires,—

arm's-length rules means the objective and rules set out in Schedule 6A.1

assets has the meaning given in section 5 of the Act

associate has the meaning given in section 6A of the Act

business has the meaning given in section 5 of the Act

consumer has the meaning given in section 5 of the Act

customer, in respect of a retailer, means a consumer to whom that retailer sells electricity

director has the meaning given in section 6A of the Act

financial year has the meaning given in section 6A of the Act

generator has the meaning given in section 5 of the Act

involved in has the meaning given in section 6A of the Act

network has the meaning given in section 5 of the Act

retailer has the meaning given in section 5 of the Act

total capacity has the meaning given in section 73(3) of the Act.

Compare: 2010 No 116 s 73

*Corporate separation and arm's-length rules***6A.3 Corporate separation and arm's-length rules applying to distributors and connected generators and connected retailers**

- (1) The person or persons who carry on the business of distribution must carry on that business in a different company from the company that carries on the business of a connected generator or a connected retailer.
- (2) Every person who is involved in a distributor, and every person who is involved in a connected generator or a connected retailer, must comply, and ensure that the person's businesses comply, with the arm's-length rules.
- (3) In this clause, unless the context otherwise requires,—

connected generator, in relation to a distributor, means a generator—

- (a) that has a total capacity of more than 50 MW of generation that is connected to any of the distributor's networks; and
- (b) in respect of which the distributor, or any other person involved in the distributor, is involved

connected retailer, in relation to a distributor, means a retailer—

- (a) that is involved in retailing more than 75 GWh of electricity in a financial year to customers who are connected to any of the distributor's networks; and
- (b) in respect of which the distributor, or any other person involved in the distributor, is involved.

Compare: 2010 No 116 s 76

*Other rules***6A.4 Distribution agreements**

- (1) Every director of a distributor in respect of which there is a connected retailer or a connected generator must ensure that—
 - (a) the distribution business has a comprehensive, written distribution agreement that provides for the supply of line function services and information to the connected retailer or connected generator (as the case may be); and
 - (b) the terms of that distribution agreement do not discriminate in favour of one business and do not contain arrangements that include elements that the business usually omits, or omit elements that the business usually includes, in distribution agreements with parties that are—
 - (i) connected or related only by the transaction or dealing in question; and
 - (ii) acting independently; and
 - (iii) each acting in its own best interests; and
 - (c) the business operates in accordance with that distribution agreement; and
 - (d) the business publicises that distribution agreement and provides it to the Authority.

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- (2) A distribution agreement required by subclause (1)(a) must be entered into, in the case of a business to which the corporate separation rule does not apply, as if the distribution business and the connected retailer or connected generator were separate legal persons.
- (3) In this clause, unless the context otherwise requires,—
- connected generator**, in relation to a distributor, means a generator—
- that has a total capacity of more than 10 MW of generation that is connected to any of the distributor's networks; and
 - in respect of which the distributor, or any other person involved in the distributor, is involved
- connected retailer**, in relation to a distributor, means a retailer—
- that is involved in retailing more than 5 GWh of electricity on the distributor's local network in a financial year to customers who are connected to that network; and
 - in respect of which the distributor, or any other person involved in the distributor, is involved
- local network** means a network operated by a distributor in a contiguous geographic area or areas.
- (4) The directors of the distributor must ensure that there is also publicised, and provided to the Authority, a certificate signed by those directors stating whether, in the preceding calendar year,—
- the terms in the distribution agreement are a true and fair view of the terms on which line function services and information were supplied in respect of the retailing or generating to which the agreement relates; and
 - this clause was otherwise fully complied with.
- (5) A director breaches this Code if the director—
- refuses or knowingly fails to comply with this clause; or
 - allows a distribution agreement or a certificate to be publicised or provided to the Authority knowing that it is false or misleading in a material particular.

Compare: 2010 No 116 s 77

6A.5 Person involved in distributor must not pay for transfer of retail customers to connected retailers

- (1) A distributor, and any other person listed in subclause (2), 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.
- (2) The persons are—
 - (a) the distributor or any other person involved in the distributor;
 - (b) a connected generator in respect of the distributor or any other person involved in the connected generator;
 - (c) a connected retailer in respect of the distributor or any other person involved in the connected retailer.

- (3) To avoid doubt, subclause (1) includes a prohibition on—
- (a) any agreement to acquire the assets or voting securities of another retailer (regardless of whether any, or only nominal, consideration is attributed to customers) as a result of which there is a transfer of responsibility for retailing electricity to customers; and
 - (b) any consideration that is directly or indirectly or in whole or in part in respect of the transfer of any of another retailer's customers or customer accounts.
- (4) A person who knowingly fails to comply with this clause breaches this Code.
- (5) In this clause,—

agreement has the same meaning as in clause 10 of Schedule 2 of the Act

connected generator has the same meaning as in clause 6A.4

connected retailer has the same meaning as in clause 6A.4.

