

Departmental Disclosure Statement

Electricity Industry Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment (**MBIE**).

MBIE certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

30 July 2021

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Part One: General Policy Statement

The Bill amends the Electricity Industry Act 2010 (**the Act**). The purpose of the Bill is to ensure the Act, which governs the Electricity Authority (**the Authority**) and the Electricity Industry Participation Code (**the Code**), will provide an effective regulatory framework for the electricity industry in view of rapidly evolving technologies and business models.

The Bill's purposes, in particular, are to—

- provide for the establishment of a small electricity consumer advocacy agency and enable the levy on industry participants to recover the Government's costs relating to small electricity consumer advocacy;
- remove ambiguity in the Authority's ability to amend the Code for the purpose of protecting household and small business consumers;
- provide more regulatory agility to promote competition in evolving contestable markets by shifting from the Act to the Code a number of existing provisions relating to a distributor's involvement in generation or retailing activities;
- ensure that the Code can regulate distribution access terms and conditions, as it already does in relation to Transpower.

Small consumer advocacy

Electricity consumers, particularly households and small businesses, struggle to make their voices heard and exert influence over decisions affecting them in the electricity sector. They struggle because—

- the complexity of the sector makes it difficult for them to understand and express their views about things affecting their electricity supply and power bills;
- small consumers have little bargaining power in their dealings with their retailer or distributor, which can make them vulnerable to unbalanced supply terms and adverse outcomes such as disconnection of power for non-payment;
- they lack the considerable time and resources needed to get involved in decision-making processes, the outcomes of which are largely made on their behalf by industry participants, regulators, and the Government;
- cultural differences and language barriers stand in the way.

The Bill provides for the establishment of a small consumer advocacy agency to provide evidence-based advocacy. Either a portion of, or all of, the costs of small consumer advocacy will be able to be recovered by an industry levy, subject to any levy regulations being made.

Protecting household and small business consumers

Small electricity consumers can be vulnerable in their dealings with electricity industry participants due to an imbalance of information and bargaining power. While there are generic consumer protections in the Fair Trading Act 1986 and Consumer Guarantees Act 1993, these are insufficient to protect small electricity consumers from sector-specific factors, such as the risks of unbalanced supply terms, and adverse outcomes, such as accumulation of debt and disconnection, that result from paying for power after it is consumed.

Despite the reference to the “benefit of consumers” in the Authority's objective, there is uncertainty regarding the extent to which the Code may include provisions to protect the interests of small consumers in their dealings with industry participants. This is because protecting small consumers in their dealings with industry participants may not

necessarily be consistent with the Authority's objective to promote competition in, reliable supply by, or efficient operation of the industry.

The Bill will give the Authority the additional objective of protecting the interests of household and small business consumers in their dealings with industry participants. This additional objective is intended to be a relevant consideration only in relation to industry participants' dealings with small consumers, for example, the manner in which electricity retailers acquire new residential customers, the terms and conditions of residential retail contracts, and how retailers deal with small consumers who have fallen behind on bill payments. The additional objective is not intended to affect the Authority's functions relating to how industry participants deal with other industry participants (eg, trading conduct and information exchange), how prices are determined (eg, wholesale and retail electricity prices), or how costs are allocated between industry participants (eg, costs of transmission and ancillary services).

Regulation to promote competition in evolving contestable markets

Businesses providing monopoly services in the industry (Transpower and distributors) may also be involved in contestable activities, including emerging markets related to distributed energy resources. Such involvements have the potential to deter or limit competition because the monopoly businesses may "self-deal" in a manner that favours their own businesses or affiliates. In short, such businesses have the opportunity and incentive to leverage market power from one market into related markets, potentially limiting competition to the detriment of consumers.

While Part 3 of the Act contains some provisions addressing this problem, it is limited to rules governing distributors' involvements in retail and generation markets, and emerging technologies increasingly blur the traditional boundaries of these markets. Moving key provisions from Part 3 of the Act into the Code will give the Authority jurisdiction to develop proportionate and targeted rules to address any competition-related problems arising from Transpower's or distributors' involvements in other contestable markets if and when they emerge.

Part 3 of the Act provides for arm's-length rules applying to a person that is involved in a distributor and a generator, or a distributor and a retailer. This is because a person with such involvements could be a conduit for information or could exert influence that has the potential to lessen competition. The Bill will move these rules to the Code, enabling the Code to regulate such a person in a like manner, whether or not that person is an industry participant.

