MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Dr Megan Woods	**Portfolio**	Energy and Resources
Title of Cabinet paper	Progressing the Electricity Price Review's Recommendations	**Date to be published**	13 February 2020

List of documents that have been proactively released		
Date	**Title**	**Author**
11 December 2019	Progressing the Electricity Price Review's Recommendations	Office of the Minister of Energy and Resources
11 December 2019	Progressing the Electricity Price Review's Recommendations DEV-19-MIN-0325	Cabinet Office
11 December 2019	Annex One Regulatory Impact Analysis for the Electricity Industry Amendment Bill future	MBIE

Information redacted **YES / NO**

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Some information has been withheld to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and Officials.

Coversheet: Electricity Industry Amendment Bill

Advising agencies	Ministry of Business, Innovation and Employment (MBIE)
Decision sought	Cabinet agreement to amend Electricity Industry Act.
Proposing Ministers	Minister of Energy and Resources

Summary: Problem and Proposed Approach

Context

What is the context for this proposal? Why is Government intervention required?

The Minister of Energy and Resources established the Electricity Price Review (EPR) in 2018 to investigate whether the electricity sector is delivering fair and equitable prices to consumers. It also considered whether the electricity market and the regulatory framework will continue to be appropriate in the future, particularly with the emergence of new technologies and our goal of moving to a low emissions economy.

Following Cabinet consideration of the EPR's final report in September 2019, Government published the report and its response to the EPR's recommendations in October 2019. The Government decided to action some of the EPR's 32 recommendations immediately. Others required further development and they will be considered progressively over the next year or so. Many are for the Electricity Authority to consider as part of its work programme.

Cabinet noted that the EPR made a number of recommendations to improve the regulatory system, and invited the Minister of Energy and Resources to report back to Cabinet by December 2019 with proposals for legislation to address some of them.

The scope of this Regulatory Impact Analysis (RIA) is confined to proposals in that report to Cabinet, which is the set of EPR recommendations to amend the Electricity Industry Act 2010. The EPR's recommendations to amend the Commerce Act and to amend regulations under the Electricity Industry Act will be the subject of separate RIAs in 2020.

There are five regulatory intervention proposals directly resulting from the EPR's recommendations that are being considered as amendments to the Electricity Industry Act 2010 and are the subject of this RIA:

- Strengthening the consumer voice - consumers, particularly households and small businesses, struggle to make their voices heard and to engage with and exert influence over decisions affecting them in the electricity sector
- Clarifying the current ambiguity regarding the Electricity Authority's powers to regulate to protect the interests of residential and small business consumers ("small consumers")
- Clarifying that the Electricity Authority should be able to regulate all parts of distribution access agreements, as it already does for transmission access

agreements

- Addressing the need for more adaptive regulation to respond to technological advances, especially where regulated monopolies are competing with other businesses to sell services to consumers, and
- Improving and clarifying the Electricity Authority's powers to gather information from industry participants for the purpose of carrying out reviews or investigations requested by the Minister in accordance with the Electricity Industry Act 2010..

There is one additional regulatory intervention proposal included in this RIA, arising indirectly from EPR recommendations: a regulatory backstop power to strengthen the incentives on industry and the Electricity Authority to address certain specified matters arising from the EPR recommendations within a required timeframe.

Problem, proposed approach and impacts

A. Strengthening the voice of small consumers

The EPR identified that residential and small business consumers struggle to be heard on decisions affecting them in the electricity market in New Zealand. The EPR consulted widely with residential, small businesses and consumer advocates, and found that these consumers struggle to engage, due to sector complexity, resource-constraints, cultural differences and language barriers. There was also a strongly-expressed view that the electricity regulators do not listen to small consumers.

The EPR recommended Government establish a Consumer Advocacy Council to advocate on behalf of residential and small business consumers. The council should operate independently of industry participants, regulators and Government. The EPR also recommended amending the Electricity Industry Act to give the council a statutory basis to ensure greater status and durability, and to enable it to be funded from the electricity levy.

The EPR also made a number of other recommendations that would assist small consumers (refer EPR Final Report) that do not require legislative change. These are not part of this RIA.

This RIA considers two options in response to the EPR recommendation to strengthen the consumer voice: a regulatory option and a non-regulatory option. It assesses these relative to the status quo (the counterfactual) against four criteria: influencing, analysing, representing and informing. The assessment concludes that the most effective means for the consumer voice to be heard and to be considered by the regulators in the regulatory design of the electricity market is to make statutory provision in the Electricity Industry Act to allow the relevant Minister(s) to appoint a suitably constituted and qualified body to perform the functions of a Consumer Advocacy Council and to enable levy funding for the Council's activities.

B. Ambiguity in the Electricity Authority's power to regulate for the protection of small consumers

Strengthening the consumer voice and protecting small consumers were key themes of the EPR's findings and recommendations, and the EPR made several recommendations in response. However, as the EPR observed, there is ambiguity regarding the Electricity Authority's ability to add consumer protection provisions to the Electricity Industry

Participation Code (Code) and/or to monitor and enforce any consumer protection provisions made under the Code or by regulation.

The ambiguity exists because of uncertainty about whether the Electricity Authority would be acting inconsistently with its statutory objectives of promoting efficiency, competition and reliability of supply in the sector if it regulated to protect consumers, particularly subsets of consumer groups (such as small consumers or vulnerable consumers). One view is that the Code can contain rules to protect consumers, but some participants have questioned whether consumer protection is consistent with the Electricity Authority's objective to promote competition, reliability and efficient operation of the electricity industry. This creates legal uncertainty about the Electricity Authority's jurisdiction to protect small consumers, and was a key factor in the EPR concluding there is a regulatory problem and that clarification is needed.

The EPR recommended amending the Electricity Industry Act to give the Electricity Authority an explicit consumer protection function. This RIA considers the EPR recommendation against the status quo of relying on the Minister of Energy and Resource's regulation-making power under section 113 of the Electricity Industry Act to make regulations for the purpose of promoting the fair treatment of domestic and small business consumers, to protect small consumers. It concludes that giving the Electricity Authority an explicit function is expected to result in greater coherence and alignment of regulatory and non-regulatory measures affecting industry participants' dealings with small consumers. It also offers less risk of unintended consequences.

C. Ambiguity in the Electricity Authority's powers to regulate terms and conditions for access to distribution networks

Retailers and other parties seeking access to all 29 distribution networks must negotiate separate network access agreements with every distributor, also called use of systems agreements or distribution agreements. The EPR found that the lack of standardisation of distribution access terms and conditions raises retailers' costs and impedes competition.

While not all distributors share this view, it is widely held by retailers and by the Court of Appeal when it considered a legal challenge to the Electricity Authority's jurisdiction to regulate distribution agreements. The same finding was made in a 2009 ministerial review, and as a result the Electricity Industry Act 2010 requires the Code to include requirements for all distributors to use more standardised use-of-system agreements.[1]

To address these problems the Electricity Authority has for several years been developing default distribution agreements (DDAs) to apply under the Code, but progress has been significantly impacted by legal action questioning the Electricity Authority's ability to regulate distribution agreements. The basis for this challenge was that Section 32(2)(b) of the Electricity Industry Act 2010 provides that the Code may not regulate anything that the Commerce Commission is authorised or required to regulate under parts 3 or 4 of the Commerce Act.

In its March 2019 judgement the Court of Appeal confirmed that the Electricity Authority can regulate such agreements. However, the judgement did identify a limitation: the Electricity Authority may not regulate or mandate quality standards as that term is used in Part 4 of the Commerce Act, although the Court of Appeal did not define what these quality

[1] Section 42(2)(e) of the Electricity Industry Act 2010.

standards are. The implication of the Court's decision is that the Electricity Authority and the Commerce Commission must carefully coordinate their respective regulatory powers in order to regulate distributors' agreements with retailers, even though they have different statutory objectives and regulatory schemes.

The EPR considered that the Electricity Authority should be able to regulate all parts of distribution access agreements, as it already does for transmission access agreements. MBIE shares this view, noting that the Electricity Authority is clearly constrained, as evidenced by it needing to modify its latest proposal to regulate DDAs[2] through the Code to address the Court of Appeal judgements. MBIE also considers that some of the benefits of the Electricity Authority's revised DDA proposal may be at risk over time while these restrictions remain and there continues to be regulatory uncertainty. The current restrictions under the Electricity Industry Act 2010 specifying what may be regulated in the Code therefore unduly constrain the Electricity Authority's ability to promote its objective.

As this primary basis for this problem is Section 32(2)(b) of the Electricity Industry Act 2010 restricting what the Code may regulate, there are no practical non-legislative solutions to addressing the identified regulatory gap. This option was assessed relative to the status quo against criteria of regulatory certainty and the ability of the Electricity Authority to meet its statutory objective.

The preferred option is to amend the Electricity Industry Act to enable the Electricity Authority to regulate standard terms and conditions in distribution agreements, including setting quality standards and information disclosure requirements as those terms are used in the Commerce Act.

D. Regulatory agility to promote competition in evolving contestable electricity markets in the face of emerging technologies

Businesses providing monopoly services in the industry (Transpower and distributors) may also be involved in contestable activities. 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.[3] 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.

Retailers and others involved in contestable electricity markets raised concerns during the EPR about distributors' involvements in contestable markets, especially the emerging markets for services involving small scale generation and storage. Similar concerns were raised in 2016 when the Commerce Commission reviewed its input methodologies for the regulation of distributors under the Commerce Act. Distributors, in contrast generally submitted that they do not have incentives to lessen competition, and/or that any such incentives were adequately managed through existing information disclosure and price-quality regulation.

