

Electricity Industry Amendment Bill

Government Bill

Explanatory note

General policy statement

The Bill amends the Electricity Industry Act 2010 (the **Act**). The purpose of the Bill is to ensure that 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 the 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 of promoting 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) of the Act 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 of Appeal in *Vector Limited 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.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2021&no=63>

Regulatory impact assessment

The Ministry of Business, Innovation, and Employment produced a regulatory impact assessment in December 2019 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact assessment can be found at—

- <https://www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-consultations-and-reviews/electricity-price/>
- <http://www.treasury.govt.nz/publications/informationreleases/ria>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 states that the Bill comes into force on the day after the date on which it receives the Royal assent.

Clause 3 provides that the Bill amends the Electricity Industry Act 2010. In this clause by clause analysis, all references to a section (for example, section 5) are to a section of the Act unless otherwise stated. All references to a *new section* (for example, *new section 2A*) are to a new section inserted into the Act by the Bill.

Part 1

Amendments to principal Act

Clause 4 inserts *new section 2A*, which gives effect to the transitional, savings, and related provisions in *Schedule 1*.

Clause 5 amends section 5, which relates to the interpretation of the Act.

Clause 5(1) replaces the definition of Code (or Electricity Industry Participation Code) to simplify it as being a reference to the Code administered by the Electricity Authority (the **Authority**) under subpart 3 of Part 2.

Clause 5(2) corrects a spelling error in the definition of load aggregator.

Clause 5(3) moves 3 definitions to section 5. The definitions of assets, business, and manager were previously in section 73, which is replaced by the Bill. Other definitions that were in section 73 and have not been moved to section 5 have been variously moved to *new section 6A*, retained in *new section 73*, moved to the *new Part 6A* of the Code (*new clause 6A.2*), or repealed as no longer required. *Clause 5(3)* also inserts definitions of distribution agreement and small business consumer.

Clause 6 inserts *new section 6A*, which provides the meaning of involved in. The definition has been moved from section 74, which is repealed by this Bill, and broadened in scope to relate to a person's involvement in any industry participant. Previously, the definition related only to a person's involvement in a distributor, generator, or retailer.

Clause 7(1) amends section 10 to update objective to objectives (plural) to reflect the changes to section 15.

Clause 7(2) and (3) makes minor and technical amendments relating to the publication of notices in the *Gazette* and replacing section 10(4), each of which is consistent with changes to be made by the Secondary Legislation Act 2021.

Clause 8 replaces section 11, which deals with exemptions from complying with the Code. The main substantive changes are—

- to the circumstances under which the Authority may grant an individual exemption to an industry participant. The change is that one of the proposed conditions is that the Authority must be satisfied that exempting the participant would better achieve the Authority's objectives than requiring compliance. This replaces the existing condition that the Authority be satisfied that exempting the participant will reduce overall administration and compliance costs:
- to allow the Authority to grant an individual exemption subject to terms or conditions that it considers necessary.

Clause 9 amends section 15, which sets out the objective of the Authority. *Clause 9* inserts an additional objective for the Authority of protecting the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers. The new objective is set out in *new subsection (2)*, and all previous references to a single objective are updated. The Authority's existing objective has been recast as its main objective.

Clause 10 amends section 16, which lists the Authority's functions. Section 16(1)(f) is amended to make it clearer that the market-facilitation measures that form part of the Authority's functions are not limited to the examples given in that paragraph. A new function is also added as *new section 16(1)(ia)*, which reflects the additional objective that has been added to section 15.

Clause 11 inserts a cross-heading and *new sections 22A and 22B*. *New section 22A* allows the Minister to establish a Small Electricity Consumers Agency and *new section 22B* sets out the function of that agency. The function of the agency is to represent and advocate for the interests of domestic consumers and small business consumers in the electricity industry.

Clause 12 makes a minor and technical amendment to section 27, which relates to the register of industry participants maintained by the Authority.

Clause 13 replaces section 32, which relates to what the Code may contain. The main changes are as follows:

- *new section 32(1)* has been updated to reflect the additional objective of the Authority inserted by *clause 9* (primarily by the addition of *new paragraph (d)*):
- under *new section 32(2)(a) and (3)*, the Code will be able to impose obligations on a person who is not an industry participant (or a person acting on behalf of an industry participant) for the purposes of restricting relationships between 2 classes of industry participants, where those relationships may not otherwise be at arm's length (this reflects the shift of provisions previously in Part 3 of the Act to the Code):
- section 32(2)(b) has been updated to clarify in what circumstances the Code can regulate things that are also regulated (or authorised to be regulated) by the Commerce Commission:
- the content of existing section 32(3), which relates to the ability of the Code to incorporate documents by reference, has been removed, consistent with the Legislation Act 2019.

