



## COVERSHEET

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

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
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.

In Confidence

Office of the Minister of Energy and Resources  
Chair, Cabinet Economic Development Committee

## **PROGRESSING THE ELECTRICITY PRICE REVIEW'S RECOMMENDATIONS**

### **Proposal**

1. I established the Electricity Price Review (the Review) in 2018, and tasked a Review panel with investigating whether the electricity sector is delivering fair and equitable prices to consumers. In October, the Review's final report was published, along with our Government's response.
2. In September, Cabinet invited me to report back with detailed proposals for a number of key aspects of the Government's response to the recommendations of the Review.
3. In this report back, I provide further detail on initiatives to strengthen the consumer voice, reduce energy hardship, improve the regulatory system, and prepare for a low-carbon future. This includes a legislative program to reform certain aspects of the electricity sector, and the framework for an institutional review.

### **Executive summary**

4. 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. To strengthen the consumer voice we will establish a Consumer Advocacy Council. I recommend the Council be a Ministerial Advisory Committee<sup>1</sup> that provides evidence-based policy advocacy. I propose that the costs of the Council are able to be recovered from a levy on industry participants, subject to legislation and consultation, but in the short term, Constitutional conventions
5. The Review also found that many households can be considered in energy hardship as they struggle to afford electricity to maintain a healthy home. I am proposing a cross sector Energy Hardship Group to bring together senior staff from NGOs and government agencies to co-ordinate and provide advice on cohesive, cost-effective energy hardship initiatives.
6. The Review recommended ways to improve the regulatory system. I am proposing to implement the following recommendations:
  - 6.1. Remove ambiguity in the Electricity Authority's ability to regulate for the protection of household and small business consumers, including vulnerable and medically dependent consumers.

<sup>1</sup> The term Ministerial Advisory Committee in this context refers to a type of organisation. The Consumer Advocacy Council will not provide advice to a Minister, but will advocate for electricity consumers with regulators and industry participants.

- 6.2. Provide more regulatory agility to promote competition in evolving contestable markets by shifting provisions relating to a distributor's involvement in contestable activities from primary legislation into secondary legislation, which the Electricity Authority can then develop and amend.
- 6.3. Clarify that the Electricity Authority should be able to regulate all parts of distribution access agreements, as it already does for transmission access agreements.
- 6.4. Improve and clarify 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.
7. I also propose to enable the Minister of Energy and Resources to amend the Electricity Industry Participation Code (secondary legislation) administered by the Electricity Authority if the Minister is not satisfied with progress on specified matters. This back-stop regulatory power will strengthen the incentives on the industry and the regulator to address the specified matters, within the required timeframe.
8. The Review recommended phasing out the regulations requiring low fixed charge tariff options to be made available to domestic consumers, as the regulations are poorly targeted and have unintended consequences. While I agree with a phase out, I am proposing to take more time on its design to moderate price impacts on households in energy hardship and facilitate energy efficiency and uptake of renewable technologies.
9. While recommending the Government explore new institutional arrangements for the energy sector, the Review did not identify any major concerns with the status quo, suggesting only that agencies with responsibility for energy policies, regulations and programmes improve their co-ordination.
10. Like the Review, however, I believe it is crucial we take a forward-looking perspective. Fit for purpose institutions will be a key factor in achieving the transition to a low-carbon economy.
11. In light of this, and having regard for investor confidence, energy security and affordability, and alignment with the broader Renewable Energy Strategy work programme, I propose a phased approach to the scope and timeframe for a review of institutional arrangements.
12. I recommend additional work be conducted with a report-back to Cabinet, that includes:
- 12.1. Developing a greater understanding of any concerns with existing arrangements, whether current or future focussed.
- 12.2. Identifying low-impact options for improved agency co-ordination and potential policy levers that address any identified market failure.
13. This work would be finalised by late-2020, with the potential for early advice to Cabinet on certain matters.

## **Introduction**

14. To produce a significant improvement in the outcomes for consumers, I propose to:
  - 14.1. Strengthen consumer voice: by establishing a consumer advocacy council (the Council) to represent small business and residential consumers.
  - 14.2. Reduce energy hardship: by establishing a cross-sector Energy Hardship Group to ensure that initiatives are well-considered, carefully co-ordinated and properly implemented.
  - 14.3. Improve the regulatory system: by giving the Electricity Authority new and clearer powers to regulate, and introducing a new regulatory backstop.
  - 14.4. Prepare for a low-carbon future: by reviewing the institutional arrangements for energy policy and regulation.
15. Some aspects of the Review's recommendations fall to other parties to address, in particular the Electricity Authority. Other aspects of the Government's response to the Review's recommendations will be subject to future Cabinet decisions.

