

# Submission on the Electricity Industry Amendment Bill

Submitted to:

Economic Development, Science and Innovation Committee

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# Commerce Commission submission on the Electricity Industry Amendment Bill

## Introduction

1. The Commerce Commission (the **Commission**) appreciates the opportunity to make a submission to the Economic Development, Science and Innovation Committee (the **Committee**) on the Electricity Industry Amendment Bill (the **Bill**). The Bill amends the Electricity Industry Act 2010 (**EIA**), which governs the Electricity Authority (**Authority**) and the Electricity Industry Participation Code 2010 (**Code**). In doing so, the Bill gives effect to a subset of key decisions from the Government's response to the Electricity Price Review (**EPR**).
2. The EIA contains provisions that interact with Part 2 and Part 4 of the Commerce Act 1986 (**Commerce Act**), and the Bill amends some of those provisions. The Commission is, among other things, responsible for enforcement of the Commerce Act, and is a multi-sector economic regulator, including for parts of the electricity sector. As part of consultation on the EPR, the Commission made a number of public submissions on matters addressed in the Bill, including a joint submission with the Authority.
3. This submission focuses on the Bill's proposals concerning the EIA's interaction with Part 4 of the Commerce Act (**Part 4**), and specifically, the regulation of electricity distribution access terms and conditions, as well as the impact of the Code on the regulation of electricity distributors and Transpower under Part 4.

## Executive summary

4. We support the Bill because it gives effect to an important subset of key recommendations from the EPR, including:
  - 4.1 providing an effective regulatory framework for the electricity industry, in view of rapidly evolving technologies and business models; and
  - 4.2 providing for the establishment of a new 'small consumer agency' to provide evidence-based advocacy into regulatory decision-making processes, on behalf of household and small business electricity consumers.
5. In particular, we support clauses 13 and 19 of the Bill, which provide for the Authority to set quality and information requirements in the Code for access to distribution or transmission networks. These amendments to the EIA clarify ambiguities in the responsibilities of the Commission and the Authority, and, in line with the EPR recommendations, ensure that the Code is able to regulate distribution access terms and conditions to the same extent it already does for transmission. We also support the small refinement we understand the Authority seeks to the Bill to remove the text "the terms and conditions for" from new s 32(4)(a) of the EIA.
6. We support amending s 54V of the Commerce Act (in clause 45 of the Bill), which specifies the process requirements on the Commission and the Authority in relation to decisions made under the Code that impact Part 4 regulation, and vice versa. We

recommend some additional amendments to s 54V to better enable complementary regulation between the two regulators.

## **Context**

### *The Commission's powers and functions relevant to the Bill*

7. The Commission is New Zealand's primary competition, consumer and economic regulation agency. We enforce the country's competition and consumer laws and regulate industries that have little or no competition, including electricity network businesses. Among other things, the Bill amends laws that interact with Part 2 and Part 4 of the Commerce Act.
8. The Commission enforces the provisions in Part 2 of the Commerce Act. Part 2 prohibits practices in markets that substantially lessen competition, and conduct that involves taking advantage of market power, including in markets in the electricity sector.
9. Under Part 4 of the Commerce Act, the Commission administers information disclosure regulation for Transpower and 29 electricity distributors. We also administer individual price-quality regulation for Transpower, and default/customised price-quality regulation for those electricity distributors that are not exempt from price-quality regulation (because they meet certain statutory criteria for being 'consumer-owned'). Transpower and distributors subject to our price-quality determinations must comply with revenue limits and quality standards, or risk enforcement action.
10. Our quality standards set network quality requirements for those distributors and for Transpower, ensuring that their revenue limits are accompanied by minimum levels of performance. Part 4 provides that quality standards set by the Commission for distributors subject to price-quality regulation may be prescribed in any way we consider appropriate, and they may include (without limitation): responsiveness to consumers, reliability of supply, reduction in energy losses, and voltage stability or other technical requirements (refer s 53M(3) of the Commerce Act). The Bill does not change these provisions in Part 4.

