

Electricity Industry Amendment Bill

Government Bill

As reported from the Economic Development, Science and Innovation
Committee

Commentary

Recommendation

The Economic Development, Science and Innovation Committee has examined the Electricity Industry Amendment Bill and recommends that it be passed. We recommend all amendments unanimously.

Introduction

This bill would amend the Electricity Industry Act 2010. It is intended to improve the electricity industry's regulatory framework, to account for rapidly-evolving technologies and business models. Part 2 of the bill would also amend the Commerce Act 1986.

The bill has four main purposes, which are to:

- provide for establishment of a small electricity consumer advocacy agency, and enable the agency to be funded partly through industry participant levies
- allow the Electricity Authority to amend the Electricity Industry Participation Code for the purpose of protecting household and small business consumers in relation to their electricity supply
- move provisions relating to distributor involvement in generation or retailing activities from the Act to the Code to improve the regulation of evolving contestable markets, and promote competition in them
- ensure that the Code can regulate distribution access terms and conditions.

The bill would also strengthen the regulatory system by including provisions that allow the Authority to:

- gather information from industry participants for industry reviews or investigations requested by the Minister
- exempt an industry participant from the Code, on any terms or conditions the Authority reasonably considers necessary
- share information with other public service agencies and statutory entities.

It would also grant the Minister power to amend the Code, within a specified time, if they consider the Code's provisions in relation to certain matters are not satisfactory.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We are satisfied that our concerns have been addressed and have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Authority's power to regulate distribution access agreements

Under existing law, retailers must negotiate separate agreements with every distributor whose network they wish to access. Access terms and conditions vary between distributors' regions, which makes negotiating more difficult and may impede competition.

The Code encourages distributors to use "default distribution agreements", with standardised access terms and conditions. However, section 32(2)(b) of the Act states that the Code may not regulate any matter that the Commerce Commission could regulate under Parts 3 or 4 of the Commerce Act (with certain exceptions). Under that Act, the Commission can regulate quality standards and information requirements. Therefore, the Code cannot regulate these matters through terms and conditions in default distribution agreements.

Clause 13 of the bill would replace section 32, which describes which matters may be included in the Code. Clause 13(2)(b) and 13(4) as introduced would expand this provision to allow the Authority to set quality or information requirements for terms and conditions for access to distribution networks, despite these being matters that the Commerce Commission could choose to regulate under the Commerce Act. This power would be analogous to the Authority's existing powers in relation to transmission networks.

Submissions raised a concern that the reference in new section 32(4) to "the terms and conditions for" access to transmission or distribution networks could unintentionally limit this provision. They were concerned that it might only apply to codified "terms and conditions" documents. We note that the provision's policy intent is to

enable the Code to set quality or information requirements in relation to distribution network access generally, not just in relation to terms and conditions for access.

We therefore recommend removing the words “terms and conditions” from new section 32(4). We believe this will better reflect the provision’s intent.

Promoting competition in contestable markets

Some industry participants provide monopoly services (such as Transpower and regional distributors). However, these businesses may also be involved in contestable activities such as emerging markets related to distributed energy resources.¹ The business could potentially leverage its monopolistic market power in the distribution market, for example by offering favourable deals to its affiliate business in the retail market. These practices could limit competition, resulting in worse outcomes for consumers.

Part 3 of the Electricity Industry Act contains some rules governing distributors’ involvement in retail and generation markets. However, emerging technologies increasingly blur the boundaries between these markets. For example, small scale “on-site” generation might avoid traditional distribution networks.

The bill would move some provisions from Part 3 of the Act into the Code. This would allow the Authority to amend the Code to target new competition-related problems as they arise.

We recommend several changes to these provisions, outlined below.

Definition of industry participants

Under section 32(2)(a) of the Act, the Code may only impose obligations on a person who is an industry participant, acting on behalf of an industry participant, or the Authority. “Industry participant” is defined in section 7 to include specific classes of persons, and any other industry service provider identified in regulations made under section 109.

Clause 13 of the bill would retain the restriction in section 32(2)(a). However, new section 32(2)(a) would be subject to subsection 32(3) which would allow the Code to impose obligations on a specified person for the purpose of restricting relationships between 2 classes of industry participants, where those relationships may not be at arm’s length.² The intent of this provision is to enable the Code to introduce rules to limit or mitigate anti-competitive conduct and favourable dealing.

The Authority expressed concern that this provision may not adequately prevent monopoly businesses from exploiting their market power in contestable markets

¹ For example, small-scale solar generation or batteries at the consumer’s property.

² In plain terms, operating “at arm’s length” means not having relationships and transactions that would not usually be offered to other businesses. Each business should act independently and in its own best interests.

involving businesses that are not industry participants, especially in new emerging markets.

We note that the bill's purpose is to promote competition in evolving contestable markets and agree that this loophole should be closed. We believe the bill could achieve this through the regulation-making powers in section 109 of the Act. That section allows regulations to identify which industry service providers, in addition to the specified classes in section 7(2), are industry participants.

We recommend inserting new clause 33A to amend the regulation-making power in section 109. Our proposed amendments to sections 7 and 109(1)(ab) would allow regulations to identify any persons (not limited to industry service providers) as industry participants, where their activities or roles in the electricity industry are material to the Authority's objectives.

Regulations under section 109(1)(ab) would be subject to appropriate decision-making criteria and notification requirements. This would provide flexibility for the Act to address our concerns around misuse of market power, especially in emerging markets, through a clear and structured process.

Minister may amend the Code no later than 3 years after enactment

Clause 19 would insert section 44B into the Act to allow the Minister to amend the Code. This power is limited to the matters specified in new section 44B(2) and subject to restrictions (such as consulting the Authority and the public).

In the bill as introduced, the Minister would be permitted to amend the Code no sooner than 2 years after the provision came into effect, and not more than 4 years after. The intent behind this provision is to provide a backstop power in the event that the Minister was not satisfied with progress being made on developing the Code.