Part 3 of the Electricity Industry Act contains rules addressing this problem, but it is limited

[2] See https://www.ea.govt.nz/dmsdocument/25535-code-amendment-default-distributor-agreement-proposal

[3] For example, a distributor that buys demand-management services from businesses operating in-home batteries (to manage congestion on its network) might favour its affiliated business because it uses the distributor's proprietary communication or control systems that competitors cannot use on equal terms.

to rules governing distributors' involvements in retail and generation markets, and emerging technologies are increasing blurring the traditional boundaries of these markets. The EPR concluded that the rapidly evolving electricity system requires more flexible and responsive regulation than can be afforded by primary legislation. The EPR recommended amending the Electricity Industry Act to give the Electricity Authority the power to establish rules in the Code to address these problems as they emerge.

This RIA considers this option relative to the status quo of relying on the ability to amend primary legislation. It concludes that moving certain identified provisions in Part 3 of the Electricity Industry Act into the Code will give the Electricity Authority jurisdiction to develop proportionate and targeted rules to address any competition-related problems arising from Transpower's and distributors' involvements in distributed energy resources and other contestable markets if and when they emerge. Provisions in the Electricity Industry Act, particularly the Code-making provisions, provide sufficient checks and balances on the Electricity Authority's powers in relation to this new area of responsibility. The alternative, the status quo, relies on amending primary legislation after problems become clear (which may be too late) or in anticipation of potential problems (which may be misinformed). It is unlikely to address the identified problem in a timely and effective manner.

E. Ambiguity in the Electricity Authority's information gathering powers

A function of the Electricity Authority is to undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry (section 16(1) of the Electricity Industry Act 2010). The Electricity Authority must also review and report on any matter relating to the electricity industry that is requested in writing by the Minister (section 18(1) of the Electricity Industry Act 2010).

The Authority can require an industry participant to provide information for the purposes of a review, study or inquiry. The purpose and scope of its information-gathering powers are prescribed in sections 45 and 46 of the Electricity Industry Act 2010. However, the Electricity Authority has advised MBIE it cannot use those information-gathering powers for the purpose of an inquiry requested by the Minister. This interpretation defeats the policy intent, which is that the Electricity Authority should be able to use its information-gathering powers when undertaking a review or inquiry requested by the Minister.

The EPR recommended amending the Electricity Industry Act to increase the Electricity Authority's information-gathering powers so it can undertake any review, study or inquiry requested by the Minister of Energy and Resources, regardless of whether the request relates to the Electricity Authority's statutory objective.

This RIA assesses this recommendation against the status quo. It concludes that amending the Electricity Industry Act is expected to enable more efficient and effective industry reviews and inquiries than the status quo. As a dedicated regulator of the electricity industry, the Electricity Authority has existing industry knowledge, skills, resources and relationships that will generally make it best-placed to undertake a review or inquiry into a matter related to the electricity industry.

F. A regulatory backstop to ensure timely action by industry and the Electricity Authority

The EPR identified a number of improvements to retail and wholesale electricity markets, which are for the Electricity Authority to consider and progress. The Electricity Authority and the industry have struggled to progress some of these matters satisfactorily to date, resulting in lost or delayed benefits to consumers.

The Government considers there is a risk the Electricity Authority may be slow to address the matters identified by the EPR because it may have different priorities, or it may become captured by industry interests that resist change. While this is a risk, there is no clear evidence that the Electricity Authority will not give adequate priority to the matters identified by the EPR, which the Government has asked it to prioritise.

Two options are identified and assessed to address the potential risk identified: rely on existing conventional crown entity performance monitoring and accountability mechanisms; and amend the Electricity Industry Act to give the Minister of Energy and Resources a time-limited power to make Code to address specified matters that have not been progressed satisfactorily.

Options that would involve substantial changes to the regulatory model (such as changing the Electricity Authority's status to an autonomous crown entity and requiring it to give effect to the Government's policy objectives, or making the Minister directly responsible for administering the Code) were considered neither sufficiently targeted nor proportionate for delivering effective solutions to the problems identified. This is because the implications of such substantive regulatory change would stretch well beyond just the problem identified. They were therefore not considered as practicable options in this assessment.

MBIE considers the costs of compromising regulatory independence will generally exceed the benefit of greater ministerial control over regulatory priorities, especially when it is not clear that degree of control is warranted. MBIE's preferred option is the status quo. The Minister of Energy and Resources' preferred option is the proposal: to amend the Electricity Industry Act to give the Minister of Energy and Resources a time-limited power to make Code to address specified matters that have not been progressed satisfactorily.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

One of the proposals in this RIA (F: regulatory back-stop) is not fully compatible with the Government's expectations for good regulatory practice, because it:

- is not well-aligned with existing requirements and may result in duplicative requirements (i.e. the Minister's power to make Code will temporarily duplicate that of the Electricity Authority)
- does not conform with established principles regarding the role of independent crown entities (the Minister's ability to regulate 'over the top' of the Electricity Authority is inconsistent with its ICE status).

Section B: Evidence certainty and quality assurance

Agency rating of evidence certainty?

How confident are you of the evidence base?
The proposals in this RIA were developed and tested through the EPR, a ministerial review process, involving thorough consultation with stakeholders on issues facing the electricity sector (First Report) and options to improve its performance (Options paper). The EPR's Final Report drew on written submissions on the first two reports, as well as workshops and direct engagement with a wide range of stakeholders throughout the review process. While stakeholders were not unanimous on the sector's problems nor their solutions, MBIE is reasonably confident the proposals will result in the expected benefits.

Quality Assurance Reviewing Agency:
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.
Quality Assurance Assessment:
The Panel considers that the RIA **partially meets** the Quality Assurance criteria.
Reviewer Comments and Recommendations:
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.

Impact Statement: Electricity Industry Amendment Bill

Section 1: General information

Purpose

MBIE is responsible for the analysis and advice set out in this RIA, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing policy decisions to be taken by Cabinet.

Key Limitations or Constraints on Analysis

While MBIE is responsible for this RIA, it has drawn heavily on the identification of problems and analysis of options undertaken by the Electricity Price Review (EPR).The EPR, which was established by the Minister of Energy and Resources in April 2018, comprised an independent panel supported by a secretariat provided by MBIE and consultants.

The EPR prepared and consulted on two reports before submitting its final report to the Minister in May 2019. The first report set out key evidence and issues, and the second report set out various options to address issues in the first report. The final report drew on written submissions on the first two reports as well as workshops and direct engagement with a wide range of stakeholders.

Not all EPR recommendations require regulatory intervention and some are being progressed through other means. Some aspects of the EPR's recommendations fall to other parties to address, in particular the Electricity Authority. Other aspects of the Government's response to the EPR's recommendations will be subject to future Cabinet decisions.

This RIA only relates to those aspects of the EPR's final recommendations that relate to amendments to the Electricity Industry Act. This RIA draws heavily on the evidence and submissions arising from the EPR's process.

The proposals in this RIA relate to the EPR's final recommendations about the ability of the regulatory system to respond to problems rather than addressing problems directly. They are essentially refinements to the existing regulatory architecture, comprising incremental changes to the scope of delegated legislation administered by the Electricity Authority.

During its review process, the EPR also considered and consulted on a number of more substantive regulatory intervention options to improve the performance of the sector, including transferring regulatory functions between regulators, reducing the number and increasing the scale of distribution businesses, and requiring separation of integrated companies that are both generators and retailers (i.e. vertical separation). However, after considering submissions, the EPR did not recommend these more substantive regulatory interventions in its Final Report. The EPR did note that these, or other more far-reaching measures, could be considered in future if implementation of the EPR's final recommendations did not result in the intended improvements.

Responsible Manager (signature and date):

Justine Cannon 5 December 2019

Manager Energy Markets Policy

Energy and Resource Markets Branch

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

The Electricity Price Review provides the context for this RIA

New Zealanders rely on access to affordable and secure energy to live their day to day lives. Energy underpins our economy as a key input into every good and service. However, having access to affordable and secure energy is no longer enough. Our reliance on fossil fuels is compromising our climate and the wellbeing of future generations.

Electricity will be a major aspect of New Zealand's energy future. Transpower's *Te Mauri Hiko – Energy* Futures report concluded that as our economy electrifies, electricity demand is likely to more than double by 2050. Electricity demand as a percentage of total energy demand is estimated to increase from 25 percent in 2016 to 61 per cent by 2050.

To realise a more sustainable energy future, without compromising affordability or security of supply, New Zealand will need to ensure our regulatory settings are right, and can embrace rapidly evolving energy technologies that can assist in the transition.

Government established the Electricity Price Review (EPR) in 2018 to investigate whether the electricity sector is delivering fair and equitable prices to consumers. It also considered whether the electricity market and the regulatory framework will continue to be appropriate in the future, particularly with the emergence of new technologies and our goal of moving to a low emissions economy.

The EPR complements the report from the Interim Climate Change Committee (ICCC), 'Accelerated Electrification', which makes recommendations on reducing carbon emissions in the electricity sector and from the use of energy more generally.

Consumers are the heart of the electricity sector. They are the reason it exists. Evidence from the EPR suggests that small consumers, residential households and small-business in particular struggle to engage with it, and influence decisions that affect them. These consumers will need a stronger voice as New Zealand attempts to decarbonise its economy through more renewable electricity, so that solutions are not industry-centric, but consumer-centric.