Clause 14 repeals sections 34, 35, and 36 because they are spent.

Clause 15 amends section 40, which provides that the Authority may make urgent amendments to the Code. The change allows for an urgent amendment made under this section to be revoked using a shortened process under *new section 40A* before its automatic expiry after 9 months.

Clause 16 inserts *new section 40A*, which sets out the circumstances in which urgent amendments made under section 40 may be revoked by the Authority without meeting the publication and consultation requirements in section 39(1).

Clause 17 repeals sections 42 and 43 and the cross-heading above section 42. These sections are spent.

Clause 18 makes a minor amendment to the cross-heading above section 44.

Clause 19 inserts *new sections 44A to 44F* and a cross-heading as follows:

- *new section 44A* provides that the Code may require a distributor and 1 or more industry participants to enter into distribution agreements for connection to, and use of, the distributor's network. This section is similar to existing section 44, which relates to transmission agreements:
- *new section 44B* enables the Minister to amend the Code to include a range of specified matters if the Minister considers that the Code's provisions for the specified matter are not satisfactory:
- *new section 44C* is inserted under a new cross-heading and is an interpretation section for the purposes of *new sections 44D to 44F*:
- *new sections 44D to 44F* relocate sections 92 to 94 of the Act from Part 3 to Part 2, to reflect that the provisions they relate to have been moved from Part 3 of the Act to the Code. An amendment has also been made in *new section 44D* (previously section 92) to include reference to sections 36 and 36A of the Commerce Act 1986, which clarifies the intent of that section.

Clause 20 amends section 45, which relates to the Authority's monitoring, investigation, and enforcement powers. A new purpose has been added enabling the Authority to use the powers to carry out a review and produce a report if the Minister requests it under section 18.

Clause 21 makes a minor amendment to the heading to section 46.

Clause 22 inserts *new sections 47A and 47B* to empower the Authority to share information with public service agencies and statutory entities. The Authority may only share the information if it considers the information may assist in the legislative functions, powers, or duties of the relevant agency or entity. The Authority must also be satisfied that there are appropriate protections for maintaining confidentiality of any information shared and may impose conditions on providing that information. *New sections 47A and 47B* are similar to sections 30 and 33 of the Financial Markets Authority Act 2011, which prescribe information-sharing powers for the Financial Markets Authority. The Privacy Act 2020 applies to any sharing of personal information under *new section 47A*.

Clause 23 makes a minor amendment to the Part 3 heading.

Clause 24 replaces subpart 1 of Part 3 of the Act, to reflect that much of the content of that subpart has been moved to the Code. The only remaining substantive provision in subpart 1 is *new section 73*, which requires ownership separation between distributors and certain generators. Previously this requirement was contained in section 75.

Clauses 25 to 34 make a range of amendments to reflect the revised structure of Part 3 of the Act and the Code (including repealing sections 88 and 99), as well as the new additional objective of the Authority. A minor amendment to section 96 reflects changes to be made by the Secondary Legislation Act 2021. An amendment to section 113 reflects that the incorporation by reference of material in regulations is now dealt with under the Legislation Act 2019, and *new section 131B*.

Clause 35 inserts *new section 113A* (regulations about small business consumers). The new section permits the Governor-General to make regulations specifying a class of consumers as small business consumers.

Clause 36 amends section 114 to reflect that the incorporation by reference of material in regulations is now dealt with under the Legislation Act 2019, and *new section 131B*.

Clause 37 amends section 128, which relates to the levy payable by industry participants to the Authority. The amendment means that the costs incurred by the person or persons performing the function of the Small Electricity Consumers Agency (or a portion of those costs) may be met out of the levy.

Clause 38 inserts *new section 129B*, which requires the Small Electricity Consumers Agency to consult before submitting a request to the Minister seeking an appropriation of public money that relates to costs of the Small Electricity Consumers Agency that are intended to be recovered by way of the levy under section 128.