### *The inter-relationship between the Commission and the Authority*

11. By contrast, the Authority is responsible for promoting competition in, reliable supply by, and the efficient operation of the electricity industry as a whole. Among other things, the Authority looks after 'access regulation' through the Code, which it administers under the EIA. Access regulation involves ensuring that generators, retailers and other market participants can access transmission and distribution networks so that electricity can be generated and sold on an equal footing. Provisions relating to access regulation are also currently set out in Part 3 of the EIA, which sets out the extent to which distributors can be involved in generation and retail markets (on the basis that a distributor competing to generate or sell electricity may harm competition by giving preferential access to itself).

12. We have a bilateral Memorandum of Understanding (**MOU**) with the Authority, and regularly meet at Board and staff levels.

*Past Commission submissions relevant to the Bill*

13. In October 2018, we made a joint submission with the Authority on the EPR's August 2018 First Report.<sup>1</sup> Among other things, the two regulators:
  - 13.1 highlighted that they share a common interest in promoting competition in energy-related markets adjacent to the regulated electricity distribution service; and
  - 13.2 recommended considering whether the EIA could be improved to address ambiguities in their respective responsibilities, which the EPR had identified in respect of the regulation of access to electricity distributors' networks.
14. In the Commission's March 2019 submission on the EPR's February 2019 Options Paper,<sup>2</sup> we:
  - 14.1 supported the EPR's proposal to establish an independent consumer advisory council, as it would provide a well-resourced, consumer view to balance industry's views;
  - 14.2 submitted on the EPR's proposal to give the Authority clearer, more flexible powers to regulate network access for distributed energy services, noting that it would be important for the relevant sector regulators to have the flexibility to respond in a timely and co-ordinated manner if the developing market structure creates harms to consumers; and
  - 14.3 reiterated our recommendation that the EIA could be improved to address ambiguities in the two regulators' respective responsibilities, particularly in respect of the Authority's powers to set default distribution agreements with retailers.
15. In preparing our respective submissions on the Bill, the Authority and the Commission have liaised on a number of key points of each other's submission, specifically those points relating to the Bill's amendments to s 32 of the EIA and to s 54V of the Commerce Act. We express support for the Authority's proposed drafting change to s 32(4)(a) of the EIA below.

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<sup>1</sup> <https://www.mbie.govt.nz/dmsdocument/4159-electricity-authority-and-commerce-commission-electricity-price-review-first-report-submission>.

<sup>2</sup> <https://www.mbie.govt.nz/dmsdocument/4820-commerce-commission-submission-electricity-price-review-options-paper-pdf>.

## Regulating distribution access terms and conditions

*Clauses 13 and 19 of the Bill provide for the Authority to set quality and information requirements relating to access terms and conditions*

16. Section 32(2)(b) of the EIA currently prohibits the Code from regulating matters that the Commission is authorised to regulate under Part 4 of the Commerce Act, with the exception of setting pricing methodologies for electricity distributors and Transpower, and setting quality standards for Transpower. One effect of this limitation is that the Code may not regulate access terms and conditions that could be expressed as quality standards or information disclosure requirements (as those terms are used in Part 4 of the Commerce Act). This limitation was clarified by the Court of Appeal in *Vector Limited v Electricity Authority* [2018] NZCA 543 and [2019] NZCA 49. The Commission was an interested party in those proceedings.
17. Clause 13 of the Bill amends s 32 of the EIA to clarify in what circumstances the Code can regulate things that are, or may be, regulated by the Commission under Part 4. New s 32(4) provides that the Code may contain provisions that set quality or information requirements for distributors, in relation to the terms and conditions for access to distribution networks, whether or not the Commission is authorised to regulate such requirements under Part 4. Section 32(4) therefore expands the existing exceptions to the general prohibition in s 32(2)(b)) on the Code regulating matters that the Commission is authorised to regulate under Part 4.
18. Clause 19 introduces new s 44A to the EIA which explicitly provides for the Code to require distributors to enter into distribution agreements for connection to, and use of, the distributor's network. Section 44A(2) provides that 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. This new section would allow the Authority to regulate all parts of distribution access agreements, as it can already do for transmission agreements.