New technologies such as solar photovoltaic (PV) and batteries are providing new opportunities for consumers to achieve greater energy independence, for example, the global trends are seeing the rise of prosumers, who consume and produce, generate and store electricity. However, there is a need to ensure that greater energy independence for some people does not exclude people from participating in the electricity market due to financial circumstances, or bearing a disproportionate share of the costs of using the national electricity grid and local distribution networks.

As we decarbonise our electricity system, we need to ensure that all consumers pay fair and reasonable prices, and that they all share the benefits of an efficient and competitive electricity market. As we move away from traditional fossil fuel sectors, it will be important to

ensure that a transition is just and inclusive and that people impacted have full opportunities to participate in the transition.

Innovation is also crucial if we are to decarbonise our energy system through more renewable electricity. It will not be enough to hope that new technologies developed offshore will be suitable for the country's needs. New Zealand needs to foster and promote an electricity market with an innovative mind-set capable of accommodating new technologies and business models while not compromising efficiency and fairness. We require a forward thinking sector, geared towards seeking out and applying new technologies.

New technologies are also beginning to challenge some of our traditional regulatory systems. For example, as electricity networks seek to adopt new technologies and business models that benefit their consumers, the lines between contestable and monopoly services have become greyed. We need to ensure our regulatory settings incentivise innovation and uptake of new technologies for the benefit of consumers.

This RIA responds to EPR recommendations relating to changing the Electricity Industry Act

The EPR has reported back and many of its recommendations address the need for electricity prices to be fair and affordable, not just efficient or competitive. The EPR's final report also includes recommendations to help ensure the electricity sector functions well during the transition away from carbon-based fuels – a consideration that will become increasingly important as electricity meets more of New Zealand's energy needs.

Following Cabinet consideration of the EPR's final report in September 2019, Government published the report and its response to the EPR's recommendations in October 2019. Of the EPR's 32 recommendations, Government decided to action 20 immediately. Others required further development.

Not all EPR recommendations require regulatory intervention and some are being progressed through other means. Some aspects of the EPR's recommendations fall to other parties to address, in particular the Electricity Authority. Other aspects of the Government's response to the EPR's recommendations will be subject to future Cabinet decisions.

Cabinet noted that the EPR made a number of recommendations to improve the regulatory system, and invited the Minister of Energy and Resources to report back to Cabinet by December 2019 with proposals for legislation and regulation to address some of these.

Thus the scope of this RIA is confined to the set of EPR recommendations that relate to proposed changes to the Electricity Industry Act 2010.

There are five regulatory intervention proposals directly resulting from the EPR's recommendations that are being considered as amendments to the Electricity Industry Act 2010 and are the subject of this RIA:

- Strengthening the consumer voice - consumers, particularly households and small businesses, struggle to make their voices heard and to engage with and exert influence over decisions affecting them in the electricity sector
- Clarifying the current ambiguity regarding the Electricity Authority's powers to regulate to protect the interests of small consumers
- Clarifying that the Electricity Authority should be able to regulate all parts of

distribution access agreements, as it already does for transmission access agreements

- Addressing the need for more adaptive regulation needed to respond to technological advances, especially where regulated monopolies are competing with other businesses to sell services to consumers, and
- Improving and clarifying the Electricity Authority's powers to gather information from industry participants for the purpose of carrying out reviews or investigations requested by the Minister in accordance with the Electricity Industry Act 2010.

There is one additional regulatory intervention proposal included in this RIA, arising indirectly from EPR recommendations: a regulatory backstop power to strengthen the incentives on industry and the Electricity Authority to address certain specified matters arising from the EPR recommendations within a required timeframe.

2.2 What regulatory system or systems are already in place?

Electricity services are delivered via a mix of competitive market services and regulated monopoly services. The generation and retailing of electricity is generally competitive while transmission and distribution of electricity over lines is considered a natural monopoly.

In general, transmission and distribution businesses are not involved in generation and retailing to any significant extent. This is a result of regulatory intervention in 1998 (Electricity Industry Reform Act) which prohibited common ownership of distribution and generation or retail businesses, and ongoing restrictions on cross-involvements set out in Part 3 of the Electricity Industry Act 2010 (discussed below).

Regulation of the electricity industry is largely devolved to independent regulators – the Electricity Authority and Commerce Commission.

The Commerce Commission, under Part 4 of the Commerce Act 1986, administers information disclosure and price-quality regulation of Transpower (the national grid) and distributors (local networks) which are all natural monopolies. In broad terms, the Commerce Commission regulates the monopoly parts of the electricity supply chain, ensuring the regulated businesses provide services consumers demand at reasonable prices.

The Electricity Authority, under the Electricity Industry Act 2010, promotes competition, reliability and efficient operation of the electricity industry for the long term benefit of consumers (its statutory objective). It has broad powers to make delegated legislation (the Code) that regulates the electricity market and industry participants to promote its statutory objective. It may not regulate matters that the Commerce Commission has authority to regulate, and the Code may not be inconsistent with the Act. The Electricity Authority can also adopt non-regulatory solutions, referred to as market facilitation measures, such as education, guidelines, information and model arrangements. It can also undertake industry and market monitoring, and carry out reviews, studies and inquiries into any matter relating to the electricity industry.

In broad terms, the Electricity Authority regulates the competitive parts of the supply chain such as generation, wholesaling and retailing of electricity. It also regulates certain aspects of transmission and distribution network that may affect competition (such as pricing and contract terms for generators and retailers using the transmission and distribution networks).

There are also provisions in the Electricity Industry Act (in Part 3) that govern competitive access to distribution networks by retailers and generators. Part 3 prohibits involvement between a distributor and a generator over a certain generating capacity (250 MW). It also places restrictions on a distributor's involvement in generation and retailing within its network. A distributor involved in generation and retailing over a certain size (50 MW generating capacity and retailing more than 75 GWh annually on its network) must comply with prescribed corporate separation and arms-length rules. The Electricity Authority may grant exemptions to any or all of these restrictions.

The Electricity Authority enforces the Act as well as the Code and any regulations made under the Act. The Electricity Authority also promotes competition by helping consumers seek out competitive offers.

The costs of electricity regulation by the Commerce Commission and Electricity Authority are recovered by industry levies prescribed by regulations made under the Commerce Act and Electricity Industry Act respectively. Levies under the Electricity Industry Act may also recover non-regulatory costs, including a portion of costs incurred by the Energy Efficiency and Conservation Authority (relating to its functions, powers and duties under the Energy Efficiency and Conservation Act 2000), as determined by the Minister; and the costs of developing and publishing regional electricity supply and demand forecasts and scenarios, for the purpose of assisting investment planning by industry participants. Such levies are designed in accordance with Treasury's guidance on charging for services in the public sector, to ensure costs fall on exacerbators or beneficiaries, as appropriate and where possible.

2.3 What is the policy problem or opportunity?

The EPR found that the regulatory system is broadly working well, but because of identified ambiguities, failings, or gaps with the Electricity Industry Act 2010, the Electricity Authority faces some limitations on its ability to effectively regulate some aspects of electricity markets.

The EPR also recommended an amendment to the Electricity Industry Act as part of its approach to strengthening the consumer voice – it considered that its recommended consumer advocacy council should be given a statutory basis to ensure greater status and durability, and to provide for levy funding.

A number of the EPR's recommendations are matters for the Electricity Authority to progress. Many are long-standing issues that have proven challenging to address. The Minister of Energy and Resources has limited ability under current the regulatory regime to ensure the Electricity Authority and industry progress these recommendations in a timely manner.

These problems are described and analysed in the next section, under the following headings:

A. strengthening the voice of small consumers
B. ambiguity in the Electricity Authority's power to regulate for the protection of small consumers
C. ambiguity in the Electricity Authority's powers to regulate terms and conditions for access to distribution networks
D. regulatory agility to promote competition in evolving contestable electricity markets in

the face of emerging technologies

E. a gap in the Electricity Authority's information gathering powers, and

F. a regulatory back-stop to ensure timely action by industry and the Electricity Authority.

2.4 Are there any constraints on the scope for decision making?

The EPR's recommendations comprise an integrated package; some are non-regulatory, some are for the Electricity Authority to consider under its existing functions, and some require amendments to legislation.

This RIA covers only those aspects of the EPR's recommendations that relate to proposed amendments to the Electricity Industry Act.

Other EPR recommendations that require amendment of the Commerce Act and amendment of existing regulations or development of new regulations under the Electricity Industry Act will be covered by separate RIAs. The regulatory proposals in this RIA are consistent with each other and with the other EPR recommendations, but are not mutually dependent.

2.5 What do stakeholders think?

The policy problems and options in this RIA were consulted on with interested parties as part of the EPR, with one exception. The proposal to establish a back-stop power for the Minister (F) was not consulted on.

Most parties consulted during the EPR agreed with or accepted the problems identified in this RIA, and supported the proposals to address them. However, distributors generally did not agree there is a problem with the regulatory system's ability to address the potential for distributors to use their monopoly position to deter competitors from entering the market for distributed energy services and other emerging technologies (D). Some distributors submitted that the existing regulatory arrangements for network agreements were satisfactory, and/or that competitive access to distribution networks was adequately regulated under the Commerce Act.

Section 3: Analysis

A. Households and small business consumers struggle to make their voices heard and exert influence over decisions that affect them in the sector

What is the problem?

The EPR identified that residential and small business consumers struggle to be heard on decisions affecting them in the electricity market in New Zealand. The EPR consulted widely with residential, small businesses and consumer advocates, and found that these consumers 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 views,
- 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 and regulators,
- cultural differences and language barriers stand in the way.

Large industrial consumers, in contrast, have their own well-funded advocacy body which provides evidenced-based policy advocacy to regulators. As a result, their voice is heard more clearly than that of small consumers.