We understand that the Code has already been amended to include most of the matters specified in new section 44B(2). Submitters suggested that permitting the Minister to amend the Code through regulations would increase regulatory uncertainty and could undermine the Authority's independence.

We consider that this power is appropriate, given the Code's importance. However, we acknowledge that the policy decision behind this provision was made over two years ago, and the Code has developed since then. We recommend amending clause 19, new section 44B(5) to bring the backstop power's timing forward by one year. That is, the Minister would only be able to exercise this power between 1 and 3 years after the provision came into effect. We believe this would reduce any future regulatory uncertainty.

Expand the Authority's information-sharing powers

Clause 22 would insert new sections 47A and 47B. As introduced, these provisions would allow the Authority to share certain information with New Zealand public service agencies or statutory entities, where the Authority holds information that it considers may assist that entity in performing its functions or duties. They would also

permit the Authority to impose conditions on any shared information, for example conditions to ensure the privacy of individuals.

The Gas Industry Company (GIC) is the approved co-regulator of the gas industry under the Gas Act 1992. The Australian Securities and Investment Commission (ASIC) regulates the ASX (Australian Securities Exchange) where many New Zealand companies regularly trade electricity futures contracts. However, GIC and ASIC are not New Zealand public service agencies or statutory entities, so would not be captured under clause 22 as introduced.

We believe that allowing the Authority to share information with these entities would improve regulatory oversight, because of the close ties between the gas and electricity industries, and between New Zealand's electricity market and Australian securities markets.

We recommend amending clause 47A to allow information-sharing with the gas industry body. We also recommend expanding this provision to include any overseas regulators that perform functions related to the regulation of New Zealand's electricity market, or otherwise corresponding to the Authority's functions.

Jurisdictional overlap with the Commerce Commission

Part 2 of the bill would amend other enactments, principally the Commerce Act. Clause 45 would amend section 54V of the Commerce Act. That section describes factors that the Commerce Commission must take into account before exercising its powers in relation to the electricity lines services.

As discussed above, the bill would broaden the scope of the Authority's regulatory powers to matters that the Commerce Commission could also regulate under the Commerce Act. We do not recommend any substantive changes to these provisions.

However, we believe the bill could better explain how the Commission should take any changes of the Code into account when exercising its functions, for example, when making determinations under section 52P of that Act. The Commission has set "default price-quality paths" for electricity distributors, which limit price increases and impose minimum service quality standards. Some submitters were concerned that the Code could impose requirements on distributors that the default price-quality path did not account for.

We recommend amending clause 45 to make it clear that the Commission must take any cost increases resulting from a change in the Code into account when issuing determinations under section 52P of the Commerce Act.

Changes to enforcement provisions

We recommend introducing several new clauses, 22A to 22C, to implement some recommendations from the recent review of the compliance framework by the Ministry of Business, Innovation and Employment. That review resulted from the 2021 Electricity Price Review,³ and was still under way when we invited the public to submit on the bill.

We believe these changes would improve the Act's regulatory regime.

Clause 22A would:

- increase the maximum penalty that the Rulings Panel may impose on an industry participant for breaching the Code from \$200,000 to \$2 million
- allow the Rulings Panel to impose an additional \$10,000 penalty for every day (or part-day) that a breach continues
- require the Rulings Panel to consider two or more Code breaches, relating to the same event or a series of closely related events arising from the same cause, as a single breach.

We recommend this change to ensure that the possible penalty deters industry participants from breaching the Code (for example, where a breach could net them revenue far in excess of the \$200,000 penalty). It would incentivise parties to remedy breaches in a timely fashion, especially in situations where the breach is extended and uninterrupted.

We note that these are maximum penalties and we expect the Rulings Panel to exercise its judgement appropriately. However, to make this clear, clause 22B would insert a requirement into section 56(2) requiring the Rulings Panel to consider the impact of the penalty on the participant, and on the electricity industry.

Clause 22A would also allow the Rulings Panel to award reasonable costs for investigations and proceedings, at its discretion, upon determining that an industry participant has not breached the Code. Responding to breach allegations can be costly for businesses. This provision would allow the respondent to recover reasonable costs from complainants, where the complaint is not upheld.

³ The Electricity Price Review can be found on the Ministry of Business, Innovation and Employment's website: <https://www.mbie.govt.nz/assets/electricity-price-review-final-report.pdf>.

Appendix

Committee process

The Electricity Industry Amendment Bill was referred to the committee on 29 September 2021.

The closing date for submissions on the bill was 17 November 2021. We received and considered 41 submissions from interested groups and individuals. We heard oral evidence from 18 submitters.

We received advice on the bill from the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Jamie Strange (Chairperson)

Glen Bennett

Naisi Chen

Hon Judith Collins (from 8 December 2021)

Melissa Lee

Hon Todd McClay (until 8 December 2021)

Stuart Smith also participated in our consideration of this bill.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Dr Megan Woods

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Schedule 1

Schedule 1 replaced

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New Part 6A and Schedule 6A.1 inserted into Electricity Industry Participation Code 2010	
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Amendments to other enactments	

The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Electricity Industry Amendment Act **2021**.
- 2 Commencement**
This Act comes into force on the day after the date on which it receives the Royal assent. 5
- 3 Principal Act**
This Act amends the Electricity Industry Act 2010.