### **Strengthen the consumer voice**

16. The Review found that consumers, particular households and small businesses, struggle to make their voices heard and exert influence over decisions affecting them in the electricity sector. These households and businesses struggle to engage in the regulatory process. This is often due to technical complexity and a lack of time and resources. There can also be cultural and language barriers.
17. Consequently, the Review recommended as a high priority to 'strengthen the consumer voice' by establishing a Consumer Advocacy Council (the Council).
18. I have considered this recommendation further, and consulted with the Minister for Commerce and Consumer Affairs and the Minister for Small Business, and we agree that there should be a focus on strengthening consumer engagement with the industry and regulators through the establishment of a new Council.

### *A focus on strengthening consumer engagement with the regulators*

19. The main gap that exists with consumer advocacy in New Zealand can be described as 'evidenced-based policy advocacy' for household and small business consumers. This form of advocacy carries with it more merit or weight because the views that represent and promote interests of an individual or group are based on research by qualified experts. This form of advocacy for household and small business consumers will give the Government, regulators and the industry access to a fact-based countervailing point of view to the views of large consumers and industry stakeholders.
20. I propose that the role of the new Council is to advocate on behalf of residential and small business electricity consumers in regulatory consultations and other decision-making processes that affect them in relation to their electricity supply.
21. The Council should complement, rather than replace, existing consumer groups advocating on behalf of consumers. Existing groups have relationships with

consumers which the new Council could leverage. A network of such groups could inform the Council's advocacy focus on what issues and concerns are of importance. A secondary role of the Council may include supporting these groups to directly engage with regulated suppliers on their preferences.

22. For the new Council to add value to existing consumer advocacy, I propose that:
  - 22.1. Is a standing body with capability and expertise in regulatory affairs that can build a body of knowledge on consumer matters.
  - 22.2. Undertakes evidence based research to investigate, and articulate issues and concerns to regulators and the industry.
  - 22.3. Could, in the long term, support other consumer and small business advocacy groups.

#### *Functions of the Council*

23. To advocate for small business and residential consumers and fill the representation gap, I recommend that the Council has four functions.
  - 23.1. Influencing: To have a meaningful effect on regulatory and industry activities to benefit households and small business consumers.
  - 23.2. 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.
  - 23.3. Representing: To communicate the views, concerns and issues of residential and small business consumers in policy design and regulatory forums or working groups.
  - 23.4. Informing: To proactively let regulators know when markets are not working for residential and small business consumers.
24. The Review recommended that the Council's functions should be set out in statute because it would give the Council status and durability. The main reason for having functions in statute is to make clear the purpose and functions of the Council, so that stakeholders can hold them to account. This would also assist with promoting accountability for costs and the work programme. While providing for the Council in statute is not essential to achieve these things, I propose that the Electricity Industry Act be amended to provide for the appointment of a council or body to advocate for household and small business electricity consumers.

#### *Organisational form and governance*

25. I propose that a Ministerial Advisory Committee is the best organisational form for the new Council. This is because I do not envisage the Council to be of a scale to justify the creation of a separate Crown entity or departmental agency. Further, as the Council, as an advisory committee, can be set up relatively easily following approval by Cabinet of a terms of reference, which would cover the role and purpose of the group, its membership, any appointment process including fees and term of appointment, how the Council will engage with other agencies and its reporting

arrangements. I propose the Minister of Commerce and Consumer Affairs, Minister for Small Business and I be delegated authority to consult interested parties on a draft terms of reference for the Council, and invited to report back to Cabinet with this further detail before commencing the appointment process.

26. I recommend that the Minister of Commerce and Consumer Affairs should be the responsible Minister for the Council, similar to the current responsibilities for energy dispute resolution schemes under Part 4 of the Electricity Industry Act. Further, the Minister should be able to appoint Council members, following consultation with the Minister of Energy and Resources and Minister for Small Business, once satisfied that those persons have the necessary expertise and experience to carry out the functions of the Council.
27. To undertake consumer advocacy, the Council will be supported by a dedicated secretariat provided by the Ministry of Business, Innovation and Employment. This is in line with the Review's recommendation that the Council consist of a Board, appointed by the Minister, and have a small executive or secretariat to provide support.