*Clauses 13 and 19 of the Bill achieve the desired policy objective*

19. We support the intent and current text of clauses 13 and 19 of the Bill. The amendments:
  - 19.1 address the specific ambiguity about the Authority's powers to set default distribution agreements that was considered in the Vector/Authority litigation, and which the EPR's Final Report recommended should be addressed;
  - 19.2 are consistent with the Authority's role as the electricity sector's access regulator; and
  - 19.3 give effect to the longstanding policy supporting the standardisation of distribution agreements to reduce costs and enhance retail competition.
20. We consider that the current text of s 32(4) of the Bill gives effect to the desired policy intent. Nonetheless, we support the small refinement we understand the

Authority seeks to the Bill to delete the reference in new section 32(4)(a) to “terms and conditions” as follows.

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:

21. This refinement reinforces the statement in the Bill’s Explanatory Note that “[Code] access terms and conditions may include, but are not limited to, terms and conditions in a distribution agreement.”

*Clause 13 of the Bill creates a manageable overlap in the roles and powers of the Commission and Authority*

22. The amendments will allow the Authority to set obligations on distributors in respect of the quality they must provide to access seekers and other parties seeking to connect to distribution networks. The Authority will be able to set network-wide quality requirements of the type we would in practice be unlikely to set under Part 4, such as those that facilitate the real-time operation of the network, including requirements on distributors that relate to frequency or harmonics.
23. However, consistent with limiting the overlap with the Commission’s jurisdiction, the Authority will not be able to set the network-wide aggregate reliability standards that we currently set under Part 4 (ie, limits on SAIDI and SAIFI). The Authority will also not be able to set other such network-wide standards of the sort we might set in the future that affect network investment, unless they relate to access. The touchstone is whether a Code quality/information requirement relates to access, or whether it more closely resembles a standard for network-wide reliability performance in the context of a price-quality path.
24. While noting the Authority’s ability to regulate in relation to access, responsibility for setting quality standards relating to overall network reliability performance for distributors that are not ‘consumer owned’ will remain with the Commission under Part 4 of the Commerce Act. The Commission may – in line with its intentions already signalled to sector stakeholders – develop more disaggregated reliability standards, as well as standards in respect of other dimensions of quality. We will also continue to be able to set information disclosure requirements for all distributors, whether in respect of quality, or any other dimension of performance consistent with the purpose of Part 4.
25. However, consistent with limiting the overlap with the Authority’s jurisdiction, such quality standards will not extend to setting access terms or conditions that impose obligations on particular access seekers or connected parties (the Authority’s domain). We may set quality standards for distributors and for Transpower, not for parties seeking access to distribution or transmission networks.
26. If the Committee were to accept the Authority’s and the Commission’s proposal to change the wording of s 32(4)(a), the Bill as reported back from the Committee could potentially be used to address any residual ambiguity about the extent of the Bill’s

change to the Authority's ability to impose quality and information requirements on distributors. For instance, it could refer to the examples provided above.

*Further changes to the two agencies' roles could be considered in future*

27. Currently, the Commission may only set quality standards for distributors that are not exempt from price-quality regulation. However, as part of its recommendations to give the Commission more powers to regulate distributors, the EPR Final Report concluded that the Commission should be able to recommend that the government revoke a distributor's exemption from price-quality regulation, or impose quality-only regulation alongside the existing information disclosure regulation, if this would be better for consumers.<sup>3</sup> Such a change could be considered during any future review of Part 4.
28. We note that the amendments to s 32 of the EIA in clause 13 of the Bill go beyond those contemplated by the EPR. The EPR's position was that the Authority should be able to regulate all parts of distribution access *agreements*, including setting quality standards relevant to such agreements (including quality standards of the kind the Commission can set).<sup>4</sup> However, as noted above, the Bill's Explanatory Note makes clear that distribution access terms and conditions set under the Code may include, *but are not limited to*, terms and conditions in a distribution agreement. By removing the reference to "terms and conditions", the Authority's refinement discussed above makes it clearer still that the Code may include provisions (other than those in the Code's default distributor agreement) requiring distributors to take actions in relation to access to their networks.
29. We support this extension of the Code's scope, as it is consistent both with the Authority's role as access regulator, as well as with the thrust of the longstanding original policy intent to increase the standardisation of distribution access agreements to enhance retail competition, which has been extensively consulted on. As noted above, the amendments enlarge the overlap in the Commission's and Authority's roles and powers, particularly with respect to the regulation of distribution quality. However, we consider that this overlap in jurisdiction is manageable, subject to our proposed changes to s 54V(1) of the Commerce Act (amended by clause 45 of the Bill), discussed later in this submission.
30. The analysis preceding this Bill has largely focused on the recommendations of the EPR. At this point, we consider that if any further expansion of the overlap in the Commission's and Authority's roles were contemplated beyond that proposed by the Bill, or beyond the proposed drafting changes above, it would be essential to conduct careful analysis of, and further consultation on, potential unintended consequences. Further expansion of the jurisdictional overlap without such prior analysis and consultation would likely introduce uncertainty about which regulator is dealing with what matters, and increase the potential for enforcement 'double

