

1 July 2021

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Electricity Industry Amendment Bill**

### **Purpose**

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1. We have considered whether the Electricity Industry Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22622/4.4). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) of the Bill of Rights Act. Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Electricity Industry Act 2010 (the principal Act) to improve the electricity regulatory system.
5. Under the principal Act, the Electricity Authority (the Authority) is the regulator and has the statutory objective of promoting competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers. The Bill was drafted in response to a review of whether the electricity sector is delivering fair and equitable prices to consumers.
6. The Bill aims to remove ambiguity in the Authority's ability to regulate industry participants by introducing an additional statutory objective of protecting domestic and small business consumers in relation to the supply of electricity to those consumers.
7. The Bill makes a number of amendments to the principal Act, including:
  - a. empowering the Minister of Energy and Resources to establish a Small Electricity Consumers Agency to represent and advocate for the interests of domestic consumers and small business consumers in the electricity industry;
  - b. providing more regulatory agility to promote competition in evolving contestable markets by shifting provisions relating to a distributor's involvement in contestable activities from primary legislation into secondary legislation;
  - c. clarifying that the Authority should be able to regulate all parts of distribution access agreements, as it already does for transmission access agreements; and

- d. improving and clarifying the Authority's powers to gather information from industry participants for the purpose of carrying out reviews or investigations.
8. The Bill also amends the Electricity Industry Participation Code (the Code), and makes consequential amendments to other enactments.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 14 – Freedom of expression**

9. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information.<sup>1</sup>
10. Clause 19 of the Bill amends the principal Act by inserting a new s 44B which empowers the Minister of Energy and Resources to amend the Code by including provisions for certain specified matters, which include:
  - a. requirements for retailers to provide information to the Authority to enable the Authority to better direct its efforts to promote the benefits of comparing and switching retailers to consumers; and
  - b. requirements for industry participants that are both generators and retailers to release information about the profitability of their retailing activities.
11. Schedule 2 of the Bill amends the Code by inserting a new Part 6A and Schedule 6A.1 which contain a number of provisions that require certain persons to provide information, and place restrictions on electricity businesses disclosing restricted information<sup>2</sup> to another electricity business. These provisions *prima facie* limit the right of freedom of expression under s 14 of the Bill of Rights Act.
12. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the right or freedom engaged and, if so, whether the limitation is rationally connected and proportionate to that objective and limits the right or freedom no more than reasonably necessary to achieve that objective.<sup>3</sup>
13. To the extent that the provisions of the Bill engage the right in s 14 (as to whether such information is truly 'expressive' in nature), we consider that the requirements are rationally connected to the objective of the Bill, which is to protect and promote the interests of domestic consumers and small business consumers in relation to the supply of electricity, and we consider this to be a sufficiently important objective.

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<sup>1</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> The Bill defines "restricted information" as information received or generated and held by the business that is connected with its business, and that is not available to competitors or potential competitors, or information that, if disclosed to another business, would put, or be likely to put, that business in a position of material advantage in relation to their competitors.

<sup>3</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

14. We consider that the limit on the freedom of expression is no more than reasonably necessary and is proportionate to the objective of the Bill. The Bill seeks to strengthen the Authority's information gathering powers for the purpose of facilitating the Authority's additional statutory objective of protecting domestic and small business consumers. The relevant provisions only compel the provision of information where it relates directly to the impact of operation and activities of electricity businesses on consumers, and only prohibit the disclosure of information between businesses that would negatively impact competition and therefore harm consumers.
15. For these reasons, we conclude that any limits on the right to freedom of expression provided by the Bill are justified under s 5 of the Bill of Rights Act.

## **Conclusion**

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16. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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