

In Confidence

Office of the Minister of Energy and Resources

Chair, Cabinet Business Committee

Addressing ambiguity in how electricity industry legislation applies to secondary networks

Proposal

- 1 This paper seeks agreement to address current ambiguity in the application of electricity industry regulation to secondary networks. The ambiguity is undermining the principled approach to electricity regulation and creating uncertainty.

Executive Summary

- 2 The Electricity Industry Act 2010 takes a principled approach to electricity industry regulation. It contains broad definitions to capture a wide range of industry participants, provides for exemptions, and enables the Electricity Authority (an independent Crown entity) to regulate the industry through delegated legislation. It also provides for a consumer dispute resolution scheme.
- 3 It has recently become obvious that there is ambiguity about how the Electricity Industry Act applies to secondary networks, which are electricity networks that are indirectly connected to the national grid via one of the 29 local distribution companies.
- 4 This is creating uncertainty about whether all secondary network owners are required to comply with electricity industry regulation. This also has implications for access to the dispute resolution scheme by consumers supplied from secondary networks.
- 5 The intention of the proposal in this paper is to amend the legislation to implement existing (not new) policy, which is:
 - 5.1 electricity industry regulation should be able to be applied to anyone providing the service of conveying electricity on lines that are not part of the national grid, which includes secondary networks, and
 - 5.2 all electricity consumers (including potential consumers), and owners and occupiers of land, are entitled to have access to a dispute resolution scheme.
- 6 Consultation has confirmed that there is ambiguity, and general support for clarifying that the legislation applies to secondary networks. This will provide improved consumer and market outcomes as it will provide certainty about how the electricity industry regulation applies to owners of secondary networks.

Background

- 7 The electricity industry is governed by two key pieces of legislation – the Electricity Industry Act 2010 and the Electricity Act 1992.
- 8 The Electricity Industry Act was introduced following a Ministerial Review of the Electricity Market in 2009, and it takes a principled approach to regulating the electricity industry. It established the Electricity Authority as an independent Crown entity that regulates the industry through delegated legislation (principally through the Electricity Industry Participation Code 2010). The Electricity Authority's objective is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.
- 9 The Electricity Industry Act replaced the Electricity Industry Reform Act 1998, and parts of the Electricity Act¹. It was designed to apply to all participants in the industry, and contains definitions that enable a broad range of activities in the electricity market to be regulated. Much of this regulation is done through the Electricity Industry Participation Code 2010 (the Code), which essentially sets out the market rules².
- 10 The value of this principled approach is that it provides flexibility. Requirements can be updated in the delegated legislation more easily to accommodate new activities and services if they are already captured by the legislation. Alternatively, the Electricity Industry Act provides for exemptions where appropriate.
- 11 This flexibility will become increasingly valuable as technological changes blur the boundaries between traditional electricity industry participant roles.
- 12 The framework for the electricity consumer dispute resolution scheme is also set out in the Electricity Industry Act. It is a requirement that every electricity distributor and retailer is a member of that scheme, along with Transpower (other than in its capacity as system operator). The framework provides that all consumers, potential consumers and owners and occupiers of land are entitled to have access to the scheme.
- 13 It has become apparent that there is ambiguity about how electricity industry regulation applies to secondary networks which is causing problems. Secondary networks are electricity networks that are indirectly connected to the national grid via one of the 29 local distribution companies. Examples include networks in some multi-tenanted office blocks, residential apartment buildings, retirement villages, shopping centres, airports, industrial/commercial parks, and residential subdivisions. It is difficult to know how many consumers are served by secondary networks, but it is estimated at about 100,000.
- 14 Many requirements rely on the owners of secondary networks being electricity distributors under the Electricity Industry Act. However, there is now uncertainty about whether they are distributors because the definition of a distributor has links to definitions in the Electricity Act 1992 that (unintentionally) make it unclear³.

¹ The Electricity Act is now focused on regulating the supply and use of electricity, such as setting out land access rights and electrical safety provisions.

² The Code is a long and technical document setting out the duties and responsibilities that apply to industry participants and the Electricity Authority, and is available at www.ea.govt.nz/code-and-compliance/the-code/.