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<sup>3</sup> <https://www.mbie.govt.nz/assets/electricity-price-review-final-report.pdf>, page 53.

<sup>4</sup> <https://www.mbie.govt.nz/assets/electricity-price-review-final-report.pdf>, page 59.

jeopardy' for distributors, detrimentally affecting their incentives to make investments that benefit consumers.

31. We note that the Authority is undertaking a review of the security and resilience of electricity supply, in response to the relevant EPR recommendation, and is investigating potential issues with distribution network regulation that might impede the transition to a low-emissions economy. We are also taking forward responses to our open letter on our regulatory priorities under Part 4,<sup>5</sup> particularly in the light of decarbonisation. The findings from this work could ultimately prompt further consideration of the Commission's and the Authority's roles, and further changes to legislation. We look forward to working closely alongside the Authority as this work progresses.

### **Impact of the Code on the regulation of distributors and Transpower under Part 4**

*Clause 45 of the Bill amends the process requirements on the Commission and the Authority*

32. Section 54V of the Commerce Act imposes process requirements on both the Commission and the Authority in respect of decisions made by the Authority under the EIA that may affect the Commission in the performance of its functions or exercise of its powers under Part 4, and vice versa.
33. Clause 45 of the Bill amends s 54V to (among other things):
- 33.1 require the Commission to also take into account any provision of the Code relating to quality or information requirements that apply to distributors or Transpower (in amended s 54V(4)), which is consistent with the Authority's expanded remit under new s 32(4)(a); and
- 33.2 repeal the explicit requirement in s 54V(6) for the Commission to set quality standards based on those set by the Authority, as the intent of this requirement now becomes implicit in the new requirement in s 54V(4).
34. We support the amendment to s 54V(4) and the repeal of s 54V(6).

*We recommend allowing the Commission to reconsider Part 4 determinations to reflect increased distribution or transmission costs due to Code changes*

35. Section 54V(3) requires the Authority to advise the Commission following any Code change that results in increased costs to Transpower or distributors. However, s 54V(5) only provides for the Commission to reconsider and amend a determination made under Part 4 to take account of any matter referred to in (the amended) s 54V(4). Section 54V(5) does not provide for the Commission to reconsider and amend determinations to take account of Code changes that result in increased costs, but which fall outside the scope of s 54V(4).
36. The 11 December 2019 Cabinet Paper on progressing the EPR's recommendations recommended that: "Section 54V should also be amended to enable the Commission

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<sup>5</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/253561/Open-letter-Ensuring-our-energy-and-airports-regulation-is-fit-for-purpose-29-April-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/253561/Open-letter-Ensuring-our-energy-and-airports-regulation-is-fit-for-purpose-29-April-2021.pdf)



to amend a price-quality path determination [made under Part 4] to take account of any changes to the Code that increase costs for Transpower and distributors”.<sup>6</sup> Subject to the clarification to process requirements in s 54V(1) of the Commerce Act suggested below, we agree. We suggest that this could be achieved by adding the following sub-clause to clause 45 of the Bill:

In section 54V(5), replace “any matter referred to in subsection (4)” with “any matter referred to in subsections (3) or (4).