What options have been considered?

There are two options which have been considered, and then assessed relative to the status quo (the counterfactual):

Option 1: Non-regulatory response. The Government could provide resources or other forms of support for existing consumer advocacy organisations that represent household and small business consumers.

Option Two: Consumer Advocacy Council. The EPR recommended establishing a consumer advocacy council to advocate on behalf of residential and small business electricity consumers. This council would operate independently of industry participants, regulators and the Government. The EPR recommended the council have a statutory basis by amending the Electricity Industry Act 2010 to establish the council in statute, and to provide for levy funding from industry participants. MBIE notes that the statutory basis for the council under an amended Electricity Industry Act could range from a very simple power for the relevant Minister(s) to appoint a suitably constituted and qualified body to perform the consumer advocacy functions, through to comprehensive provisions for the council's governance and operation.

What criteria have been used to assess options?

To assess these two options we look to understand what would be required to strengthen the voice of these consumers. This leads to four criteria:

- Influencing: To have a meaningful effect on regulatory and industry activities to benefit household and small business consumers
- Analysing: To use its expertise, knowledge, research and capacity to analyse potential policy, regulatory and service options that could address concerns and issues of

residential and small business consumers

- Representing: To communicate the views, concerns and issues of residential and small business consumers in policy design and regulatory forums or working groups, and
- Informing: To proactively let regulators know when markets are not working for residential and small business consumers.

For Option Two: Consumer Advocacy Council, there is further assessment on the evaluation of organisational form, governance and funding, these include five criteria:

- An expert voice in consumer affairs and regulation of utilities
- Is supported and recognised by consumers and small business as protecting their interests
- Has appropriate accountability to Ministers reflecting its role and funding arrangements
- Responsive to the changes in regulation of utilities over time, and
- Efficient i.e. cost effective.

What impact does each option have, relative to the counterfactual?

Option One: Non-regulatory response. There are existing groups that represent residential and small business consumers, in particular:

Utilities Disputes Ltd has been handling consumer complaints since 2001 and also keeps detailed case notes on consumer complaints. Knowing about consumer issues and if there are recurring problems is important for targeted consumer advocacy. However, Utilities Disputes is an independent mediator of disputes between suppliers and consumers, and does not advocate on behalf of consumers. Independence is important for it to be a credible mediator in disputes, and it is paramount that dispute resolution services maintain this in order to be effective.

Consumer New Zealand is also a national organisation that is engaged in representing the consumer voice. However, it is a fee-paying membership-based, non-profit, organisation. Its work is primarily funded via membership fees. Other funds are sourced from contract work, mostly with Government agencies. Fee-paying members influence the type of consumer advocacy undertaken and have access to member-only informational content. Although Consumer NZ has provided consumer advocacy, it had limited success in making regulators listen to the consumer voice.

Some industry participants have recently established consumer panels to improve their own understanding and engagement with consumers. The Electricity Network Association (ENA), Transpower and Powerco are some of the companies that have these consumer panels. The intent of these panels is to help the industry participants better understand consumer issues. The Electricity Authority and Commerce Commission also engage with the community on policy and regulation pertaining to the electricity market.

The EPR did not recommend this option, because many stakeholders said such panels would not have sufficient independence from the regulators and industry, and would therefore be constrained in their advocacy and/or would lack credibility with consumers. Extending the remit of these non-government consumer advocacy bodies, dispute resolutions services, panels and stakeholder advocacy is not preferred for this reason.

Option Two: Consumer Advocacy Council. This option of a council is an option which has

been employed in other countries such as the United States and Australia.

In Australia, Energy Consumers Australia is a national independent body established to provide residential and small business consumers with a voice in national energy matters. In the United States (US) there is no national body and each State authority has adopted different approaches to consumer representation. Different US states have created publicly funded consumer advocates with mandates defined in legislation. The common elements to these consumer advocates are the mandate to represent residential consumers, in particular to help consumers who are often underrepresented to overcome barriers of participation. The consumers who they represent are unable to represent themselves because they are dispersed, are less able to organise, lack expertise and resources to participate in technical proceedings and are less likely to be heard by the utilities. International evidence also suggests that jurisdictions with consumer advocacy councils that have legislated authority have lower consumer utility bills compared with jurisdictions that either do not have councils or have functions which are not legislated[4].

A Consumer Advocacy Council does not necessarily need aa statutory basis to advocate on behalf of residential and small business,, however, establishing a council with no reference in statute is essentially a minor variation on Option One above. AA statutory basis will help make clear the purpose and functions of the council, so that stakeholders can hold them to account. It will also assist in promoting accountability for funding arrangements and the work programme. Many stakeholders from the EPR process were in favour of the council's functions being outlined in statute as they felt that without it the council would not be resourced effectively to carry out targeted research, active engagement with consumers, meaningful contributions to regulatory and policy discussions, and forceful advocacy on behalf of consumers. Some of the negatives of outlining functions in statute include it takes time to amend legislation and the council could be less flexible in its approach.

On balance, the benefits of giving the council a statutory basis under the Electricity Industry Act outweigh the negatives.

It is important that the functions reflect what would be required to strengthen the voice of these consumers, in order to be most effective. The EPR recommended that the council's functions would include working with regulators, government agencies, industry and other consumer groups on matters affecting electricity consumers, make formal submissions on behalf of consumers, host or participate in workshops on electricity consumer matters, and commissioning specialist research and analysis to support its activities.

The four criteria above provide a good basis for delivering consumer advocacy functions: influencing, analysing, representing and informing. There may be other functions, which could be added in the future if required through amendment.

Options for the organisational form of the council are based on evaluation criteria outlined above and discussions with the State Services Commission. A ministerial advisory committee is the best organisational form. This reflects that the council is expected to lack the scale to justify the creation of a separate crown entity or departmental agency. However, the Minister of Commerce and Consumer Affairs should be the responsible minister for the

[4] http://www.energyregulationquarterly.ca/articles/consumer-advocacy-in-ontarios-energy-sector-a-new-model#sthash.nDq1iqGp.dpbs

council, similar to the current responsibilities for energy dispute resolution schemes under Part 6 of the Electricity Industry Act, as there is potential benefit from extending the council to other regulated markets in the future. The Minister may appoint council members, following consultation with the Minister of Energy and Resources and the Minister for Small Business, and must be satisfied that any persons have the necessary expertise and experience to carry out the functions of the council.

In the shorter term the council's focus would be electricity, however, in the longer term, the council could potentially evolve to include a number of other regulated sectors where similar consumer issues exist. Some sectors such as gas, telecommunications and water have direct synergies for a potential inclusion into a cross-sector mandate with electricity because of their interdependent markets, bundling with electricity services, or because they are seen as essential services by many New Zealanders.

The EPR's suggested range for funding was $1 million for establishment and $1.5 million to $2.5 million per year for ongoing costs. In the New Zealand context this would only be a tiny fraction of electricity sales, as annual electricity sales for 2018 were more than $6.5 billion. There are about 2 million consumers of electricity and if the council had a budget of $2 million this would be a small increase of less than $2.00 per year on consumer electricity bills if the Government decided to cost-recover the council's operations.

The EPR recommended the costs of the council be recovered from those who benefit from its advocacy, via the existing industry levy arrangements.

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 requiring the specified interventions, and/or that industry levies can be designed in a way that ensures the costs fall on the beneficiaries.

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. The design of any proposed levy regulation to recover the costs of consumer advocacy will require a cost recovery impact analysis, which is not included in this RIA.

Conclusions

The preferred option is Option Two: Consumer Advocacy Council. The council would be set up through the organisational governance form of a ministerial advisory committee.. The council would be referenced in statute through a power under the Electricity Industry Act for the Minister of Commerce and Consumer Affairs (in consultation with the Minister of Energy and Resources and the Minister for Small Business) to appoint a suitable constituted and qualified body to perform the functions of consumer advocacy. These would include influencing, analysing, representing and informing on behalf of residential consumers and small business. Providing for this consumer advocacy in the Electricity Industry Act would promote credibility and accountability to these consumers. A regulation-making power allowing the costs of consumer advocacy to fall on those who benefit would promote transparency and accountability, if such levy regulations are made.

B. Ambiguity in the Electricity Authority's powers to regulate for the protection of small consumers

What is the problem?

Strengthening the consumer voice and protecting small consumers were key themes of the EPR's findings and recommendations. In particular the EPR observed that 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, and
- cultural differences and language barriers stand in the way.

EPR made several recommendations aimed at strengthening the consumer voice and protecting small consumers:

- Establish a consumer advocacy council: this is addressed in (A) above.
- Ensure regulators listen to consumers: Government should encourage the Electricity Authority and Commerce Commission to review, document and publish their consultation and stakeholder engagement processes to ensure they understand and take into account consumers' views and needs when making policy decisions or when making or amending market rules that could affect electricity prices. This is a matter for the Electricity Authority and Commerce Commission to address.
- Set mandatory minimum standards to protect vulnerable and medically dependent consumers: this particular group of residential consumers needs the protection of formal enforceable rules to ensure distributors, retailers and others meet mandatory minimum standards when providing electricity or electricity-related services. This will be the subject of a future RIA.
- Give the Electricity Authority an explicit consumer protection function: this would address the current regulatory uncertainty regarding the Electricity Authority's ability to add consumer protection provisions to the Code and/or to monitor and enforce any consumer protection provisions made under the Code or by regulation.

This section relates to the last of these – addressing an identified regulatory gap in the protection of small consumers' interests. It indirectly relates to the others because, while there is regulatory uncertainty, the Electricity Authority may be unduly constrained in its ability to progress initiatives that protect small consumers.