Part 1
Amendments to principal Act 10

- 4 New section 2A inserted (Transitional, savings, and related provisions)**
After section 2, insert:

2A Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms. 15
- 5 Section 5 amended (Interpretation)**
 - (1) In section 5, replace the definition of **Code** with:

Code or Electricity Industry Participation Code means the Code administered by the Authority under subpart 3 of Part 2
 - (2) In section 5, definition of **load aggregator**, replace “interruptable” with “interruptible”. 20
 - (3) In section 5, insert in their appropriate alphabetical order:

assets includes property of any kind, whether tangible or intangible, and includes rights, interests, and claims of every kind however they arise

business means any undertaking that is carried on whether for gain or reward or not 25

distribution agreement means an agreement referred to in **section 44A(1)**

manager, in relation to a person,—

- (a) means a person who, whether alone or jointly with any other person, manages, or directs or supervises the management of, the whole or a substantial part of the business and affairs of the person; and
- (b) includes,—
 - (i) in relation to a trust, a trustee:
 - (ii) in relation to a local authority, a member; but
- (c) does not include,—
 - (i) in relation to a body corporate, a director of that body corporate:
 - (ii) in relation to a business in which a local authority or any other person has an interest, a member of that local authority or manager of that person only as a result of that person having that position

small business consumer means a consumer that is not a domestic consumer and—

- (a) that is in a class specified in regulations made under **section 113A**; or
- (b) if no such regulations have been made, that consumes less than 40 MWh of electricity per year

6 New section 6A inserted (Meaning of involved in)

After section 6, insert:

6A Meaning of involved in

- (1) In this Act, unless the context otherwise requires, a person is **involved in** an industry participant if the person—
 - (a) carries on a business as an industry participant, either alone or together with its associates and either on its own or another's behalf; or
 - (b) exceeds the 10% threshold in respect of a business that is an industry participant; or
 - (c) has material influence over a business that is an industry participant.
- (2) A person **exceeds the 10% threshold** in respect of a business if the person—
 - (a) has more than 10% of the control rights in the business; or
 - (b) has more than 10% of the equity return rights in the business; or
 - (c) is one of 2 or more associates who, in aggregate, have more than 10% of the control rights in the business; or
 - (d) is one of 2 or more associates who, in aggregate, have more than 10% of the equity return rights in the business.
- (3) This section is subject to Schedule 2.
- (4) In this section and in Schedule 2,—

associate has the meaning given in clause 8 of Schedule 2

control right has the meaning given in clause 5 of Schedule 2

director, in relation to a body corporate, means a person occupying the position of director of the body corporate by whatever name called

equity return right has the meaning given in clause 6 of Schedule 2

financial year means a period of 12 months ending with 31 March

involvement has a corresponding meaning to involved in

material influence has the meaning given in clause 7 of Schedule 2

rights means all rights, powers, privileges, and immunities, whether actual, contingent, or prospective.

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6A Section 7 amended (Industry participants)

(1) After section 7(1)(i), insert:

(j) any other person identified in regulations made under **section 109(1)(ba)**.

(2) In section 7(2)(h), replace “109” with “109(1)(a)”.

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7 Section 10 amended (Exemption from obligation to register)

(1) In section 10(2)(a) and (3)(b)(i), replace “objective” with “objectives”.

(2) In section 10(1)(b) and (3), delete “in the *Gazette*”.

(3) Replace section 10(4) with:

(4) A notice issued under subsection (1)(b) or (3) must be published in the *Gazette*.

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8 Section 11 replaced (Exemption from obligation to comply with Code)

Replace section 11 with:

11 Exemption from obligation to comply with Code

(1) Despite section 9(1)(b), an industry participant need not comply with the Code, or specific provisions of the Code, if—

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(a) it is a member of a class of industry participants identified in regulations made under section 110 as a class of industry participants that is exempt from the obligation to comply with the Code or specific provisions of the Code; or

(b) the Authority exempts the participant by issuing an individual exemption notice that—

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(i) identifies the industry participant that is exempt from the obligation to comply with the Code or specific provisions of the Code; and

(ii) gives reasons for the exemption.

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- (2) The Authority may grant an individual exemption to an industry participant only if the Authority is satisfied that—
- (a) it is not necessary, for the purpose of achieving the Authority’s objectives under section 15, for the participant to comply with the Code or the specific provisions of the Code; or 5
 - (b) exempting the participant from the requirement to comply with the Code or the specific provisions of the Code would better achieve the Authority’s objectives than requiring compliance.
- (3) The Authority may grant an individual exemption on any terms or conditions that it reasonably considers are necessary. 10
- (4) The Authority may amend or revoke an individual exemption, by issuing a notice that identifies the exempt participant 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 exempt participant and given the participant a reasonable opportunity to comment; and 15
 - (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; and
 - (c) in relation to a revocation, is no longer satisfied of the matters in **subsection (2)**. 20
- (5) A notice issued under **subsection (1)(b) or (4)** must be published in the *Gazette*.
- (6) The Authority must publicise a list of all current class and individual exemptions. 25

9 Section 15 amended (Objective of Authority)

- (1) In the heading to section 15, replace “**Objective**” with “**Objectives**”.
- (2) In section 15, replace “The objective” with “The main objective”.
- (3) In section 15, insert as subsections (2) and (3):
- (2) The additional objective of the Authority is to protect the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers. 30
 - (3) The additional objective applies only to the Authority’s activities in relation to the dealings of industry participants with domestic consumers and small business consumers. 35

10 Section 16 amended (Functions of Authority)

- (1) In section 16(1)(f), replace “such as” with “for example,”.
- (2) After section 16(1)(i), insert:

- (ia) to undertake measures aimed at protecting the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers:

11 New sections 22A and 22B and cross-heading inserted

After section 22, insert:

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Small Electricity Consumers Agency

22A Minister may establish Small Electricity Consumers Agency

- (1) The Minister may establish a Small Electricity Consumers Agency by approving 1 or more persons to perform the function of the agency.
- (2) The Minister may approve 1 or more persons to perform the function of the agency, and each person approved may perform all or any part of that function.
- (3) In **subsection (2)**, **person** includes any instrument of the Crown (for example, a public service agency, as that term is defined in section 5 of the Public Service Act 2020).
- (4) In approving a person or persons under **subsection (2)**, the Minister must be satisfied that the person has (or the persons collectively have) the ability to perform the function of the agency.
- (5) The agency may determine its own procedure, subject to any directions given to it by the Minister.