Regulating distribution access terms and conditions

Retailers and other parties seeking access to all distribution networks must negotiate separate agreements with every distributor. Variation between distributors' access terms and conditions raises costs and can impede competition. To address this issue, the Code contains provisions to promote standardisation of terms and conditions in distribution agreements, but the Act limits the extent of such regulation.

Section 32(2)(b) currently limits how the Code may regulate matters that the Commerce Commission is authorised to regulate under Part 4 of the Commerce Act 1986. One effect of this limitation is that the Code may not regulate terms and conditions that could be expressed as quality standards or information disclosure requirements as those terms are used in the Commerce Act 1986. This limitation was clarified by the Court in *Vector Ltd v Electricity Authority* [2018] NZCA 543 and [2019] NZCA 49.

The Bill will enable the Code to regulate distribution access terms and conditions as it already does for transmission. Such access terms and conditions may include, but are not limited to, terms and conditions in a distribution agreement, and they may include quality and information requirements whether or not the Commerce Commission is authorised to regulate such requirements under Part 4 of the Commerce Act 1986.

Other matters

The Bill also provides for other matters that will improve the electricity regulatory system, including to—

- clarify the Authority's powers to gather information from industry participants for the purpose of carrying out reviews or investigations requested by the Minister:
- enable the Authority to exempt an industry participant from compliance with the Code on any terms and conditions that it reasonably considers are necessary:
- enable the Authority to revoke Code amendments that were made under urgency under a shortened process:
- allow the Authority to share information with other public service agencies and statutory entities:
- enable the Minister to amend the Code if the Minister is not satisfied with progress on specified matters:
- clarify the impact of the Code on the regulation of Transpower and electricity distributors under Part 4 of the Commerce Act 1986.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The findings and recommendations of the 2019 Electricity Price Review (EPR) can be found at the following web page: Electricity Price Review Ministry of Business, Innovation & Employment (mbie.govt.nz). Relevant documents include:</p> <ul style="list-style-type: none">• EPR First Report for discussion, August 2018, https://www.mbie.govt.nz/dmsdocument/3757-first-report-electricity-price-review-pdf• EPR Options Paper, February 2019, https://www.mbie.govt.nz/dmsdocument/4578-electricity-price-review-options-paper• EPR Final Report, May 2019 https://www.mbie.govt.nz/dmsdocument/6932-electricity-price-review-final-report• Government Response to EPR Report – Cabinet Paper, September 2019 https://www.mbie.govt.nz/dmsdocument/6981-electricity-price-review-government-response-to-final-report-proactiverelase-pdf• Progressing the EPR Recommendations – Cabinet Paper, December 2019 https://www.mbie.govt.nz/dmsdocument/10987-progressing-the-electricity-price-reviews-recommendations-proactiverelase-pdf• Regulatory Impact Analysis for the Electricity Industry Amendment Bill, December 2019 https://www.mbie.govt.nz/assets/annex-one-regulatory-impact-analysis-for-the-electricity-industry-amendment-bill-future.pdf	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>A RIS was prepared to support a Cabinet submission considered in December 2019. A copy of the RIS, Cabinet submission and Cabinet Committee minute can be found on MBIE's website at: Electricity Price Review Ministry of Business, Innovation & Employment (mbie.govt.nz).</p>	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES

A Quality Assurance Panel with representatives from MBIE and the Treasury has reviewed the 'Progressing the Electricity Price Review's Recommendations' Regulatory Impact Assessment (RIA) produced by MBIE dated November 2019. The Panel considers that the RIA partially meets the Quality Assurance criteria.

A significant constraint for the RIA is that the analysis is limited to enabling the regulatory system to respond to specific issues identified as part of the EPR. As a consequence, the RIA does not fully quantify or consider the underlying causes of the problems, or assess the complete range of options that could potentially address them.

The Panel considers that the level of analysis is sufficient for most of the proposals as it is commensurate with their size and expected risk and impact. However, the analysis of costs and benefits and of safeguards is incomplete around the proposals to: extend the Electricity Authority's power to regulate monopoly businesses' involvement in emerging contestable markets; and to provide a regulatory 'back-stop' mechanism.

The Panel recommends that MBIE do further analysis of these two proposals and update the RIA prior to tabling legislation in Parliament.

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?

YES

There is one proposal in the Bill that was not analysed in the RIS. This is the provision in clause 23 to enable the Electricity Authority to share information with public service agencies and statutory entities. This proposal was not identified or evaluated during the EPR, is considered to be broadly consistent with the overall purpose of the Bill, which is to improve the effectiveness of the electricity regulatory regime.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?

NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:

(a) the size of the potential costs and benefits?

NO

(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?

NO

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:

(a) the level of effective compliance or non-compliance with applicable obligations or standards?

NO

(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The Bill will give the Electricity Authority clearer power to amend the Code to protect the interests of small consumers and to promote competition in the electricity industry. The effectiveness of the Bill will depend on whether and how the Authority makes and enforces compliance with any such Code amendments.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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MBIE considers the policy to be given effect by the Bill is consistent with New Zealand's international obligations.
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Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

MBIE considers the policy to be given effect by the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is expected to be available on the Ministry of Justice's website at: http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/ .
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Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
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<p>The Bill will enable the Electricity Authority to provide information to a public agency or statutory agency. Some information held by the Authority, for example household electricity consumption, could include personal information. The Privacy Act will apply to the sharing of any personal information.</p>	
<p>3.5.1. Was the Privacy Commissioner consulted about these provisions?</p>	<p>YES</p>
<p>The Bill clarifies that the Privacy Act will apply to personal information shared with or by the Electricity Authority.</p>	

External consultation

<p>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</p>	<p>YES</p>
<p>The Electricity Price Review consulted widely when developing its findings and recommendations that are reflected in the Bill. The Review, which spanned 13 months, consisted of three stages:</p> <ul style="list-style-type: none"> • The first stage (April to August 2018) examined the state of the electricity sector, culminating in a 85-page report containing preliminary findings. The Review sought oral and written comment from the industry and the public, and received more than 100 written submissions. • The second stage (November 2018 to February 2019) included development of a 37-page options paper setting out possible ways to address problems discussed in the first report. Written and oral feedback was sought, and more than 140 submissions were received. • The third stage (March to May 2019) produced a final report informed by written submissions on the options paper and extensive discussions with submitters and stakeholders. <p>Further information about the Review, including its three reports, can be found on MBIE's website at: https://www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-consultations-and-reviews/electricity-price-2018-19/.</p>	

Other testing of proposals

<p>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</p>	<p>YES</p>
<p>Prior to and during preparation of the Bill, MBIE consulted the Electricity Authority, Commerce Commission and the Legislation Design Advisory Committee to ensure the provisions in the Bill are workable.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	YES
<p>Clause 38 enables levy regulations to be made to prescribe a levy on industry participants to recover a portion of the costs of a small electricity consumer advocacy agency.</p> <p>Providing a regulation-making power to recover costs via an industry levy is consistent with the existing regulation-making power in section 128 of the Electricity Industry Act, which provides for industry levies to recover a wide range of regulatory and non-regulatory costs. The rationale for such industry levies is that industry participants exacerbate risks that require regulation, and/or that industry levies can be designed in a way that ensures the costs fall on the beneficiaries.</p> <p>Statutory provision for the ability to recover consumer advocacy costs via an industry levy has been assessed under Treasury's Guidelines for Setting Charges in the Public Sector.</p> <p>The design of any proposed levy regulation to recover the costs of consumer advocacy will require a separate cost recovery impact analysis, and the amount of any levy authorised in levy regulations may only be set after consultation with levy payers.</p>	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>The Bill will amend the Electricity Authority's power to exempt an industry participant from complying with the Electricity Industry Participation Code. The Authority can exempt a participant from compliance with the Code or specific provisions of the Code if it is satisfied that compliance is not necessary for the purpose of achieving the Authority's objective, <i>and exempting the participant will reduce overall administration and compliance cost.</i></p> <p>The Bill will enable the Authority to exempt a participant from the Code if it is satisfied that compliance is not necessary for the purpose of achieving the Authority's objective <i>or if exempting the participant would better achieve the objective.</i> The Bill will also enable the Authority to grant an exemption on any terms that it reasonably considers are necessary.</p> <p>Amending the exemption power enables key provisions in Part 3 of the Act to be moved into the Code. Section 90, in Part 3 of the Act, provides for the Authority to grant exemptions on any terms and conditions it reasonably considers necessary to give effect to the purpose of Part 3. When those provisions are moved into the Code, the Authority will continue to be able to grant exemptions, using the amended exemption power in the Bill.</p>	
4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill will transfer some regulatory provisions from Part 3 of the Act to the Code. The Electricity Authority will thereafter be able to amend those provisions according to the process set out in the Act. The Bill will also clarify that the Code may protect the interests of residential and small business electricity consumers in their dealings with industry participants.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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