#### *Funding*

28. Constitutional conventions
29. The Review suggested that the Council's costs should be recovered from a levy on electricity industry participants. This would require amendments to regulation-making powers in the Electricity Industry Act to enable the existing levy regulations to recover the costs of the Council.
30. A levy on industry participants would ensure that there is a secure ongoing funding stream that is sufficiently flexible to meet the Council's needs. The decision to recover the Council's costs through an industry levy, and the basis for any such levy, would be subject to consultation with levy payers and the results of a cost recovery impact assessment.

#### *Phased approach to extending the scope of the Council*

31. It could be beneficial for the Council to have a cross-sector mandate, given similar consumer issues exist across other regulated sectors. Some sectors such as gas, telecommunications and water have direct synergies for a potential inclusion in a cross-sector mandate with electricity because of their interdependent markets, bundling with electricity services, or being seen as essential services by many New Zealanders.
32. 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. The Review did not explore this, and it would require more stakeholder consultation with other potential sectors.

#### **Reducing energy hardship**

33. The Review found that many households struggle to afford the electricity needed to maintain a healthy home environment, and may cut back on heating, resulting in poor

living standards. Such households can be considered in energy hardship. Children are disproportionately impacted by the effects of energy hardship.

34. The Review highlighted that there is no singular policy intervention that will address energy hardship and that policies need to be carefully designed and co-ordinated in order to tackle the issue.
35. The Review made eight recommendations to address energy hardship. The different recommendations recognise that the causes of energy hardship are complex, and achieving meaningful change will require leadership and action from government, regulators and the industry.

*Establish a cross-sector energy hardship group*

36. The Review envisioned that a cross-sector energy hardship group would bring together decision-makers from key government agencies, community organisations, consumer advocates, industry participants and regulators to co-ordinate and provide advice on cohesive, cost-effective energy hardship initiatives. These initiatives could range from providing advice on high-level policy and strategy, through to the detailed design and implementation.
37. I have considered this recommendation further and taken advice from my officials. I propose establishing a cross-sector energy hardship group (the Group) that would bring together senior staff from NGOs and government agencies. This level of representation will ensure the Group has the benefit of senior leadership with good knowledge of energy hardship issues.
38. I considered the alternative of a group made up of just public sector officials that sought guidance from NGO staff from time to time. However, I believe a group that has both government and NGO representation will be able to better coordinate across the sector and have a more complete understanding of the issues and potential solutions.
39. The Review emphasised the need to keep the Group small but ensure liaison with other groups and co-opt experts as needed. I agree this will make the Group workable – it should consist of senior staff from government and NGOs that have good knowledge of the drivers of energy hardship and whose work is central to the problems and the solutions. Stakeholders who sit outside those agencies (both government and non-government), but whose views are important, particularly for specific aspects of the Group's work, could be part of a wider Reference group of senior staff providing additional support when required on specific matters.
40. I propose the agencies whose senior staff will be members of the Group or Reference group will likely be drawn from the Ministry of Business, Innovation and Employment, Kāinga Ora, Te Puni Kōkiri, the Child Wellbeing and Poverty Reduction Group in the Department of the Prime Minister and Cabinet, the Energy Efficiency and Conservation Authority, the Ministry of Health, the Ministry of Housing and Urban Development, the Ministry for Pacific Peoples, the Ministry of Social Development and the Electricity Authority. Non-government members of the Group or Reference group could include financial capability service providers, consumer advocates, community energy advocates and service providers, social and community service

organisations, public housing organisations, electricity distributors, electricity retailers and iwi groups.

41. I propose that once I appoint a Chair, that person and senior staff from relevant government agencies will recommend to me the final make-up of the Group, as well as its terms of reference and work programme. I am seeking delegated authority from Cabinet to approve the final make-up of the Group and its terms of reference.
42. The Group will report to me through its Chair. As the Minister responsible for the Group, I will determine its work programme and receive regular reports from its Chair.
43. The key role of the Group will be to provide advice, support and assistance in the development and maintenance of an energy hardship work programme, which includes:
  - 43.1. Define energy hardship, and the statistics that should be gathered to monitor changes in energy hardship levels over time (this work is already underway).
  - 43.2. Conduct a stocktake of existing support services to households in energy hardship.
  - 43.3. Investigate linking and expanding existing support services (based on the stocktake) to establish a nationwide network of organisations offering credible, independent, specific advice and support services to those in energy hardship.
  - 43.4. Investigate establishing a fund to assist eligible households to buy items recommended by community-level advisors to improve the energy efficiency of their homes.
  - 43.5. Any additional work requested by the Minister of Energy and Resources (or by other members of the Group, if agreed to by the majority of Group members and approved by the Minister).
44. To support the work of the Group, a small secretariat will be necessary. The Group may also convene and oversee one or more working groups to assist it with implementing energy hardship work streams in line with agreed government policies.
45. Given its likely work programme, I envisage the Group will initially operate for 18 months, but this may need to be extended if required to complete the energy hardship initiatives.
46. I have consulted with Ministers of Housing, Social Development, Commerce and Consumer Affairs, and Child Poverty Reduction on my expectations for the Energy Hardship Group.
47. [REDACTED] Constitutional conventions [REDACTED]