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22B Function of agency

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- (1) The function of the agency is to represent and advocate for the interests of domestic consumers and small business consumers in the electricity industry.
- (2) The agency may carry out its function by, for example,—
 - (a) promoting the interests of domestic consumers and small business consumers to relevant public service agencies and Crown entities; and
 - (b) providing evidence-based advocacy on behalf of domestic consumers and small business consumers, whether in response to policy proposals or on its own initiative.

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12 Section 27 amended (Register of industry participants)

In section 27(3)(b), replace “involved” with “engaged”.

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13 Section 32 replaced (Content of Code)

Replace section 32 with:

32 Content of Code

- (1) The Code may contain any provisions that are consistent with the objectives of the Authority and are necessary or desirable to promote any or all of the following:

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- (a) competition in the electricity industry:
- (b) the reliable supply of electricity to consumers:
- (c) the efficient operation of the electricity industry:
- (d) the protection of the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers: 5
- (e) the performance by the Authority of its functions:
- (f) any other matter specifically referred to in this Act as a matter for inclusion in the Code.
- (2) The Code may not—
 - (a) impose obligations on any person other than an industry participant or a person acting on behalf of an industry participant, or the Authority (other than in accordance with **subsection (3)**); or 10
 - (b) purport to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 4 of the Commerce Act 1986 (other than in accordance with **subsection (4)**); or 15
 - (c) purport to regulate any matter dealt with in or under the Electricity Act 1992.
- (3) The Code may impose obligations on a specified person for the purpose of restricting relationships between 2 classes of industry participants, where those relationships may not otherwise be at arm's length. 20
- (4) The Code may contain provisions that do any of the following, regardless of whether such a provision would otherwise be prohibited under **subsection (2)(b)**:
 - (a) set quality or information requirements for Transpower or 1 or more distributors, in relation to ~~the terms and conditions for access to transmission or distribution networks~~: 25
 - (b) set pricing methodologies for Transpower or 1 or more distributors.
- (5) **Subsections (3) and (4)** do not limit **subsection (1)**.
- (6) In this section,—

pricing methodologies has the meaning given in section 52C of the Commerce Act 1986 30

specified person means a person (other than an industry participant) who is involved in both classes of industry participant that are the subject of any provisions made in accordance with **subsection (3)**.
- 14 Sections 34 to 36 repealed** 35

Repeal sections 34 to 36.
- 15 Section 40 amended (Urgent amendments to Code)**

Replace section 40(2)(b) with:

- (b) expires on the date that is 9 months after the date on which it comes into force, unless it is revoked earlier under **section 40A**.

16 New section 40A inserted (Revocation of urgent amendments)

After section 40, insert:

- 40A Revocation of urgent amendments** 5
- (1) The Authority may revoke an amendment made under section 40 without complying with section 39(1) if—
- (a) the Authority considers that the circumstances that gave rise to the amendment no longer exist or have changed significantly; and
- (b) the Authority considers that, as a result, the continued application of the amendment is not required. 10
- (2) A revocation made under this section—
- (a) must be published (as required under section 33) with a statement of the Authority’s reasons why the criteria in **subsection (1)** are met; and
- (b) is not subject to section 38(4). 15

17 Sections 42 and 43 and cross-heading repealed

Repeal sections 42 and 43, and the cross-heading above section 42.

18 Cross-heading above section 44 amended

In the cross-heading above section 44, delete “*specific*”.

19 New sections 44A to 44F and cross-heading inserted 20

After section 44, insert:

- 44A Distribution agreements**
- (1) Without limiting section 32, the Code may require a distributor and 1 or more other industry participants to enter into 1 or more agreements for connection to, and use of, the distributor’s network (a **distribution agreement**). 25
- (2) The Code may prescribe default terms and conditions that are deemed to be included in distribution agreements, including terms and conditions that relate to quality or information requirements.
- (3) The parties to a distribution agreement may, by mutual consent, agree to modify any default terms and conditions, but only if and to the extent that the Code permits those terms and conditions to be modified. 30
- (4) A distribution agreement is binding on both parties and enforceable as if it were a contract between the parties that had been freely and voluntarily entered into.
- (5) If the parties do not comply with a requirement in the Code to enter into 1 or more distribution agreements, the default terms and conditions in the Code are 35

binding on the parties and enforceable as if they were set out in a distribution agreement.

44B Minister may amend Code to include specified matters

- (1) The Minister may amend the Code by including provisions for any matter specified in **subsection (2)** if the Minister— 5
 - (a) considers that the Code's provisions for the specified matter are not satisfactory; and
 - (b) is satisfied that the amendment will further the Authority's objectives in section 15.
- (2) The matters referred to in **subsection (1)** are as follows: 10
 - (a) requirements for retailers to process consumer requests for information about their electricity consumption in a timely way:
 - (b) limitations on retailer saves and win-backs:
 - (c) requirements for retailers to provide information to the Authority to enable the Authority to better direct its efforts under section 16(1)(i) 15
(which relates to promoting to consumers the benefits of comparing and switching retailers):
 - (d) requirements for distributors to offer retailers standard terms for access to their networks:
 - (e) requirements for certain categories of industry participant to make available information directed at improving the performance of the wholesale market: 20
 - (f) requirements for certain industry participants to act as market makers in relation to the trading of some wholesale electricity contracts:
 - (g) requirements for some or all industry participants that are both generators and retailers to release information about the profitability of their retailing activities. 25
- (3) The Minister may amend the Code under this section as if the Minister were the Authority, and ~~sections 37~~ 38 to 40 apply accordingly, with any necessary modifications. 30
- (4) Before amending the Code, the Minister must consult the Authority (in addition to any consultation required under section 39).
- (5) The power given by this section may not be exercised earlier than ~~2 years~~ 1 year after, and not more than ~~4~~ 3 years after, the date on which this section comes into force. 35
- (6) In this section,—
save, in relation to a retailer, means action taken by the retailer to initiate contact with a consumer that is intending to switch its electricity supply from the retailer to another retailer, in an attempt to retain the consumer's business

win-back, in relation to a retailer, means action taken by the retailer to initiate contact with a consumer that has agreed to switch its electricity supply from the retailer to another retailer, in an attempt to retain the consumer's business.