The regulatory uncertainty exists because it is not clear whether the Electricity Authority would be acting inconsistently with its statutory objectives of promoting efficiency, competition and reliability of supply in the sector if it regulated to protect consumers,

particularly subsets of consumer groups (such as small consumers or vulnerable consumers). One view is that the Code can contain rules to protect consumers, but some participants have questioned whether consumer protection is consistent with the Electricity Authority's objective to promote competition, reliability and efficient operation of the electricity industry. This creates legal uncertainty about the Electricity Authority's jurisdiction to protect small consumers, and was a key factor in the EPR concluding there is a regulatory problem and that clarification is needed.

While there are generic consumer protections in the Fair Trading Act and Consumer Guarantees Act[5], 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. The EPR identified material problems in this area, and with energy hardship more generally which it considered to be a significant issue for government, regulators and industry to address as a matter of priority. The EPR recommendation to set mandatory minimum standards for vulnerable and medically dependent consumers (discussed above) was a key initiative in its package of energy hardship recommendations.

What options have been considered?

The following options have been considered:

- Rely on the Minister of Energy and Resource's regulation-making power under section 113 of the Electricity Industry Act to make regulations for the purpose of promoting the fair treatment of domestic and small business consumers, to protect small consumers (counterfactual and status quo)
- Add a new limb – 'consumer protection' - to the Electricity Authority's objective (which is to "promote competition in, reliable supply by, and efficient operation of, the electricity industry …"), and
- Give the Electricity Authority an explicit consumer protection function, without changing its objective.

What criteria have been used to assess options?

The options have been assessed against the following criteria:

- Coherence of any consumer protection measures with related measures affecting the industry's interactions with small consumers (e.g. price change notifications, dispute resolution, billing practices, credit management practices, and outage communications), and
- Risk of unintended consequences.

What impact does each option have, relative to the counterfactual?

The counterfactual relies on the existing power to regulate under s113 of the Electricity Industry Act for the purpose of promoting the fair treatment of domestic and small business consumers by retailers and distributors. Such regulations could be used to protect small consumers, to the extent 'fair treatment' is aligned with 'protection'. There is some risk that

[5] For instance, the Consumer Guarantees Act provides a specific guarantee of acceptable quality for the supply of electricity supplied by a retailer, and the Fair Trading Act gives consumers certain rights if a business acts in an unfair or misleading way.

such regulations could cut across, duplicate, or lack alignment with Code and non-regulatory measures the Electricity Authority might have or develop for the purposes of its objective, because they would be made with a different purpose and developed by a different agency (MBIE).

Changing the Electricity Authority's objective to include a new limb - consumer protection - would clearly empower it to amend the Code for that purpose. However this option carries a risk of unintended consequences, particularly if the Electricity Authority were to place undue weight or focus on the new limb of its objective to the detriment of the existing limbs. It is difficult to assess the extent of this risk, and to identify how this risk could be mitigated. It could increase the risk of judicial review of Electricity Authority decisions. Arguably the Electricity Authority would need to review all parts of the Code to ensure the new 'consumer protection limb' was given sufficient weight alongside the existing limbs of its objective.

Giving the Electricity Authority an explicit consumer protection function will clarify its jurisdiction to promote consumer protection, which is the identified problem. It will be a less significant change than amending its statutory objective, with less risk of unintended consequences. Consumer protection will become a matter for the Electricity Authority to consider and take action to address, and to determine how to do so in a manner that is not at the expense of the 'competition, reliability and efficient operation' limbs of its objective. Any consumer protection measures could be woven together with existing and new measures designed to promote competition, reliability and efficient market operation.

Conclusions

The preferred option is to give the Electricity Authority an explicit consumer protection function, enabling it to integrate that function with its related regulatory and non-regulatory functions that influence the industry's interactions with small consumers. This is expected to result in greater coherence and alignment of regulatory and non-regulatory measures affecting industry participants' dealings with small consumers.

The preferred option also offers less risk of unintended consequences (e.g. distorting the balance of the existing limbs of the objective) than the alternative option of adding 'consumer protection' to the objective.

C. Ambiguity in the Electricity Authority's powers to regulate standard terms and conditions for access to distribution networks

What is the problem?

Retailers and other parties seeking access to all 29 distribution networks must negotiate separate network access agreements with every distributor, also called use of systems agreements or distribution agreements. The EPR found that the lack of standardisation of distribution access terms and conditions raises retailers' costs and impedes competition.

While not all distributors share this view, it is widely held by retailers and by the Court of Appeal when it considered a legal challenge to the Electricity Authority's jurisdiction to regulate distribution agreements (discussed below). The same finding was made in a 2009 ministerial review, and as a result the Electricity Industry Act 2010 requires the Code to include requirements for all distributors to use more standardised use-of-system

agreements.[6]

The Electricity Authority considers that the current approach to agreeing use of system agreements: [7]

- involves multiple bespoke agreements with little industry transparency
- creates high cost and effort for contract negotiations between each distributor and retailer
- causes competition problems in retail markets (this is explained further below), and
- imposes barriers for innovation and emerging markets.

To address these problems the Electricity Authority has for several years been developing default distribution agreements (DDAs) to apply under the Code, but progress was delayed by legal action questioning the Electricity Authority's ability to regulate distribution agreements. The basis for this challenge was that Section 32(2)(b) of the Electricity Industry Act 2010 provides that the Code may not regulate anything that the Commerce Commission is authorised or required to regulate under parts 3 or 4 of the Commerce Act.

In its March 2019 judgement the Court of Appeal confirmed that the Electricity Authority can regulate such agreements. It also confirmed that this may include regulating quality issues that fall outside the purposes of the Commerce Act 1986. However, the judgement did identify a limitation: the Electricity Authority may not regulate or mandate quality standards as that term is used in Part 4 of the Commerce Act, although the Court of Appeal did not define what these quality standards are.

In September 2019 the Electricity Authority released its latest DDA proposal for consultation.[8] Under the proposal, the DDA for distribution services is deemed to apply if:

- the parties fail to negotiate their own agreements, or
- negotiations are taking longer than necessary, or
- one party prefers to contract under the DDA.

The Electricity Authority considers its DDA proposal will provide long-term benefits to consumers by increasing industry efficiency and competition in the retail market. Its consultation document includes a formal regulatory statement and cost-benefit analysis in support of its proposal.[9] Of particular note, retailers would find it easier and less costly to expand across distribution networks, and existing retailers would gain confidence that their terms for network access are competitive – the arrangements would create a more equal bargaining position between retailers and distributors, and enable retailers to compete within and across networks on a level playing field. This would promote competition in services

6 Section 42(2)(e) of the Electricity Industry Act 2010.

7 See https://www.ea.govt.nz/dmsdocument/25649-default-distributor-agreement-proposal-information-for-industry-participants

8 See https://www.ea.govt.nz/dmsdocument/25535-code-amendment-default-distributor-agreement-proposal

9 Ibid Error: Reference source not found

beyond distribution, such as load control, installing and use of batteries or electric vehicles. Amongst other benefits, the Electricity Authority estimates that introducing its DDA proposal would reduce new contract negotiation costs across the industry by an estimated $1.1 – $1.3 million per annum. This results from:

- DDAs being able to be accepted by retailers with little or no costs
- fewer commercial and legal resources required for negotiations between a retailer and a distributor, and
- reduced need to negotiate bespoke agreements.

The Electricity Authority's September 2019 DDA proposal accommodated the Court of Appeal judgment by modifying some aspects of the terms it had earlier intended including in the DDAs.

For example, the Electricity Authority withdrew its previous proposal to require distributors to schedule planned service interruptions to minimise disruption to customers, because that could be considered a quality standard that is able to be regulated by the Commerce Commission. Similarly, it withdrew its previous proposal for distributors to notify retailers about planned service interruptions because that could be considered an information disclosure requirement that is able to be regulated by the Commerce Commission.

Whether or not the Electricity Authority's initial proposals to regulate distribution agreements have merit, the implication of the Court's decision is that the Electricity Authority and the Commerce Commission must carefully coordinate their respective regulatory powers in order to regulate distributors' agreements with retailers, even though they have different statutory objectives and regulatory schemes.

The EPR considered that the Electricity Authority should be able to regulate all parts of distribution access agreements, as it already does for transmission access agreements. MBIE shares this view, noting that the Electricity Authority is clearly constrained, as evidenced by it needing to modify its proposal to regulate DDAs through the Code to address the Court of Appeal judgements. MBIE also considers that some of the benefits of the Electricity Authority's revised DDA proposal described above may be at risk over time while these restrictions remain and there continues to be regulatory uncertainty. The current restrictions under the Electricity Industry Act 2010 specifying what may be regulated in the Code therefore unduly constrain the Electricity Authority's ability to promote its objective.

What options have been considered?

As the primary basis for this problem is Section 32(2)(b) of the Electricity Industry Act 2010 restricting what the Code may regulate, there are no practical non-legislative solutions to addressing the regulatory gap regarding the Electricity Authority's powers to regulate standard terms and conditions for access to distribution networks. Two options have therefore been considered:

- Leave the Authority with a significant gap in its power to regulate distribution agreements (counterfactual and status quo), and
- Fill the regulatory gap by amending the Electricity Industry Act to enable the Electricity Authority to regulate distribution agreements, including setting quality

standards and information disclosure requirements. The Commerce Commission's powers under the Commerce Act would be unchanged.