Compare: 2010 No 116 s 78

6A.6 No discrimination when paying rebates or dividends

- (1) This clause applies if a distributor has a connected retailer.
- (2) Every person listed in subclause (3) must ensure that any rebates or dividends or other similar payments paid do not discriminate between—
- (a) customers of the connected retailer; and
 - (b) customers of other retailers where those customers are connected to the distributor's networks.
- (3) The persons are—
- (a) the directors of the distributor;
 - (b) the trustees of any customer trust or community trust that is involved in the distributor and the connected retailer;
 - (c) the directors of any customer co-operative that is involved in the distributor and the connected retailer.
- (4) In this clause, **connected retailer** has the same meaning as in clause 6A.4.
- (5) A director or trustee who knowingly fails to comply with this clause breaches this Code.

Compare: 2010 No 116 s 79

Disclosure and reporting to Authority

6A.7 Disclosure of information to Authority

- (1) Each director of a distributor referred to in clause 6A.4(1) (distribution agreements) must ensure that the distributor discloses the quantity of electricity sold each financial year by connected retailers to customers who are connected to its local network (within the meanings in that clause).
- (2) The disclosure must be made in a statement to the Authority within 2 months after the

end of the financial year.

- (3) The statement must be in the form prescribed by the Authority from time to time.
- (4) The statement must be publicised by the Authority and the distributor.
- (5) A director breaches this Code if the director—
 - (a) refuses or knowingly fails to comply with this clause; or
 - (b) provides the statement to the Authority knowing that it is false or misleading in a material particular.

Compare: 2010 No 116 s 88

6A.8 Directors must report compliance with arm's-length rules

- (1) Each director of a business to which the arm's-length rules apply must provide to the Authority, no later than 31 March in each year, a statement confirming whether the director has complied with all of the arm's-length rules during the preceding calendar year.
- (2) The directors and the Authority must ensure that the statement is publicised.
- (3) A director breaches this Code if the director—
 - (a) refuses or knowingly fails to comply with this clause; or
 - (b) provides the statement to the Authority knowing that it is false or misleading in a material particular.

Compare: 2010 No 116 s 89

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

- (1) A **specified person** may apply to the **Authority** for a **Part 6A dispensation** in respect of their involvement 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** to a **specified person** 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 the **specified person** to comply with this Part or the specific provisions of this Part; or
 - (b) granting a **Part 6A dispensation** in respect 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.
- (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** 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.

Clause 6A.9: inserted, on 31 August 2023, by clause 5 of the Electricity Industry Participation Code Amendment (Part 6A Dispensation for Specified Persons) 2023.

Schedule 6A.1

cl 6A.2

Arm's-length rules

1 Objective

- (1) The objective of this schedule is to ensure that businesses to which clause 6A.3 applies operate at arm's-length.
- (2) Without limiting the ordinary meaning of the expression, **arm's-length** includes having relationships, dealings, and transactions that, if the parties were in the position described in subclause (3),—
 - (a) do not include elements that parties in that position would usually omit; and
 - (b) do not omit elements that parties in that position would usually include.
- (3) The position of the parties referred to in subclause (2) is one in which the parties are—
 - (a) connected or related only by the transaction or dealing in question; and
 - (b) acting independently; and
 - (c) each acting in their own best interests.

2 Interpretation

- (1) In this schedule,—

business A means a business that is required to be carried out in one company under clause 6A.3, and **business B** then refers to a business that is required to be carried out in another company under that clause

common parent, in relation to business A and business B, means a person that is involved in both business A and business B

electricity trust means a community trust or a customer trust or a customer co-operative

parent, in relation to a business, means every person that is involved in the business.
- (2) In this schedule, a person is **interested** in a transaction if the person, or an associate of that person,—
 - (a) is a party to, or will derive a material financial benefit from, the transaction; or
 - (b) has a material financial interest in a party to the transaction; or
 - (c) is a director or manager of a party to, or a person who will or may derive a material financial benefit from, the transaction; or
 - (d) is otherwise directly or indirectly materially interested in the transaction.
- (3) Where this schedule applies to business A, it applies equally to business B, and vice versa.
- (4) References to trust A and trust B have corresponding meanings and application.

3 Arm's-length rules

The arm's-length rules are as follows:

Duty to ensure arm's-length objective is met

- 1 Business A and every parent of business A, and business B and every parent of business B, must take all reasonable steps to ensure that the arm's-length objective in clause 1 is met.