Application of other Acts

44C Interpretation

5

In **sections 44D to 44F**, a provision in the Code—

- (a) **relates to corporate separation** if it requires corporate separation between classes of industry participants, or relates to such a provision; and
- (b) **relates to arm's-length rules** if it requires a person to comply with arm's-length rules, or relates to such a provision.

10

44D Not interconnected under Commerce Act 1986

- (1) For the purposes of Part 2 of the Commerce Act 1986 (other than sections 36 and 36A), businesses to which provisions in the Code relating to corporate separation or arm's-length rules apply are deemed to be separate bodies corporate that are not interconnected, despite the fact that they may have a common owner.
- (2) **Subsection (1)** applies despite section 2(7) of the Commerce Act 1986.

15

Compare: 2010 No 116 s 92

44E Illegal contracts

20

- (1) An agreement lawfully entered into does not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of a provision in the Code relating to corporate separation or arm's-length rules.
- (2) An agreement entered into in breach of a Code provision relating to corporate separation or arm's-length rules is voidable, at the option of any party to the agreement who is not in breach of the Code provision, by notice in writing to the other party or parties, at any time within 1 month after the innocent party has notice that the agreement is in breach of the Code provision.

25

Compare: 2010 No 116 s 93

44F Substance matters, not form

30

Any question under a provision in the Code relating to corporate separation or arm's-length rules is to be determined according to the nature, substance, and economic effect of the relevant interest or relationship or other facts, and independently of form.

Compare: 2010 No 116 s 94

35

- 20 Section 45 amended (Purposes of exercise of Authority’s monitoring, investigation, and enforcement powers)**
- (1) In the heading to section 45, replace “**and enforcement powers**” with “**enforcement, and review powers**”.
- (2) After section 45(b), insert: 5
- (c) carrying out a review and producing a report in response to a request by the Minister under section 18.
- 21 Section 46 amended (Authority’s monitoring, investigation, and enforcement powers)**
- In the heading to section 46, replace “**and enforcement powers**” with “**enforcement, and review powers**”. 10
- 22 New sections 47A and 47B inserted**
- After section 47, insert:
- 47A Sharing of information and documents with public service agencies and statutory entities, statutory entities, gas industry body, and overseas regulators** 15
- (1) The Authority may provide to a public service agency ~~or a statutory entity, a statutory entity, the gas industry body, or an overseas regulator~~ any information, or a copy of any document, that the Authority—
- (a) holds in relation to the performance or exercise of the Authority’s functions, powers, or duties under this Act or any other legislation; and 20
- (b) ~~considers may assist the public service agency or statutory entity in the performance or exercise of its functions, powers, or duties under this Act or any other legislation.~~
- (b) considers may assist, as the case may be,— 25
- (i) the public service agency, statutory entity, or gas industry body in the performance or exercise of its functions, powers, or duties under any legislation; or
- (ii) the overseas regulator in the performance or exercise of the overseas regulator’s functions, powers, or duties under foreign law. 30
- (2) The Authority may provide information, or a copy of a document, under this section only if the Authority is satisfied that—
- (a) doing so will not substantially affect the performance of its functions; and
- (b) appropriate protections are or will be in place for the purpose of maintaining the confidentiality of anything provided (in particular, information that is personal information within the meaning of the Privacy Act 2020). 35

- (3) The Authority may use any information, or a copy of any document, in the Authority's performance or exercise of its functions, powers, or duties under any legislation if the information or copy is provided to the Authority—
- (a) by a public service agency ~~or statutory entity~~, a statutory entity, or the gas industry body under any legislation; or 5
 - (b) by an overseas regulator.
- (4) ~~In this section, **statutory entity** means an entity or office named in Schedule 1 of the Crown Entities Act 2004.~~
- (4) In this section and **section 47B**,—
- gas industry body** means the industry body within the meaning of section 43D of the Gas Act 1992 10
- overseas regulator** means a body in another country that performs functions—
- (a) that are related to the regulation of New Zealand's electricity markets; or
 - (b) that otherwise correspond with, or are similar to, any of those conferred on the Authority 15
- public service agency** has the meaning given in section 5 of the Public Service Act 2020
- statutory entity** means an entity or office named in Schedule 1 of the Crown Entities Act 2004.
- (5) This section applies despite anything to the contrary in any contract, deed, or document. 20
- (6) Nothing in this section limits the Privacy Act 2020 ~~or any provision of this Act or any other legislation that allows the Authority to use or disclose information (for example, under section 17 of the Crown Entities Act 2004 for the purpose of performing its functions).~~ 25
- Compare: 1986 No 5 s 99AA; 2011 No 5 s 30; 2021 No 31 s 282
- 47B Authority may impose conditions on provision of information or documents**
- (1) The Authority may impose any conditions in relation to providing information, or a copy of a document, to a public service agency ~~or a statutory entity~~, a statutory entity, the gas industry body, or an overseas regulator (whether provided in compliance with a request or otherwise). 30
- (2) The Authority must, in considering what conditions to impose, have regard to whether conditions are necessary or desirable in order to protect the privacy of any individual. 35
- (3) The conditions may include, without limitation, conditions relating to—
- (a) maintaining the confidentiality of anything provided (in particular, information that is personal information within the meaning of the Privacy Act 2020):

- (b) the storing of, the use of, or access to anything provided:
- (c) the copying, returning, or disposing of copies of documents provided:
- (d) payment of the costs incurred by the Authority in providing anything or in generally complying with a request.