*We recommend clarifying the process requirements to ensure decisions made under the Code and Part 4 are complementary*

37. The Bill includes provisions that give the Authority greater flexibility to promote competition in evolving contestable markets, the most significant of which is to move key provisions from Part 3 of the EIA into the Code. Doing so will allow the Authority to develop rules in the Code to address any competition-related problems arising from distributors’ or Transpower’s involvements in contestable markets (including emerging markets for distributed energy resources). The Bill also makes minor amendments to the sections that refer to provisions in Part 2 of the Commerce Act.
38. The 11 December 2019 Cabinet Paper expressed agreement with the EPR’s recommendation on this topic, stating that “any amendments to the Code that regulate a distributor’s involvement in contestable activities should be developed in consultation with the Commerce Commission”. The Cabinet Paper observed that “this would help ensure the resulting rules complement the Commission’s price-quality and information disclosure regulation and promote clarity about where the boundary lies between the monopoly elements of the sector and the contestable elements.”<sup>7</sup> We note that this would also help ensure consistency with the Commission’s role as the national competition authority.
39. The Cabinet Paper went on to note that the Authority is already required to consult the Commission before amending the Code in a manner that could affect the Commission’s decision-making. However, as we explain below, we recommend the Committee consider whether clarifying this existing obligation might be desirable to ensure that the two regulators’ decisions are complementary.
40. Price-quality determinations made by the Commission under Part 4 are typically required to be in force for ‘regulatory periods’ of 4 to 5 years (or 3 to 5 years in certain circumstances). Part 4 provides that such determinations may only be reconsidered to change revenue limits and quality standards in limited situations, such as in response to a request from the Authority under s 54V(5) (discussed above), or where criteria set out by the Commission in rules determined in advance of the regulatory period are met. The certainty this provides to distributors and Transpower is consistent with a key objective of the Part 4 regulatory regime, which

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<sup>6</sup> <https://www.mbie.govt.nz/assets/electricity-price-review-government-response-to-final-report.pdf>, paragraph 77.

<sup>7</sup> <https://www.mbie.govt.nz/assets/electricity-price-review-government-response-to-final-report.pdf>, paragraph 74.

is that regulated suppliers should have incentives to invest and innovate for the long-term benefit of consumers of regulated services (refer s 52A(1)(a) of the Commerce Act).

41. As noted above, we consider that the Bill should enable price-quality determinations to be reconsidered due to changes in the Code, especially those that might increase distribution or transmission costs. However, we emphasise that frequent reconsiderations of price-quality determinations, even if they ultimately do not result in a change to revenue limits or quality standards, will increase regulatory uncertainty.
42. Section 54V of the Commerce Act already imposes process requirements to manage the current overlap in the roles of the Authority and the Commission, and these process requirements are backed up by the MOU between the two regulators. However, the Bill expands the Authority's powers in ways that enlarge the overlap between the Authority's and the Commission's roles. We also note that certain Commission's decisions under Part 4 are appealable to the courts on their merits, whereas amendments to the Code and decisions under it are not.
43. As noted above, we consider that the greater overlap created by ensuring the Code may contain access terms and conditions relating to distribution quality and information requirements is manageable. However, when combined with the other changes in the Bill we suggest that clarifying the process requirements on the Authority might be desirable.
44. We recommend that clause 45 of the Bill makes the following amendment to s 54V:  
  
In section 54V(1), after "consult with", insert "and take into account any views of".
45. We consider that this change clarifies and makes explicit that the Authority needs to take into account the Commission's views before amending the Code in a way that overlaps with the Commission's role. This will ensure that the decisions by the Authority and the Commission in relation to Transpower or distributors are complementary. This proposed change is consistent with the language used in s 54V(4), which requires the Commission to take particular provisions of the Code into account before making decisions under Part 4.

## Conclusion

46. We thank the Committee for this submission opportunity and would be pleased to provide any further assistance that the Committee may require. If the Committee has any specific questions on this submission please contact Andy Burgess, Head of Energy, Airports and Dairy Regulation ([andy.burgess@comcom.govt.nz](mailto:andy.burgess@comcom.govt.nz) or 04-924-3713), or Simon Thomson, Strategy, Policy and Performance Manager ([simon.thomson@comcom.govt.nz](mailto:simon.thomson@comcom.govt.nz) or 04-924-3791).