Arm's-length test

- 2 Business A, and every parent of business A, must not enter into a transaction in which business B, or any parent of business B, is interested if the terms of the transaction are terms that unrelated parties in the position of the parties to the transaction, each acting independently and in its own best interests, would not have agreed to.

Duty not to prefer interests of business B

- 3 A director or manager of business A must not, when exercising powers or performing duties in connection with business A, act in a manner that the director or manager knows or ought reasonably to know would prefer the interests of business B over the interests of business A.

Duty not to discriminate in favour of business B

- 4 Business A must not, in providing services or benefits, discriminate in favour of business B or the customers, suppliers, or members of business B.

Duty to focus on interests of right ultimate owners

- 5 A director or manager of business A must, when exercising powers or performing duties in connection with business A, act in the interests of the ultimate members of business A in their capacity as such, and must neither subordinate the interests of those members to the interests of the members of business B nor, to the extent that the members or ultimate beneficial members of each business overlap, take account of that fact or have regard to their dual capacity as members of business B and business A.

Duty of directors and managers of parents of business A

- 6 A director or manager of a parent of business A must not, when exercising powers or performing duties in connection with business A, act in a manner that the director or manager knows or ought reasonably to know would favour the interests of business B, or of the customers, suppliers, or members of business B in that capacity, over the interests of business A or the customers, suppliers, or members of business A.

At least 2 independent directors

- 7 At least 2 directors of business A must—
- (a) be neither a director nor a manager of business B; and
 - (b) not be an associate of business B, other than by virtue of being a director of business A.

No cross-directors who are executive directors

- 8 A director of business A may be a director of business B, but must not—
- (a) manage business B on a day-to-day basis; or
 - (b) be an associate of business B, other than by virtue of being a director of business A or business B; or
 - (c) be involved in business B (other than by having material influence over business B by virtue of being a director of business B).

Separate management rule

- 9 (1) This clause applies if business A is involved in—
- (a) a generator that has a total capacity of more than 50 MW and that is connected to any of business A's networks; or
 - (b) a retailer that retails more than 75 GWh of electricity in a financial year to customers who are connected to any of business A's networks.
- (2) A manager of business A must not—
- (a) be a manager of business B; or
 - (b) be an associate of business B, other than by virtue of being a manager of business A; or
 - (c) be involved in the business of business B.

Directors and managers must not be placed under certain obligations

- 10 (1) Subject to subclause (2), no person may place a director or manager of business A under an obligation, whether enforceable or not, to act in accordance with the directions, instructions, or wishes of business B, or any director or manager or associate of business B, or any parent of business B, and no director or manager may submit to any such obligation.
- (2) A common parent, or a cross-director or a cross-manager, of both business A and business B may place a director or manager under an obligation referred to in subclause (1) if doing so does not contravene another of the arm's-length rules.

Restriction on use of information

- 11 (1) Business A must not disclose or permit the disclosure to business B, or use or permit the use for the purposes of business B, of restricted information of business A.

An electricity trust that is a parent of business A (**trust A**), business A, and every parent of trust A must not disclose or permit the disclosure to business B, an electricity trust that is a parent of business B (**trust B**), or any parent of trust B, or use or permit the use for the purposes of business B or trust B, of restricted information of business A or trust A.

In these rules, **restricted information** is information received or generated, and held, by business A or trust A that is connected with its business, being information that—

- (a) is not available to the competitors or potential competitors of business B or trust B; and
 - (b) if disclosed to business B or trust B, would put, or be likely to put, business B or trust B in a position of material advantage in relation to any competitor or potential competitor.
- (2) This rule does not prevent cross-directors under rule 8 from having access to normal board information.
 - (3) A manager of business A who is not prohibited from being a manager of business B under rule 9 may use restricted information of both business A and business B, but only to the extent that the use does not contravene another of the arm's-length rules.

Records

- 12 Every business to which this schedule applies must keep at its registered office a register of transactions entered into between business A, or any parent of business A, and business B, or any parent of business B.
- 13 Business A must, within 10 working days of entering into such transaction, enter in its register details sufficient to identify the nature and import of the transaction.

Practical considerations

- 14 Business A and every parent of business A must ensure that its practical arrangements, such as use of accommodation, equipment, and services, do not contravene this schedule.
- 15 Business A and every parent of business A must ensure that its selection and appointment of advisors does not prejudice compliance with rules 7 to 11.

4 Rules do not limit objective

The arm's-length rules in clause 3 do not limit the generality of the arm's-length objective in clause 1.