It is also relevant to note that in 2012 the Electricity Authority published a model use-of-system agreement as a voluntary measure to address the problems with contract negotiation. However, the Electricity Authority's post-implementation review found that the model approach was not successful.[10] Following further stakeholder engagement and analysis, the Electricity Authority subsequently concluded that a mandatory DDA approach implemented through the Code was the best solution.

The powers of the Commerce Commission to regulate quality standards and information disclosure requirements for electricity network business are critical to its functions under the Commerce Act. Options that would limit those powers are therefore not considered practicable for addressing the regulatory gap identified with the Electricity Authority's powers.

What criteria have been used to assess options?

The key criterion is the effectiveness of the regulatory system to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long term benefit of consumers, that is, the Electricity Authority's statutory objective.[11] There are two aspects to this effectiveness criterion: regulatory certainty and the ability of the Electricity Authority to meet its statutory objective.

What impact does each option have, relative to the counterfactual?

Amending the Electricity Industry Act to enable the Electricity Authority to regulate standard terms and conditions for retailers' access to distribution networks would make the regulatory system more effective than it is under the counterfactual. This is because it would clarify the residual regulatory uncertainty regarding the Electricity Authority's ability to regulate aspects of distribution agreements that relate to quality and information disclosure. This in turn would improve the ability of the Electricity Authority to meet its statutory objective.

It is reasonable to believe its ability to do so will result in greater benefits than costs, because the Electricity Authority must meet statutory requirements when making Code amendments, including consulting on a regulatory statement that presents an evaluation of the costs, benefits and alternatives. The Electricity Authority is subject to checks and balances when exercising its powers, including judicial review.

While the option to close the identified regulatory gap in the manner proposed was widely supported during the EPR, many distributors considered it unnecessary. Some distributors

10 In its September 2019 DDA proposal the Electricity Authority observed: that distributors were offering significantly amended versions of the model agreement for negotiation with retailers, that retailers refused to negotiate with distributors; that offered contracts closely aligned with the model agreement; and that there was relatively little evidence of developing new model agreements in most distribution networks. Based on observed behaviours the Electricity Authority concluded a voluntary model regime was unlikely to be successful in achieving the objectives.

11 The Electricity Authority's statutory objective, set out in section 15 of the Electricity Industry Act 2010.

were concerned it could result in them bearing higher costs or risks under one regulatory regime (regulated network access conditions imposed by the Electricity Authority) that might not be compensated under the other regulatory regime (the Commerce Commission's price-quality regulation).[12] This risk can be managed by ensuring the requirements in section 54V of the Commerce Act (for the Electricity Authority to consult with the Commerce Commission before making Code and for the Commerce Commission to take into account the Code) apply to all of the relevant powers of the Electricity Authority. The EPR also supported this as a mitigation of the potential risk some distributors raised.

Continuing with the status quo would mean the Electricity Authority remained constrained in its ability to meet its statutory objective. It would also expose the Electricity Authority to continued regulatory uncertainty (and associated costs) regarding its powers to regulate network access agreements, creating the prospect for further costly legal challenge in the future.

Conclusions

The preferred option is to amend the Electricity Industry Act to enable the Electricity Authority to regulate standard terms and conditions in distribution agreements, including setting quality standards and information disclosure requirements as those terms are used in the Commerce Act.

D. Regulatory agility to promote competition in evolving contestable electricity markets.

What is the problem?

Businesses providing monopoly services in the industry (Transpower and distributors) may also be involved in contestable activities. 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.[13] 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.

Retailers and others involved in contestable electricity markets raised concerns during the Review about distributors' involvements in contestable markets, especially the emerging markets for services involving small scale generation and storage enabled by information and communication technologies. Similar concerns were raised in 2016 when the Commerce Commission reviewed its input methodologies for the regulation of distributors under the Commerce Act. Distributors, in contrast generally submitted that they do not have incentives to lessen competition, and/or that any such incentives were adequately managed through existing information disclosure and price-quality regulation.

Part 3 of the Electricity Industry Act contains rules addressing this problem, but it is limited to rules governing distributors' involvements in retail and generation markets. Part 3 does not

[12] The current regulatory regime is described in section 2.2 of this RIA.

[13] For example, a distributor that buys demand-management services from businesses operating in-home batteries (to manage congestion on its network) might favour its affiliated business because it uses the distributor's proprietary communication or control systems that competitors cannot use on equal terms.

govern Transpower's and distributors' involvements in emerging contestable markets for distributed energy resources, including electricity storage and demand management. The EPR found that the Electricity Authority's ability to make Code to regulate distributors' or Transpower's involvements in contestable markets generally is constrained by Part 3, because the Code is subordinate to the Act and may not be inconsistent with the Act.

For the purposes of this RIA, no judgement is made as to whether regulating distributors' or Transpower's involvements in contestable markets is necessary or desirable. This RIA assesses how those involvements might be regulated, through time, if a case to regulate were to be made.

What options have been considered?

Two options have been considered:

- Rely on Parliament's ability to amend Part 3 of Electricity Industry Act to regulate Transpower's and distributors' involvements in contestable electricity markets (in addition to retail and generation markets), in the future, if warranted (the status quo and counterfactual), and
- Move the substance of sections 76 to 79 of the Electricity Industry Act[14] into the Code, allowing Electricity Authority to amend those rules applying to distributors' involvements in retail and generation markets, and to develop new rules applying to other contestable electricity markets, if it considers that to be necessary or desirable to promote its statutory objective (the proposal).

What criteria have been used to assess options?

Two criteria have been used to assess the options:

- Government's expectations for the design of regulatory systems, particularly: scope to evolve in response to changing circumstances or new information on the regulatory system's performance, and
- Whether a matter is more appropriate for delegated legislation or for primary legislation (drawing on relevant Legislation Design Advisory Committee guidelines).

What impact does each option have, relative to the counterfactual?

Delivering regulatory agility

Both options provide for the regulation of distributors' and Transpower's involvements in contestable electricity markets, if such regulation were ever considered necessary or desirable to promote competition. The status quo would see this occur through the development of primary legislation, while the proposal would see such regulation developed by the Electricity Authority. While regulating business conduct through primary legislation is a common way to address may kinds of problems, regulation of conduct by electricity industry participants has evolved over recent decades to be administered by dedicated, independent, regulators. The Commerce Commission regulates certain conduct (relating to revenues and

[14] These sections generally require corporate separation, arms-length relationships, and non-discriminatory contracts and dividend policies where distributors have material involvements in retail or generation businesses.

service quality) of Transpower and some distributors, and the Electricity Authority regulates conduct relating to the production and trading of electricity on Transpower's and distributors' networks.

Both electricity regulators have delegated powers to make legislation to promote their respective statutory objectives. The EPR considered that this kind of regulation of the industry by dedicated regulators, using delegated legislation, is more efficient and effective than regulation via primary legislation, because it can better respond to rapidly evolving market conditions.[15]

While developing primary legislation to address an emerging problem[16] is possible, there is a risk it could be too slow, allowing the problem to become locked-in or embedded. Alternatively, primary legislation could be developed in a pre-emptive manner, in advance of problems emerging or taking root, but this approach carries significant risk the regulatory intervention could be misdirected, if the problems were not yet fully emergent or well-understood.

The Legislation Design Advisory Committee Guidelines state: "As a general rule, matters of significant policy and principle should be included in an Act. Secondary legislation should generally deal with minor or technical matters of implementation and the operation of the Act."

However, of particular relevance here, the guidelines also note that secondary legislation may be appropriate for subject matter that requires flexibility or updating in light of technological developments in an area.

The EPR recommended removing rules in Part 3 of the Electricity Industry Act that limit and regulate involvements between distributors, generators and retailers, and delegating to the Electricity Authority the development of secondary legislation (the Code) to replace them. Faced with the rapidly evolving electricity system, moving a number of these statutory provisions into the Code would deliver more flexible and responsive regulation than would be the case if the rules remain in primary legislation.

The need for more adaptive regulation arises from technological advances that are testing the primary legislation as they blur the boundary between distributors and retailers. These advances and their widespread introduction are still in their early stages, but they are expected to grow and have a significant impact on the electricity sector.[17] The Electricity Authority also needs to be able to develop rules that can respond quickly if distributors use their monopoly position, deliberately or inadvertently, to deter competitors from entering the

[15] The liberalisation of electricity markets commenced less than 30 years ago and those markets continue to develop rapidly, particularly in response to changing technologies like batteries, small-scale generation and digitalisation.

[16] The particular kind of problem under consideration here is the lessening of competition that might result if Transpower or distributors were to favour affiliated businesses in a contestable market, such as the management of generation, demand, or storage.

[17] This technology and related services include: the sale and control of solar panels, batteries (including those in electric vehicles), and the sale and operation of energy management systems that automatically control consumers' appliances to limit their use at times of system stress or peak demand. Collectively these are known as distributed energy services. Distributors, retailers, Transpower and others have begun offering such services.

market for such products and services or disadvantage those already in the market. This would not be in the interests of consumers.

Moving some provisions in Part 3 of the Electricity Industry Act to the Code would enable the Electricity Authority to monitor and amend them if and when it identified an emerging barrier to competition that could be remedied via regulation of Transpower's or distributors' involvements in relevant markets.

The Code is more readily amended than the Act. More importantly, the Code is administered and developed by a specialist regulator (the Electricity Authority) which is continuously monitoring the relevant electricity markets against its objective (promoting competition, reliability and efficient operation of the industry). The Authority's proactive regulatory role makes it well-placed to identify problems and address them more quickly and proportionately than would be the case in the alternative option. MBIE considers that giving the Electricity Authority the power to make secondary legislation would be consistent with LDAC guideline Part 3, subject to the discussion below regarding which provisions would be suitable for transfer to the Code and the appropriateness of the checks and balances on the Electricity Authority.