³ The definition of an electricity distributor in the Electricity Industry Act is ultimately dependent on the meaning of property (as it applies to the definition of point of supply) in the Electricity Act. This means that some secondary networks could in fact be electrical installations (not works), and therefore the owners of the network cannot be electricity distributors (who, by definition, convey electricity on works).

- 15 If owners of secondary networks are undertaking activities that are akin to those of an electricity distributor, they should be meeting the same requirements under:
- 15.1 the Electricity Industry Participation Code 2010;
 - 15.2 Part 3 of the Electricity Industry Act 2010;
 - 15.3 the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004, and
 - 15.4 the Electricity Industry (Levy of Industry Participants) Regulations 2010 (which recover the Electricity Authority's costs).
- 16 The uncertainty created by the ambiguity means that compliance with these requirements may be unenforceable, and it has led the Electricity Authority to discontinue levying some secondary network owners.
- 17 In addition, the Electricity and Gas Complaints Commissioner (EGCC) scheme (as the approved consumer disputes resolution scheme under the Electricity Industry Act) has had to advise secondary network owners that they can withdraw their membership. It has also stopped pursuing secondary network owners that are not members of the scheme to join the scheme.

Comment

- 18 The ambiguity is impacting on consumer and market outcomes. Consumers on secondary networks should have the same access to the consumer dispute resolution scheme as those on local distribution networks. In addition, it is affecting the Electricity Authority's ability to meet its statutory objective because, for example, there is legal risk in enforcing requirements that are supposed to apply to embedded networks (which are a type of secondary network). Work to determine how its regulation should apply to secondary networks is now dependant on the outcome of this proposal.

Consultation

- 19 A technical consultation paper titled *Electricity legislation: Consultation on the application of electricity legislation to secondary networks and public charging infrastructure for electric vehicles* was released by the Ministry of Business, Innovation and Employment on 18 July 2016 and submissions closed on 5 August 2016.
- 20 The paper explained the legislative ambiguity and the implications in terms of the policy intent. It proposed that the legislation be clarified for secondary networks⁴. Twenty one submissions from a range of parties were received on this issue and have informed this advice.
- 21 Submitters were generally supportive of the proposal to clarify the legislation. It was noted that some types of secondary network owners provide services as an electricity retailer, rather than a distributor, so 'blanket' coverage may not be appropriate.
- 22 Many also urged caution about the potential unintended consequences that could result from amending definitions in legislation, including altering how it applies for other purposes, and placing inappropriate requirements on persons.

⁴ It also sought comment on whether the legislation should be clarified for electric vehicle (EV) infrastructure, but this is now progressing separately as changes to primary legislation are not being proposed.

Response

- 23 I recognise the importance of ensuring that changes in definitions to address one issue do not alter how these definitions apply for other legislative purposes, and the intention is to preserve all other existing requirements.
- 24 There may be some merit in the argument for not necessarily treating all types of secondary network owners as distributors, but I am confident that this will be able to be dealt with through the proposed amendment, and through the delegated legislation. The focus will be on enabling the regulation under the Electricity Industry Act of anyone providing the *service* of conveying electricity on lines that are not part of the national grid.
- 25 The risk of placing inappropriate requirements can be mitigated through exemptions, or by amending existing requirements to ensure they are appropriate. Future requirements can be developed in the context of the amended legislation – regulations and the Code can specify the types of secondary network they apply to depending on the relevance.
- 26 This approach will provide the Electricity Authority with certainty in terms of its regulation, but also a clear indication of scope in terms of its non-regulatory market facilitation measures. This could provide options to address the issue of visibility raised by some submitters, such as improved consumer advice and information regarding the service they should receive.
- 27 A few submitters called for a wider review of definitions given the rapid emergence of new technologies that are increasingly blurring the boundaries between traditional roles in the electricity industry. I consider that it is not an immediate issue to be addressed and the purpose of the consultation was to specifically address implementation of existing policy regarding secondary networks.