Compare: 1986 No 5 s 99AB; 2011 No 5 s 33; 2021 No 31 s 283

5

22A Section 54 amended (Remedial orders for breach of Code)

- (1) Replace section 54(1)(d) with:

- (d) make a pecuniary penalty order requiring an industry participant to pay a pecuniary penalty to the Crown of an amount not exceeding \$2 million and a further amount not exceeding \$10,000 for every day or part of a day during which the breach continues (see section 56):

10

- (2) After section 54(2), insert:

- (3) Two or more breaches relating to one event or series of closely related events arising from the same cause or circumstance must be treated as a single breach.

- (4) The Rulings Panel may also decide to make orders regarding the reasonable costs of any investigations or proceedings on determining that an industry participant has not breached the Code.

15

22B Section 56 amended (Pecuniary penalty orders)

After section 56(2)(i), insert:

- (ia) the impact of the penalty on the participant and on the electricity industry:

20

22C Section 65 amended (Appeal against certain orders of Rulings Panel)

In section 65(1)(e), after “section 54(1)(g)”, insert “or **(4)**”.

23 Part 3 heading amended

In the Part 3 heading, delete “and retailing”.

25

24 Subpart 1 of Part 3 replaced

Replace subpart 1 of Part 3 with:

Subpart 1—Separation of distribution from certain generation

72 Purpose of this Part

The purpose of this Part is to prohibit a person who is involved in a distributor from being involved in a generator where that may create incentives and opportunities to inhibit competition in the electricity industry.

30

73 Ownership separation

- (1) A person who is involved in a distributor must not be involved in 1 or more generators that have a total capacity of more than 250 MW that is generated by 1 or more generating plants that are directly connected to the national grid.
- (2) To avoid doubt, generation connected to a distribution network is not directly connected to the national grid. 5
- (3) In this section,—
- nameplate** means the full-load continuous rating of a generating plant under specific conditions as designated by its manufacturer and measured in megawatts in accordance with International Electrotechnical Commission Standard 60034-1 or any successor to that standard or any recognised equivalent standard 10
- total capacity** means the total nominal capacity of a generator in a financial year (determined according to the nameplates of all of the generator's generating plants). 15
- Compare: 2010 No 116 s 75

25 Section 80 amended (Pecuniary penalties)

In section 80(3)(b)(ii), delete “and section 92”.

25A Section 85 amended (Application of Commerce Act 1986 provisions)

In section 85(f), replace “99A,” with “**99AA** to 99P,”. 20

26 Section 87 amended (Application to persons outside New Zealand)

In section 87, replace “distributor, generator, or retailer” with “distributor or generator”.

27 Sections 88 and 89 and cross-heading repealed

Repeal sections 88 and 89 and the cross-heading above section 88. 25

28 Section 90 amended (Exemptions)

In section 90(2)(b), delete “or a retailer”.

29 Section 91 amended (Application of Commerce Act 1986)

In section 91, replace “Except as provided in section 92, nothing” with “Nothing”. 30

30 Section 92 repealed (Not interconnected under Commerce Act 1986)

Repeal section 92.

31 Section 94 amended (Substance matters, not form)

In section 94, delete “or 3”.

- 32 Section 96 amended (Membership of dispute resolution scheme)**
Repeal section 96(6).
- 33 Section 108 amended (Application of other enactments)**
In section 108(3), after “for the purposes of Part 3”, insert “or the Code”.
- 33A Section 109 amended (Regulations identifying industry participants and market operation service provider roles)** 5
- (1) After section 109(1)(a), insert:
- (ab) identifying which other persons whose activities or roles in the electricity industry are material to the Authority’s objectives under section 15 are industry participants: 10
- (2) After section 109(1), insert:
- (1A) The Minister may make a recommendation for the purpose of **subsection (1)(ab)** only if the Minister is satisfied—
- (a) that affected persons have been given notice of the proposed recommendation and a reasonable opportunity to comment on the recommendation; and 15
- (b) that it is necessary or desirable, for the purpose of achieving the Authority’s objectives under section 15, for the proposed recommendation to be made; and
- (c) that the advantages and disadvantages of the proposed recommendation have been considered. 20
- (1B) Regulations under **subsection (1)(ab)** may identify whether the persons are industry participants for the purposes only of some of this Act, the regulations, or the Code, but if not, the persons are industry participants for all purposes.
- 34 Section 113 amended (Regulations about tariffs and other consumer issues)** 25
- (1) In section 113, replace “small businesses” with “small business consumers” in each place.
- (2) Replace section 113(5) with:
- (5) In this section, **rural consumer** means a consumer in a sparsely populated area. 30
- (3) Repeal section 113(6).
- 35 New section 113A inserted (Regulations about small business consumers)**
After section 113, insert:

113A Regulations about small business consumers

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations specifying a class of consumers that are not domestic consumers as small business consumers.
- (2) Regulations made under this section are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

5

36 Section 114 amended (Regulations promoting accountability in customer trusts and community trusts)

Repeal section 114(4).

37 Section 128 amended (Levies)

10

After section 128(3)(d), insert:

- (da) the costs incurred by the person or persons performing the function of the Small Electricity Consumers Agency, or a portion of those costs, where the size of the portion to be met by levies under this Act is determined by the Minister; and

15

38 New section 129B inserted (Small Electricity Consumers Agency consultation about request for appropriation)

After section 129A, insert:

129B Small Electricity Consumers Agency consultation about request for appropriation

20

- (1) The Small Electricity Consumers Agency must, before submitting a request to the Minister seeking an appropriation of public money for the following year, or any change to an appropriation for the current year, that relates to costs that are intended to be recovered by way of levies under **section 128(3)(da)**, consult the following about that request:
- (a) those industry participants who are liable to pay a levy under that section:
- (b) any other representatives of persons whom the Small Electricity Consumers Agency believes would be significantly affected by a levy under that section.
- (2) The Small Electricity Consumers Agency must, when it submits the request, report to the Minister on the outcome of that consultation.
- (3) This section applies to requests in respect of the financial year beginning 1 July 2021 and later financial years.