Drawing on the LDAC guidelines (particularly Part 1 – is the matter appropriate for secondary legislation) MBIE has given careful consideration on what matters should be delegated to the Code to deliver the regulatory agility needed (refer above), and what matters should remain in the Act for consistency with good regulatory practice. Consideration has also been given to the checks and balances on the Electricity Authority's ability to amend those provisions currently in the Act that would be transferred to the Code under the proposal (LDAC guideline Part 4).

Provisions not suitable for transfer to the Code

MBIE considers that ownership separation rules should be a matter for primary rather than secondary legislation. Section 75 of the Act prohibits a distributor having any involvement in generation connected to the national grid with total capacity exceeding 250 MW. Its purpose is to prevent regional vertical integration between a distributor and a large grid-connected generator. Secondary legislation should not contain rules that prohibit property transactions, such as preventing business mergers and acquisitions or requiring divestments, as might be implied if section 75 of the Act were to be delegated to the Code. MBIE therefore proposes the ownership prohibition in section 75 remains in the Act, along with its enforcement provisions and any other matters necessary for its operation.

Similarly, MBIE considers that the provisions in part 3 of the Act for enforcement of the ownership prohibition, including significant pecuniary penalties, should remain within the Act. These enforcement provisions are the same as when legislation was introduced in 1998 to enforce the ownership separation of power companies, all of which at that time operated both distribution and retail businesses and some of which operated generation businesses. This was a very significant intervention and warranted strong enforcement provisions, which are

based on those in the Commerce Act 1986 for breach of restrictive trade practices.

Provisions suitable for transfer to the Code

MBIE considers that provisions in the Act that give effect to the second limb of the purpose of Part 3, which is to promote competition in the electricity industry by restricting relationships between a distributor and a generator or a retailer where those relationships are not otherwise at arm's length, can and should be delegated to the Code to enable flexibility to adapt to changing technology:

- Section 76 requires corporate separation and arm's length relationships when a distributor is involved in generation and retail business above specified thresholds (50 MW of generation capacity and 75 GWh of annual electricity retailed)
- Section 77 requires distributors to have non-discriminatory use-of-system agreements with connected generators and retailers,
- Section 78 prohibits distributors involved in a connected retailer from purchasing the customer base of another retailer, and
- Section 79 requires a distributor to ensure any rebates or dividends paid to its customers do not discriminate between the customers of its connected retailer and those of other retailers on its network.
- Rules about arm's length relationships are set out in Schedule 3 of the Act. Operating at arm's length includes having relationships, dealings, and transactions that do not include elements that parties in their respective positions would usually omit, or elements that parties in their respective positions would usually include if connected or related only by the transaction or dealing in question, and acting independently, and each acting in its own best interests.

MBIE considers that the substance of sections 76 to 79, and any related provisions necessary for their operation, should be transferred into the Code and repealed from the Act. Once transferred into the Code, the Electricity Authority would be able to amend any or all of the rules, including the circumstances in which specific rules apply (e.g. the thresholds currently set out in section 76). Importantly, the Electricity Authority would also be able to make new rules applying to involvements between monopoly businesses (Transpower and distributors) and contestable businesses in the electricity industry (not only retail and generation businesses). Indeed, this latter point is the principle reason for delegating this kind of rule-making to the Code, as discussed above.

Sections 50 to 62 of the Act already provide for the enforcement of the Code. MBIE considers they are also appropriate for the enforcement of the Part 3 provisions once transferred into the Code. This will represent a 'down-grading' of the enforcement of these provisions but MBIE considers this is appropriate given the nature of the rules and the risk of any breach. Rules about arm's-length relationships and non-discriminatory conduct are rather different to ownership prohibition, and do no warrant high pecuniary penalties to

encourage compliance. The rules in sections 76 to 79 of the Act are similar in nature to existing parts of the Code relating to wholesale market trading conduct, and they should therefore be subject to the same enforcement arrangements.

Checks and balances on Code-making powers

MBIE considers the Electricity Authority's role in making and administering the Code is appropriately guided and constrained by existing provisions in the Act setting out its objective (section 15), the content and status of the Code (sections 32 and 33), and the process for amending the Code (sections 38 and 39). In particular, when exercising its Code-making powers, the Electricity Authority must publicise a draft amendment, prepare and publicise a regulatory statement, and consult on the proposed amendment and regulatory statement. The regulatory statement must include a statement of the objectives of the proposed amendment, an evaluation of its costs and benefits, and an evaluation of alternative means of achieving the objectives. These existing provisions in the Act ensure a good law-making process that enables transparency, participation and accountability.

Accordingly, MBIE does not consider there is a need for additional provisions to guide or constrain the Electricity Authority's ability to amend those provisions currently in the Act that would be transferred to the Code.

The EPR recommended that the High Court should be able to hear appeals on the merits of any Code amendments relating to involvements between a distributor and businesses accessing the distributor's network. It considered any such Code amendments could have significant implications for commercial freedom and investment by distributors, and that an ability to appeal on merit would provide some checks and balances on that decision power.

MBIE considers that it would be unusual, and undesirable, to allow courts to decide appeals on legislation, including delegated legislation. Allowing courts to make legislation would be inconsistent with the principle of separation of powers. The Regulations Review Committee already provides an avenue for review of any matter in the Code. Also, many matters in the Code have implications for commercial freedom and investment by industry participants; it is not clear why some parts of the Code should be appealable and others not. MBIE, therefore, does not propose to provide an appeal right on Code amendments relating to a distributor's involvements in contestable activities that require access to the distributor's network.

MBIE does, however, agree with the EPR's recommendation that any amendments to the Code that regulate a distributor's involvement in contestable activities should be developed in consultation with the Commerce Commission. Among other things, this would help ensure the resulting rules complement the Commission's price-quality and information disclosure regulation and promote clarity about where the boundary lies between the monopoly elements of the sector and the contestable elements. The legislation already requires the Electricity Authority to consult the Commerce Commission before amending the Code in a manner that will, or is likely to, affect the Commission in the performance of its functions or exercise of its powers.

Conclusions

Moving certain identified provisions in Part 3 of the Electricity Industry Act into the Code will give the Electricity Authority jurisdiction to develop timely, proportionate and targeted rules to address any competition-related problems arising from Transpower's and distributors' involvements in distributed energy resources and other contestable markets if and when they

emerge. Moving these specified provisions into the Code would deliver a more agile regulatory regime capable of addressing the identified problems in a manner consistent with good regulatory practice (including relevant LDAC guidelines). In particular, the Electricity Authority is the appropriate regulatory body to hold the power to make secondary legislation in this area, and it is subject to appropriate existing checks and balances on that power.

The alternative option (the status quo and counterfactual) relies on amending primary legislation after problems become clear (which may be too late) or in anticipation of potential problems (which may be misinformed). It is unlikely to address, in a timely and effective manner, the problems identified regarding Transpower's and distributors' involvements in emerging contestable markets for distributed energy resources.

E. Ambiguity in the Electricity Authority's powers to obtain information when undertaking a review or inquiry requested by the Minister

What is the problem?

A function of the Electricity Authority is to undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry (section 16(1) of the Electricity Industry Act 2010). The Authority must also review and report on any matter relating to the electricity industry that is requested in writing by the Minister (section 18(1) of the Electricity Industry Act 2010).

The Authority can require an industry participant to provide information for a review, study or inquiry. The purpose and scope of its information-gathering powers are prescribed in sections 45 and 46 of the Electricity Industry Act 2010. These provisions make it clear that the power is expressly for the purpose of the Electricity Authority undertaking its statutory monitoring, investigation and enforcement powers.

However, the Authority has advised MBIE it cannot use those information-gathering powers for the purpose of an inquiry requested by the Minister. This interpretation defeats the policy intent, which is that the Authority should also be able to use its information-gathering powers when undertaking a review or inquiry requested by the Minister.

The EPR recommended amending the Act to increase the Electricity Authority's information-gathering powers so it can undertake any review, study or inquiry requested by the Minister of Energy and Resources, regardless of whether the request relates to the Electricity Authority's statutory objective. The EPR considered this was necessary to address legal uncertainty about whether the Electricity Authority can act on requests by the Minister that are not related to its statutory objective, such as reviews of fairness or environmental matters relating to the electricity industry.

What options have been considered?

The following options have been considered:

- The Minister could establish a government inquiry under the Inquiries Act 2013, or initiate a market study by the Commerce Commission under the Commerce Act, if he or she considers information-gathering powers are necessary or desirable for a review or inquiry into a matter related to the electricity industry (counterfactual and status quo), and

- Amend the Electricity Industry Act to clarify that the Electricity Authority can use its information-gathering powers for the purpose of a review or inquiry requested by the Minister.

What criteria have been used to assess options?

The key criterion is the efficiency and effectiveness of undertaking a review or inquiry into any matter related to the electricity industry.

What impact does each option have, relative to the counterfactual?

In both options the Minister could initiate an inquiry or market study from a person or agency that has the necessary information-gathering powers. As a dedicated regulator of the electricity industry, the Electricity Authority has existing industry knowledge, skills, resources and relationships that will generally make it best-placed to undertake a review or inquiry into a matter related to the electricity industry. An ad hoc inquiry or a body such as the Commerce Commission would first need to acquire the necessary knowledge, skills and resources to undertake a review or inquiry, requiring more time and/or higher cost than a review or inquiry by the Electricity Authority.