Proposal

- 28 I therefore propose that the Electricity Industry Act be amended to reflect the original design intent, which is to enable the regulation of anyone providing the service of conveying electricity on lines that are not part of the national grid, including on secondary networks. This will clarify that it applies to secondary networks where the services provided are akin to those of an electricity distributor.
- 29 There is no intention to cover providers of short-term accommodation such as hotels and motels, and landlords that lease out homes or rooms in boarding houses. Rather, it should encompass businesses providing services similar to those of a distributor.
- 30 This would mean that industry regulations and requirements (including the Code and the requirement to belong to the EGCC), would apply to secondary network owners unless:
- 30.1 they are covered by an exemption granted using one or more of the various exemptions options provided for in the legislation, or
- 30.2 a narrower definition is used in the industry regulations and requirements.
- 31 There may be a need to clarify the intent in the regulations and delegated legislation listed in paragraph 15, depending on how the Electricity Industry Act amendment is drafted.

Consultation

- 32 There has been public consultation on the application of electricity legislation to secondary networks through a consultation document released in July 2016. Twenty one submissions were received on this issue and informed this proposal.
- 33 The Treasury has been consulted on the development of this paper and associated Regulatory Impact Statement. The Electricity Authority and WorkSafe New Zealand have also been consulted. The Department of Prime Minister and Cabinet has been informed.
- 34 Interested parties will be able to make submissions on the proposed amendments to the legislation when they are taken through the Select Committee process.

Financial Implications

- 35 There are no financial implications for the Crown from the proposals.

Human Rights

- 36 There are no human rights issues associated with the proposals in this paper.

Legislative Implications

- 37 The Electricity Industry Act 2010 will require amendments and I plan to include them in the Energy Innovation (Electric Vehicles and Other Matters) Bill [REDACTED]
- 38 Depending on how the amendments are drafted, it is possible that the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004 and the Electricity Industry (Levy of Industry Participants) Regulations 2010) will also require amendment to clarify how they apply to secondary networks. If so, I will seek Cabinet agreement to make amendments to those regulations.
- 39 The Electricity Industry Participation Code 2010, which is developed and administered by the Electricity Authority, will likely require amendment by the Authority. This does not require Ministerial or Cabinet approval.
- 40 The Electricity Industry Act 2010 binds the Crown and the changes proposed in this paper will not alter that.

Regulatory Impact Analysis

- 41 The Regulatory Impact Analysis requirements apply to this policy process. A Regulatory Impact Statement has been prepared and is provided with this Cabinet paper.

Quality of Impact Analysis

- 42 The Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement (RIS) prepared by the Ministry of Business, Innovation and Employment. They consider that the information and analysis summarised in the RIS meets the criteria necessary for Ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper.

Publicity

- 43 I will consider proactively releasing this paper along with the Regulatory Impact Statement that will be published on the Ministry's website, following Cabinet approval.

Recommendations

- 44 The Minister of Energy and Resources recommends that the Committee:
- 1 **note** that the Electricity Industry Act 2010 takes a principled approach to regulating the electricity industry, enabling the Electricity Authority (an independent Crown entity) to regulate the industry through delegated legislation and providing for a consumer dispute resolution scheme;
 - 2 **note** that there is ambiguity about how the Electricity Industry Act 2010 applies to secondary networks, which are electricity networks that are indirectly connected to the national grid via one of the 29 local distribution companies;
 - 3 **note** that this is creating uncertainty about whether all secondary networks owners are required to comply with electricity industry regulation, specifically:
 - 3.1 the Electricity Industry Participation Code 2010;
 - 3.2 Part 3 of the Electricity Industry Act 2010;
 - 3.3 the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004; and
 - 3.4 the Electricity Industry (Levy of Industry Participants) Regulations 2010 (which recover the Electricity Authority's costs);
 - 4 **note** that the ambiguity also affects access to the dispute resolution scheme by consumers supplied from secondary networks (the number of which is difficult to know, but is estimated at about 100,000);
 - 5 **agree** that the Electricity Industry Act 2010 (and the regulations listed above, if necessary) be amended to clarify that it applies to secondary networks where the services provided are akin to those of an electricity distributor;
 - 6 **note** that the Electricity Industry Act 2010 is binding on the Crown and the changes proposed in this paper will not alter that;
 - 7 **invite** the Minister of Energy and Resources to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
 - 8 **authorise** the Minister of Energy and Resources to make decisions consistent with the overall policy decisions in this paper on any minor and technical issue that may arise in the drafting process.

Authorised for lodgement

Hon Simon Bridges

Minister of Energy and Resources