Clause 39 inserts *new section 131B* in *new subpart 2B* of Part 5. *New section 131B* preserves the effect of clauses 5 and 6 of Schedule 1 of the Act, which is replaced by the Bill. Those clauses enable legal effect to be given to the amendment, replacement, revocation, or expiry of material incorporated by reference in secondary legislation made under the Act, without the need to amend the secondary legislation. This is different to the default position under the Legislation Act 2019. Accordingly, consistent with section 66(2)(b) of that Act, *new section 131B* specifically provides for it.

Clause 40 amends section 140 of the Act to reflect that section 34 (to which section 40 refers) is repealed by this Bill.

Clause 41 replaces Schedule 1, which relates to material incorporated by reference. The incorporation by reference of material into secondary legislation made under the Act is now dealt with by the Legislation Act 2019 and *new section 131B*. *New Schedule 1* contains transitional, savings, and related provisions.

Clause 42 makes a range of amendments to Schedule 2, which relates to the circumstances in which a person must be taken to be involved in a distributor, generator, or retailer for the purposes of Part 3 of the Act. The amendments reflect that this Bill moves much of the content of Part 3 to the Code.

Clause 43 repeals Schedule 3, which sets out the arm's-length rules. The arm's-length rules are now included in *new Part 6A* of the Code.

Part 2

Amendments to other enactments

Amendments to Commerce Act 1986

Clause 44 explains that *clause 45* amends the Commerce Act 1986.

Clause 45 amends section 54V of the Commerce Act 1986, which relates to the impact of certain decisions made under the Electricity Industry Act 2010 that may

affect the Commerce Commission in the performance of its functions or exercise of its powers under the Commerce Act 1986. It imposes process requirements on both the Authority and the Commerce Commission in relation to such decisions. The main amendments are as follows:

- various amendments consolidate references to actions taken by the Authority in relation to the Code, and clarify and simplify wording:
- section 54V(4) is replaced with *new subclause (4)* that reflects the consolidation and simplification amendments made earlier in the section, and makes it clearer what matters the Commission is required to take into account:
- section 54V(6), which requires quality standards for Transpower made by the Commerce Commission in a section 52P determination to be based on, and be consistent with, quality standards that are set by the Authority, is repealed.

Amendment to Electricity Industry Participation Code 2010

Clause 46 explains that *clause 47* amends the Electricity Industry Participation Code 2010.

Clause 47 inserts a *new Part 6A* and a *new Schedule 6A.1* into the Electricity Industry Participation Code 2010.

New Part 6A of the Code contains *new clauses 6A.1 to 6A.8*, which contain the content (with adjustments) of a large part of what is currently in Part 3 of the Act. Specifically, sections 72, 73, 76 to 79, 88, and 89.

New Schedule 6A.1 of the Code sets out the arm's-length rules, which had previously been contained in Schedule 3 of the Act.

Amendments to other enactments

Clause 48 provides that the legislation in *Schedule 3* is amended to reflect the changes contained in this Bill.

Hon Dr Megan Woods

Electricity Industry Amendment Bill

Government Bill

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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.

3 Principal Act

This Act amends the Electricity Industry Act 2010.

5

Part 1 Amendments to principal Act

4 New section 2A inserted (Transitional, savings, and related provisions)

After section 2, insert:

2A Transitional, savings, and related provisions

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The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

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

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(2) In section 5, definition of **load aggregator**, replace “interruptable” with “interruptible”.

(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

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

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

manager, in relation to a person,—

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(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:

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(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— 5

- (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) 10

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— 15
- (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— 20
- (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. 25
- (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 30
- 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 35
- 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.

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*”. 5
- (3) Replace section 10(4) with:
- (4) A notice issued under subsection (1)(b) or (3) must be published in the *Gazette*.

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

Replace section 11 with:

11 Exemption from obligation to comply with Code 10

- (1) Despite section 9(1)(b), an industry participant need not comply with the Code, or specific provisions of the Code, if—
 - (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 15
 - (b) the Authority exempts the participant by issuing an individual exemption notice that—
 - (i) identifies the industry participant that is exempt from the obligation to comply with the Code or specific provisions of the Code; and 20
 - (ii) gives reasons for the exemption.
- (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 25
 - (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. 30
- (3) The Authority may grant an individual exemption on any terms or conditions that it reasonably considers are necessary.
- (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— 35
 - (a) has given notice of the proposed amendment or revocation to the exempt participant and given the participant a reasonable opportunity to comment; and