48. Constitutional conventions I am proposing that the current working group (made up of public sector officials) continues progressing some key work streams such as defining energy hardship and conducting a stocktake of existing support services.

*Progress on the other energy hardship recommendations*

49. Cabinet requested [DEV-19-MIN-0264], that I, in consultation with the Ministers of Housing, Social Development, Commerce and Consumer Affairs, and Child Poverty Reduction, report back progress on some of the Review's energy hardship recommendations. This progress update is below.

*Define Energy Hardship*

50. Officials have now begun work on the definition of energy hardship. This work will be part of the work programme for the cross sector energy hardship group. The first stage will focus on agreeing the outcomes framework that will be used to assess broader measures of success from reducing energy hardship. This builds on definitions of energy hardship and enables the links between health, living standards, housing and energy hardship to be evaluated in a coherent manner.

*Establish a network of community-level support services to help consumers in energy hardship*

51. The cross sector energy hardship group discussed above will play a key role in designing, monitoring and steering the development of community-level support energy hardship services.
52. The first step will be to undertake a stock-take of existing community-level services, including pilot services, to help identify opportunities to join and leverage them.
53. I then envisage an initial programme of evaluated pilots will be undertaken.

Constitutional conventions

*Set up a fund to help households in energy hardship to become more energy efficient*

54. As recommended by the Review I propose a fund to complement the development of community-level support, and I expect the cross sector energy hardship group to help design it.

55. Constitutional conventions

**Improving the regulatory system**

*Give the Electricity Authority more powers to regulate network access*

56. The Review recommended several ways to improve the regulatory system. The most significant is to reduce constraints and ambiguity about regulators' powers to control access to distributors' networks, especially where they are competing with other businesses to sell services to consumers. This is an area of the sector where changes are afoot – the generation, storage and active management of electricity by consumers themselves or by their agents, often assisted by automation. The

Review's recommendation aims to ensure a level playing field so competition can flourish on fair terms for all.

57. The Review recommended removing rules in Part 3 of the Electricity Industry Act that limit and regulate involvements between distributors, generators and retailers, and delegate to the Electricity Authority the development of secondary legislation (the Code) to replace them. I support moving a number of these statutory provisions into the Code because the rapidly evolving electricity system requires more flexible and responsive regulation than would be the case if the rules remain in primary legislation.
58. 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.<sup>2</sup>
59. The Electricity Authority also needs to be able to develop rules that can respond if distributors use their monopoly position, deliberately or inadvertently, to deter competitors from entering the market for such products and services or disadvantage those already in the market. This would not be in the interests of consumers.
60. 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." 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.<sup>3</sup> I have given careful consideration to this guidance on what matters should be delegated to the Code, and what matters should remain in the Act.
61. 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.
62. I consider ownership separation rules should be a matter for primary rather than secondary legislation. 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. I therefore propose the ownership prohibition in section 75 remains in the Act, along with its enforcement provisions and any other matters necessary for its operation.
63. Sections 76 to 79 of the Act set out various rules giving effect to the second limb of the purpose of Part 3, which is to promote competition in the electricity industry by

<sup>2</sup> 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.

<sup>3</sup> Legislation Design Advisory Committee, Legislation Guidelines: 2018 edition, Chapter 14.

restricting relationships between a distributor and a generator or a retailer where those relationships are not otherwise at arm's length:<sup>4</sup>

- 63.1. 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).
  - 63.2. 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.
  - 63.3. Section 77 requires distributors to have non-discriminatory use-of-system agreements with connected generators and retailers,
  - 63.4. Section 78 prohibits distributors involved in a connected retailer from purchasing the customer base of another retailer, and
  - 63.5. 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.
64. I propose that the substance of sections 76 to 79, and any related provisions necessary for their operation, 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.
65. When considering any amendments to the provisions transferred into the Code, or when making new Code of a similar nature, the Electricity Authority must comply with existing statutory provisions about the content of the Code and its statutory objective.
66. The precise mechanism by which sections 76 to 79 are transferred into the Code is a matter of legislative drafting. A key principle governing the transfer is that no regulatory gap should be created; the provisions in sections 76 to 79 should remain in force until such time that the Electricity Authority amends, removes or replaces them. Transitional arrangements may be required for any Part 3 investigation or exemption processes that may be underway.