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39 New subpart 2B of Part 5 inserted

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After section 131A, insert:

Subpart 2B—Material incorporated by reference

131B Material incorporated by reference

- (1) This section applies for the purposes of section 66(2)(b) of the Legislation Act 2019.
- (2) If material incorporated by reference in secondary legislation made under this Act is amended or replaced by the originator of the material after the secondary legislation is made, legal effect may be given to that amendment or replacement material if—
 - (a) the amendment or replacement material is of the same general character as the original material; and
 - (b) the maker of the secondary legislation issues a notice to adopt the amendment or replacement material as having legal effect as part of the secondary legislation.
- (3) If material incorporated by reference in secondary legislation made under this Act expires, is revoked, or otherwise ceases to have effect, the material ceases to have legal effect as part of the secondary legislation if the maker of the secondary legislation issues a notice stating that the material ceases to have that legal effect.
- (4) A notice issued under **subsection (2)(b) or (3)** must be published in the *Gazette* and publicised by the maker of the secondary legislation.
- (5) This section does not limit section 66(2)(a) of the Legislation Act 2019.
- (6) In this section, **material** has the meaning given in section 63 of the Legislation Act 2019.

40 Section 140 amended (References to Electricity Governance Rules 2003 and certain regulations)

- (1) In section 140, replace “regulations listed in section 34(1)” with “regulations listed in **subsection (2)**”.
- (2) In section 140, insert as subsection (2):
 - (a) the Electricity Governance Rules made under section 172H of the Electricity Act 1992:
 - (b) subpart 2 of Part 1 and Parts 2, 2A, and 3 of the Electricity Governance Regulations 2003:
 - (c) subpart 2 of Part 10 of the Electricity Governance Regulations 2003 (the Comalco agreements exemptions):
 - (d) the Electricity Governance (Security of Supply) Regulations 2008:
 - (e) the Electricity Governance (Connection of Distributed Generation) Regulations 2007.

41 Schedule 1 replaced

Replace Schedule 1 with the **Schedule 1** set out in **Schedule 1** of this Act.

42 Schedule 2 amended

- (1) Replace the Schedule 2 heading with “**When person is involved in industry participant for purposes of section 6A**”.

5

- (2) Replace clause 1 and the cross-heading above clause 1 with:

*Involvements that do not count for purposes of **section 6A***

1 Purpose of this schedule

The purpose of this schedule is—

- (a) to exclude certain interests from the application of Code provisions imposed under **section 32(3) and (4)**; and
- (b) to exclude certain interests from the application of the ownership separation rule in **section 73**; and
- (c) to help in interpreting—
 - (i) any Code provisions referred to in **paragraph (a)**; and
 - (ii) **section 73**.

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15

- (3) In the heading to clause 2, replace “**Part 3**” with “**section 6A**”.

- (4) In clause 2, replace “Part 3” with “**section 6A**”.

- (5) In the heading to clause 3, replace “**Part 3**” with “**section 6A**”.

- (6) In clause 3, replace “Part 3” with “**section 6A**”.

20

- (7) In clause 3, insert as subclause (2):

- (2) In this clause, **nameplate** has the meaning given in **section 73(3)**.

- (8) In the heading to clause 4, replace “**Part 3**” with “**section 6A**”.

- (9) In clause 4(1), replace “Part 3” with “**section 6A**”.

- (10) In clause 4(1)(a), after “section 90”, insert “, or section 11, if the exemption under section 11 is an exemption from a Code provision that relates to corporate separation or arm’s-length rules (as defined in **section 44C**)”.

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- (11) In clause 7(4), replace “the arm’s-length rules (with all necessary modifications)” with “the Code provisions (if any) relating to arm’s-length rules (as defined in **section 44C**)”.

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- (12) In clause 9(1), replace “section 74” with “**section 6A**”.

- (13) Replace the heading to clause 10 with “**Other interpretation rules**”.

- (14) In clause 10,—

- (a) replace “Part 3, this schedule, and Schedule 3” with “**section 6A** and this schedule”; and

35

- (b) repeal the definition of **manager**.

43 Schedule 3 repealed

Repeal Schedule 3.

Part 2

Amendments to other enactments

5

Amendments to Commerce Act 1986

44 Principal Act

Section 45 amends the Commerce Act 1986.

45 Section 54V amended (Impact of certain decisions made under Electricity Industry Act 2010)

10

- (1) In section 54V(1), after “performance of its functions or exercise of its powers”, insert “in relation to electricity lines services”.

- (2) In section 54V(2), replace “is likely” with “are likely”.

- (2A) In section 54V(2), after “powers or functions of the Commission”, insert “in relation to electricity lines services”.

15

- (3) Replace section 54V(2)(c) and (d) with:

- (c) undertaking any market-facilitation measures.

- (4) In section 54V(3), replace “Transpower or to any distributor or class of distributors” with “a supplier of electricity lines services”.

- (5) Replace section 54V(4) with:

20

- (4) The Commission must take into account, before exercising any of its powers or performing any of its functions in relation to electricity lines services under this Part,—

- (a) any provision of the Code, or decision made under it, that relates to or affects—

25

- (i) pricing methodologies that apply to a supplier of electricity lines services; or

- (ii) quality or information requirements that apply to a supplier of electricity lines services:

- (b) any market-facilitation measures of which it receives advice under **sub-section (2)(c)**:

30

- (c) the levy payable by a supplier of electricity lines services under section 128 of the Electricity Industry Act 2010:

- (d) the continuance of supply obligations imposed by section 105 of the Electricity Industry Act 2010.

35

(5A) In section 54V(5), replace “subsection (4)” with “subsection (3) or **(4)**”.

(6) Repeal section 54V(6).

Amendment to Electricity Industry Participation Code 2010

46 Principal Code

Section 47 amends the Electricity Industry Participation Code 2010. 5

47 New Part 6A and Schedule 6A.1 inserted

After Part 6, insert the **Part 6A** and **Schedule 6A.1** set out in **Schedule 2** of this Act.