<p>(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</p> <p>(c) in relation to a revocation, is no longer satisfied of the matters in subsection (2).</p> <p>(5) A notice issued under subsection (1)(b) or (4) must be published in the <i>Gazette</i>.</p> <p>(6) The Authority must publicise a list of all current class and individual exemptions.</p>	<p>5</p>
9 Section 15 amended (Objective of Authority)	10
<p>(1) In the heading to section 15, replace “Objective” with “Objectives”.</p> <p>(2) In section 15, replace “The objective” with “The main objective”.</p> <p>(3) In section 15, insert as subsections (2) and (3):</p> <p>(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.</p> <p>(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.</p>	<p>15</p>
10 Section 16 amended (Functions of Authority)	20
<p>(1) In section 16(1)(f), replace “such as” with “for example,”.</p> <p>(2) After section 16(1)(i), insert:</p> <p>(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:</p>	<p>25</p>
11 New sections 22A and 22B and cross-heading inserted	
After section 22, insert:	
<i>Small Electricity Consumers Agency</i>	
22A Minister may establish Small Electricity Consumers Agency	30
<p>(1) The Minister may establish a Small Electricity Consumers Agency by approving 1 or more persons to perform the function of the agency.</p> <p>(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.</p> <p>(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).</p>	<p>35</p>

(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.	5
22B Function of agency		
(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	10
(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.	
12	Section 27 amended (Register of industry participants)	15
	In section 27(3)(b), replace “involved” with “engaged”.	
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:	20
(a)	competition in the electricity industry:	
(b)	the reliable supply of electricity to consumers:	
(c)	the efficient operation of the electricity industry:	25
(d)	the protection of the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers:	
(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.	30
(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	
(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	35

- (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. 5
- (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: 10
- (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 15
- 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** 20
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**. 25
- 16 New section 40A inserted (Revocation of urgent amendments)**
After section 40, insert:
- 40A Revocation of urgent amendments**
- (1) The Authority may revoke an amendment made under section 40 without complying with section 39(1) if— 30
- (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.
- (2) A revocation made under this section— 35
- (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).	
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 “ <i>specific</i> ”.	5
19	New sections 44A to 44F and cross-heading inserted	
	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).	10
(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.	15
(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.	20
(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 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	25
(1)	The Minister may amend the Code by including provisions for any matter specified in subsection (2) if the Minister—	
(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.	30
(2)	The matters referred to in subsection (1) are as follows:	
(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:	35
(c)	requirements for retailers to provide information to the Authority to enable the Authority to better direct its efforts under section 16(1)(i)	

	(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:	5
	(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.	10
(3)	The Minister may amend the Code under this section as if the Minister were the Authority, and sections 37 to 40 apply accordingly, with any necessary modifications.	15
(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 after, and not more than 4 years after, the date on which this section comes into force.	20
(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.	25
<i>Application of other Acts</i>		
44C	Interpretation	
	In sections 44D to 44F , a provision in the Code—	30
	(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.	35
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 sep-	

- aration 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.
Compare: 2010 No 116 s 92 5
- 44E Illegal contracts**
- (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. 10
- (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. 15
Compare: 2010 No 116 s 93
- 44F Substance matters, not form**
- 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. 20
Compare: 2010 No 116 s 94
- 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**". 25
- (2) After section 45(b), insert:
- (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)** 30
- In the heading to section 46, replace "**and enforcement powers**" with "**enforcement, and review powers**".
- 22 New sections 47A and 47B inserted**
- After section 47, insert:

47A	Sharing of information and documents with public service agencies and statutory entities	
(1)	The Authority may provide to a public service agency or a statutory entity 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	5
(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.	
(2)	The Authority may provide information, or a copy of a document, under this section only if the Authority is satisfied that—	10
(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).	15
(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—	20
(a)	by a public service agency or statutory entity under any legislation; or	
(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.	
(5)	This section applies despite anything to the contrary in any contract, deed, or document.	25
(6)	Nothing in this section limits the Privacy Act 2020.	
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 (whether 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.	
23	Part 3 heading amended	5
	In the Part 3 heading, delete “ and retailing ”.	
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	10
	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.	
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.	15
(2)	To avoid doubt, generation connected to a distribution network is not directly connected to the national grid.	
(3)	In this section,—	20
	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	25
	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).	
	Compare: 2010 No 116 s 75	
25	Section 80 amended (Pecuniary penalties)	30
	In section 80(3)(b)(ii), delete “and section 92”.	
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.
- 28 Section 90 amended (Exemptions)**
In section 90(2)(b), delete “or a retailer”.
- 29 Section 91 amended (Application of Commerce Act 1986)** 5
In section 91, replace “Except as provided in section 92, nothing” with “Nothing”.
- 30 Section 92 repealed (Not interconnected under Commerce Act 1986)**
Repeal section 92.
- 31 Section 94 amended (Substance matters, not form)** 10
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)** 15
In section 108(3), after “for the purposes of Part 3”, insert “or the Code”.
- 34 Section 113 amended (Regulations about tariffs and other consumer issues)**
- (1) In section 113, replace “small businesses” with “small business consumers” in each place.
- (2) Replace section 113(5) with: 20
- (5) In this section, **rural consumer** means a consumer in a sparsely populated area.
- (3) Repeal section 113(6).
- 35 New section 113A inserted (Regulations about small business consumers)** 25
After section 113, insert:
- 113A Regulations about small business consumers**
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.
- 36 Section 114 amended (Regulations promoting accountability in customer trusts and community trusts)** 30
Repeal section 114(4).

37 Section 128 amended (Levies)

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

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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

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- (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

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

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- (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. 5
- (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. 10
- (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)** 15
- (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):
- (2) The regulations are as follows:
- (a) the Electricity Governance Rules made under section 172H of the Electricity Act 1992: 20
- (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): 25
- (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. 30
- 42 Schedule 2 amended**
- (1) Replace the Schedule 2 heading with “**When person is involved in industry participant for purposes of section 6A**”.
- (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 5
- (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**. 10

(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**”.

(7) In clause 3, insert as subclause (2): 15

(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**)”. 20

(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**)”.

(12) In clause 9(1), replace “section 74” with “**section 6A**”. 25

(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
- (b) repeal the definition of **manager**. 30

43 Schedule 3 repealed

Repeal Schedule 3.

Part 2 Amendments to other enactments

Amendments to Commerce Act 1986

- 44 Principal Act**
- Section 45** amends the Commerce Act 1986. 5
- 45 Section 54V amended (Impact of certain decisions made under Electricity Industry Act 2010)**
- (1) In section 54V(1), after “performance of its functions or exercise of its powers”, insert “in relation to electricity lines services”. 10
- (2) In section 54V(2), replace “is likely” with “are likely”. 10
- (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”. 15
- (5) Replace section 54V(4) with: 15
- (4) The Commission must take into account, before exercising any of its powers or performing any of its functions under this Part,—
- (a) any provision of the Code, or decision made under it, that relates to or affects—
- (i) pricing methodologies that apply to a supplier of electricity lines services; or 20
- (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)**: 25
- (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. 30
- (6) Repeal section 54V(6).

Amendment to Electricity Industry Participation Code 2010

- 46 Principal Code**
- Section 47** amends the Electricity Industry Participation Code 2010.

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

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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

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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.	
Compare: 2010 No 116 s 72	30
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	35
business has the meaning given in section 5 of the Act	

consumer has the meaning given in section 5 of the Act	
customer , in respect of a retailer, means a consumer to whom that retailer sells electricity	
director has the meaning given in section 6A of the Act	
financial year has the meaning given in section 6A of the Act	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— 5
 - (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— 10
 - (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. 15
- (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 20

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). 25
- (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. 30
- (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

35

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 15

- (1) The objective of this schedule is to ensure that businesses to which **clause 6A.3** applies operate at arm's length.
- (2) Without limiting the ordinary meaning of the expression, **arm's length** includes having relationships, dealings, and transactions that, if the parties were in the position described in **subclause (3)**,— 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 30

- (1) In this schedule,—
- business A** means a business that is required to be carried out in one company under **clause 6A.3**, and **business B** then refers to a business that is required to be carried out in another company under that clause
- common parent**, in relation to business A and business B, means a person that is involved in both business A and business B 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. 5

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. 10 15

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. 20

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). 25

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. 30
- (2) A manager of business A must not—
 (a) be a manager of business B; or 35

- (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. 5

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. 10

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**. 15

Schedule 3
Amendments to other enactments

s 49

Ombudsmen Act 1975 (1975 No 9)

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

5

Small Electricity Consumers Agency