In response to the EPR proposal, some submitters supported more information-gathering powers for the Electricity Authority, but others said it was unnecessary or might encourage the Electricity Authority to go on 'fishing expeditions' for the Minister. Some pointed to existing mechanisms such as the Inquiries Act 2013 and the Commerce Commission's recently introduced market study powers. The EPR considered submissions but concluded it is appropriate the Minister has the power to make full use of the Electricity Authority's electricity industry knowledge and expertise in this way when required.

Conclusions

The proposal to amend the Electricity Industry Act to clarify the current ambiguity is expected to enable more efficient and effective industry reviews and inquiries than the counterfactual.

F. A regulatory back-stop to ensure timely action by the industry and Electricity Authority

What is the problem?

The EPR identified a number of important improvements to retail and wholesale electricity markets, which are for the Electricity Authority to consider and progress because of its statutory objective and functions. However, some of these EPR recommendations relate to long-standing issues that the Electricity Authority and the industry have struggled to progress satisfactorily to date, The lack of progress has adversely affected wholesale and retail competition, and resulted in lost or delayed benefits to consumers.

The Government considers there is a risk the Electricity Authority may be slow to address the matters identified by the EPR because it may have different priorities, or because its progress may become unduly impeded by industry interests that resist change and benefit from delays.

Effective, efficient, competitive wholesale and retail electricity markets are critical to the Government's objectives for ensuring consumers have access to secure, affordable and sustainable electricity, and for delivering Government's broader Renewable Energy Strategy work programme. Government therefore considers it vital that the Electricity Authority progress the EPR recommendations to address identified problems in those markets, and to do so in a timely and effective manner.

While confident the Electricity Authority will focus its full attention on all of the matters recommended by the EPR that fall within its statutory ambit, Government considers it desirable to strengthen the incentives on the regulator and the industry to implement specific matters arising from the EPR recommendations.

What options have been considered?

Two options have been considered:

- Rely on conventional existing crown entity performance monitoring and accountability mechanisms to encourage timely and effective progress by the Electricity Authority, including through letters of expectation, government policy statements (which have not been used to date), participating in the preparation of statements of intent and of performance expectations, and through board appointments and budget approvals (status quo and counterfactual)
- Amend the Electricity Industry Act to give the Minister of Energy and Resources a time-limited power to make Code to address specified matters that have not been progressed satisfactorily (the proposal) This mechanism has been previously used in the Electricity Industry Act.[18]

Options that would involve substantial changes to the entire regulatory regime were considered neither sufficiently targetted nor proportionate for delivering effective solutions to the problems identified. This is because the implications of such substantive regulatory change would stretch well beyond just the problem identified. Such options were therefore not considered to be practicable for addressing the identified problem and were excluded from this assessment. Examples of such options would include:

- Changing the Electricity Authority's status from an independent crown entity (ICE) to an autonomous crown entity (ACE), and require it to give effect to the Government's policy objectives, and
- Making the Minister directly responsible for administering the Code.

Government has, however, signalled its intent explore new institutional arrangements in the energy sector. This is in response to another EPR recommendation acknowledging the vital importance of fit-for-purpose energy institutions in facilitating the transition to a low-carbon economy. The timing and approach for this more fundamental review will have regard for investor confidence, energy security and affordability, alignment with the broader renewable energy strategy work programme, and the number of decisions and reviews that impact the

[18] Section 42 required the Electricity Authority to address seven prescribed matters and report on its progress after one year. Section 43 enabled the Minister to amend the Code to address those same matters if not satisfied the Electricity Authority had done so satisfactorily. That backstop provision expired after three years.

energy regulatory system that are to be implemented over the next 6-12 months, including the EPR recommendations approved by Cabinet in September.

What criteria have been used to assess options?

Two criteria have been considered:

- Timeliness of effective measures that improve the performance of electricity markets
- Regulatory certainty and investor confidence.

What impact does each option have, relative to the counterfactual?

The Minister could rely on conventional existing crown entity performance monitoring and accountability mechanisms to encourage timely and effective progress by the Electricity Authority (status quo and counterfactual). These mechanisms have the potential to be effective in ensuring the Minister's expectations and priorities regarding specific EPR recommendations are clearly communicated to the Electricity Authority and that it receives appropriate funding and resources if requested. However, the Electricity Authority is an independent agency which cannot be directed to prioritise certain activities, nor to regulate in specific ways. Thus the existing mechanisms only have a limited (and/or delayed) effect if the Electricity Authority chooses not to prioritise the matters recommended by the EPR or decides to progress them in a manner unlikely to address the problems the EPR identified and to deliver the benefits sought. Furthermore, addressing the wholesale and retail electricity market issues the EPR identified falls not just to the Electricity Authority but also to industry, and yet industry is not bound by crown entity performance monitoring and accountability mechanisms.

Giving the Minister a time-limited power to make Code (the proposal) may provide a higher level of confidence that priority matters will be progressed in a timely manner and will result in outcomes that meet Government's requirements.. This is because the Electricity Authority and industry would be incentivised to work together effectively to make progress on the specified matters to the satisfaction of the Minister within a clearly specified timeframe, knowing that if they fail the Minister will intervene and take over. If this intervention were to occur, then the Minister could make Code that delivered the outcomes sought, subject to the checks and balances of good regulatory practice.

The proposal does however create some risk of duplication of resources – MBIE would likely need the same kind of resources as the Electricity Authority already has to undertake the Code development work if the power were exercised. More significantly, it also risks undermining the independent regulator and invite lobbying of the Minister by parties that may resist the Electricity Authority's efforts to regulate. The proposal is likely to adversely affect investor confidence because it would compromise the Electricity Authority's independence and it would introduce the uncertainty of possible future intervention by the Minister on matters affecting the wholesale and retail electricity markets. In a highly capital-intensive industry, this could have serious implications for supply security and affordability, and for the Government's objectives to reduce emissions via acceleration of renewable electricity generation investment.

The adverse effects of the Minister's power to make Code could be limited by ensuring the power can only be used for a limited period – no more than two years – and that it can be used only after the Electricity Authority has had a reasonable period of time – at least two years following enactment – in which to make satisfactory progress. It should also apply only

to the specified matters recommended by the EPR[19], to limit the scope of any investment uncertainty.

Conclusions

The costs and benefits discussed above have not been quantified, but MBIE considers the costs of compromising regulatory independence will generally exceed the benefit of greater Ministerial control over regulatory priorities, especially when it is not clear whether more control is needed. MBIE's preferred option is the counterfactual. The Minister of Energy and Resources' preferred option is the proposal to give the Minister a time-limited power to amend the Code to address certain specified matters arising from the EPR recommendations.

Section 4: Implementation and operation

4.1 How will the new arrangements work in practice?

The proposals will come into effect with the passage of an Electricity Industry Amendment Bill. The drafting process will include targeted engagement with affected parties, particularly the Electricity Authority and Commerce Commission. The Electricity Authority will continue to amend, monitor and enforce the Code under the existing statutory provisions.

MBIE will provide secretariat services for the proposed consumer advocacy council and will advise ministers on appointments to the council. MBIE will consider amending the Electricity (Levy of Industry Participants) Regulations to recover the costs of the consumer advocacy functions, subject to a cost recovery impact analysis.

The Electricity Authority and Commerce Commission have been consulted and support the proposals, except the proposal in F to establish a ministerial back-stop power which the Electricity Authority has raised concerns with. No significant transitional or implementation issues are anticipated. Existing consumer representative groups (such as Consumer NZ) will be consulted on the establishment of a consumer advocacy council.

4.2 What are the implementation risks?

Consulting stakeholders during drafting and on an exposure draft of the Bill would reduce the risk of unintended consequences. In particular consultation with the Electricity Authority and Commerce Commission will reduce the risk of introducing unanticipated boundary issues between their respective regulatory regimes. MBIE will also engage with interested parties as part of establishing the Consumer Advocacy Council.

[19] The specified matters are described in detail in sections C and D of the EPR final report: https://www.mbie.govt.nz/assets/electricity-price-review-final-report.pdf. The Government has agreed these recommendations should be priorities for the Electricity Authority to improve retail and wholesale market competition.

Section 5: Monitoring, evaluation and review

5.1 How will the impact of the new arrangements be monitored?

Within the regulatory system, the Electricity Authority regularly monitors and evaluates industry outcomes relevant to its statutory objective, and uses such assessments to inform its strategic and operational planning. Outcomes are reported in the Electricity Authority's annual reports and in its regular reviews and investigations into market performance. MBIE is the crown entity monitoring agency for the Electricity Authority and advises the Minister on the Authority's performance against policy outcomes.

The Electricity Authority and the Electricity Industry Act are part of the energy markets regulatory system for which MBIE has stewardship. As such, MBIE has developed and maintains an energy markets regulatory system charter, and the system is subject to periodic assessments. The last such assessment, undertaken as part of the competition regulatory system, was in 2015, and MBIE intends to undertake another review by 2021

A Council of Energy Regulators, comprising senior executives and officials from MBIE, the Electricity Authority, Commerce Commission and Gas Industry Company meets quarterly to share information about the performance of the system and to monitor any risks relating to regulatory boundaries. The Council's objectives include taking a whole-systems view to consider regulatory issues and trends, risks and gaps. This forum will also be used to monitor system-level impacts of the proposals in this RIA.

5.2 When and how will the new arrangements be reviewed?

The EPR recommended a review within three years. No formal review has been scheduled, but one can be initiated at any time. Electricity market regulation was last reviewed comprehensively in 2018-19. There have been several such ministerial reviews in the last two decades.