Amendments to other enactments

48 Amendments to other enactments 10

Amend the enactments specified in **Schedule 3** as set out in that schedule.

Schedule 1

Schedule 1 replaced

s 41

Schedule 1

Transitional, savings, and related provisions

5

s 2A

Part 1

Provisions relating to Electricity Industry Amendment Act 2021

1 Interpretation

In this Part,—

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amendment Act means the Electricity Industry Amendment Act 2021

commencement date means the day after the date on which the amendment Act receives the Royal assent.

2 Existing material incorporated by reference

- (1) This clause applies in relation to any written material that was, immediately before the commencement date, incorporated by reference into— 15

(a) the Code; or

(b) regulations made under section 113 or 114.

- (2) On and from the commencement date, the material must be treated as having been incorporated by reference in accordance with section 64 of the Legislation Act 2019. 20

3 Existing exemptions granted under section 11

An exemption granted by the Authority under section 11 that was in force immediately before the commencement date—

(a) continues in effect until it is amended or revoked under section 11(3), or until it expires according to its terms; and 25

(b) must not be treated as an exemption from any provision in the Code relating to corporate separation or arm's-length rules (as defined in **section 44C**); and

(c) must, on and from the commencement date, be treated as having been made under **section 11** as replaced by the amendment Act. 30

4	Existing exemptions granted under section 90	
(1)	This clause applies to an exemption granted by the Authority under section 90 and in force immediately before the commencement date, if it is an exemption from the obligation to comply with any of the following sections:	
(a)	section 76 (corporate separation and arm's-length rules applying to distributors and connected generators and connected retailers):	5
(b)	section 77 (use-of-systems agreements):	
(c)	section 79 (no discrimination when paying rebates or dividends):	
(d)	section 88 (disclosure of information to Authority):	
(e)	section 89 (directors must report compliance with arm's-length rules).	10
(2)	On and from the commencement date, the exemption—	
(a)	must be treated as an exemption made under section 11 (as replaced by the amendment Act) from the obligation to comply with the equivalent provision in the Code; and	
(b)	continues in force until it is amended or revoked under section 11(4) , or until it expires according to its terms.	15
5	Applications for exemptions received before commencement date	
(1)	An application for an exemption made under section 11 or 90 that is received (but not granted) by the Authority before the commencement date must be considered under the relevant section as if the amendment Act had not been enacted.	20
(2)	If the application is granted by the Authority and is an exemption of a type described in subclause (3) , it must be treated, after it comes into effect, as having been made under section 11 as inserted by the amendment Act.	
(3)	For the purposes of subclause (2) , the relevant exemptions are as follows:	25
(a)	exemptions under section 11:	
(b)	exemptions under section 90(1) that are exemptions from the obligation to comply with any of the following sections:	
(i)	section 76 (corporate separation and arm's-length rules applying to distributors and connected generators and connected retailers):	30
(ii)	section 77 (use-of-systems agreements):	
(iii)	section 79 (no discrimination when paying rebates or dividends):	
(iv)	section 88 (disclosure of information to Authority):	
(v)	section 89 (directors must report compliance with arm's-length rules).	35

6 Regulations regarding Small Electricity Consumers Agency

Regulations made under **section 128(3)(da)** may provide for the recovery of costs incurred in the year ending 30 June 2022, even if the regulations come into effect after that date.

Schedule 2
New Part 6A and Schedule 6A.1 inserted into Electricity Industry
Participation Code 2010

s 47

Part 6A

5

Separation of distribution from certain generation and retailing

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. 10
- (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: 15
 - (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 20
 - (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. 25
- (3) **Subclause (2)** is intended only as a guide to the general scheme and effect of this Part. 30
 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

35

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 5
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. 10
 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. 15
- (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. 20
- (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 25**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 30
 - (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 5
 - (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— 10
 - (i) connected or related only by the transaction or dealing in question; and
 - (ii) acting independently; and 15
 - (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.
- (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. 20
- (3) In this clause, unless the context otherwise requires,—
- connected generator**, in relation to a distributor, means a generator— 25
- (a) that has a total capacity of more than 10 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— 30
- (a) 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
 - (b) in respect of which the distributor, or any other person involved in the distributor, is involved 35
- 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,—
- (a) 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 5
 - (b) this clause was otherwise fully complied with.
- (5) A director breaches this Code if the director—
- (a) refuses or knowingly fails to comply with this clause; or
 - (b) 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. 10
- Compare: 2010 No 116 s 77
- 6A.5 Person involved in distributor must not pay for transfer of retail customers to connected retailers** 15
- (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— 20
- (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. 25
- (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 30
 - (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,— 35
- 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. 5
- (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. 10

Compare: 2010 No 116 s 89

Schedule 6A.1 Arm's-length rules

cl 6A.2

1 Objective

- (1) The objective of this schedule is to ensure that businesses to which **clause 6A.3** applies operate at arm's length. 15
- (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)**,— 20
 - (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— 25
 - (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,— 30

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 35

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	5
	(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.	10
(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	15
	The arm's-length rules are as follows:	
	<i>Duty to ensure arm's-length objective is met</i>	
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.	20
	<i>Arm's-length test</i>	
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.	25
	<i>Duty not to prefer interests of business B</i>	
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.	30
	<i>Duty not to discriminate in favour of business B</i>	
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.

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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.

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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.

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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).

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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

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- (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. 5
- (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. 10

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. 15
- 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. 20
- 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— 25
- (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. 30
- (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. 35

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 any such transaction, enter in its register details sufficient to identify the nature and import of the transaction.

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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.

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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**.

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Schedule 3
Amendments to other enactments

s-49 48

Ombudsmen Act 1975 (1975 No 9)

In Schedule 1, Part 2, insert in its appropriate alphabetical order:

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Small Electricity Consumers Agency

Legislative history

9 September 2021
29 September 2021

Introduction (Bill 63–1)
First reading and referral to Economic Development, Science
and Innovation Committee