<sup>4</sup> Section 72(1) of the Electricity Industry Act 2010.

*Enforcement and general provisions in Part 3 should not be transferred to the Code*

67. Part 3 of the Act includes provisions for enforcement of the ownership prohibition and involvement rules, including significant pecuniary penalties. 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.<sup>5</sup> 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.
68. The current enforcement provisions in Part 3 will need to be retained, because section 75 will remain in the Act. However, I consider it unnecessary to apply those enforcement provisions to sections 76 to 79 after they are transferred to the Code.
69. Sections 50 to 62 of the Act already provide for the enforcement of the Code, and I consider 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 I think that 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 not warrant high pecuniary penalties to encourage compliance. I believe 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.
70. There are also a number of general provisions in Part 3 of the Act that should either remain in the Act (because they are needed to support the ownership rules that will remain in the Act), or be transferred or duplicated in the Code, as the case may be. For example, section 90 enables the Electricity Authority to exempt any party from the application of Part 3 of the Act. This exemption power should remain in respect of section 75 but it does not also need to be transferred into the Code because the Act already enables the Electricity Authority to grant exemptions to the Code.

*Checks and balances on Code-making powers*

71. The Review 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.
72. I am advised 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. I therefore do not propose to provide an

5 Electricity Industry Reform Act 1998.

appeal right on Code amendments relating to a distributor's involvements in contestable activities that require access to the distributor's network.

73. 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). I do not think 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.
74. I do, however, agree with the Review'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. I note 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.<sup>6</sup>

#### *Regulation of distribution access agreements*

75. I propose amending the Electricity Industry Act 2010 to enable the Electricity Authority to regulate access agreements between distributors and retailers, including quality standards relevant to such agreements.
76. Regulation of distribution access agreements could bring more standardisation and in turn more effective retail competition. The Electricity Authority is developing default access agreements for this purpose, but this work was held up by legal action questioning its ability to regulate for this. The Court of Appeal recently confirmed the Electricity Authority could regulate such agreements, but could not include quality standards of the kind the Commerce Commission could regulate. I agree with the Review's position that the Electricity Authority should be able to regulate all parts of distribution access agreements, as it already does for transmission access agreements.
77. Some distributors expressed concern that regulation of their access agreements could impose risks or costs on them that would not be compensated under the Commerce Commission's price-quality regulation. This concern can be managed by ensuring the existing 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. Section 54V should also be amended to enable the Commerce Commission to amend a price-quality path determination (under section 52P of the Commerce Act) to take account of any changes to the Code that increase costs for Transpower and distributors.

<sup>6</sup> Section 38(1) of the Electricity Industry Act and section 54V of the Commerce Act.

### *Closing minor regulatory gaps*

78. The Review observed that the Electricity Authority has uncertain powers to collect information from industry participants to support reviews or inquiries requested by the Minister. It is clear the Authority has the power to collect information when undertaking its own reviews or inquires, but less clear this power exists when it is requested by the Minister to undertake a review.
79. I agree with the Review's recommendations to clarify the Electricity Authority's powers to gather information from industry participants for the purpose of carrying out reviews or investigations requested by the Minister.

### *Improving the protection of consumers*

80. I support the Review's recommendation that Government amend the Electricity Industry Act 2010 to give the Electricity Authority an explicit consumer protection function.
81. Making this function explicit will remove regulatory uncertainty about the Electricity Authority's ability to regulate to promote the protection of small consumers. The uncertainty exists because regulating to protect consumers could be argued to be inconsistent with the Electricity Authority's statutory objective of promoting competition, reliability, and efficient operation of the industry.
82. Giving the Electricity Authority an explicit consumer protection function would enable it to add consumer protection-related provisions to the Code, including existing voluntary guidelines applying to medically dependent consumers and to consumers in energy hardship which was another of the Review's recommendations.
83. I note that section 113 of the Act allows the Minister of Energy and Resources to recommend regulations for the purpose of the fair treatment of domestic and small business consumers by retailers and distributors. This regulation-making power can be used to protect household and small business consumers, but any such regulation risks cutting across or creating inconsistencies with the Code or other measures governing industry participants' dealings with small consumers (such as price change notifications, dispute resolution, billing practices, and outage communications). I consider it preferable for the Electricity Authority to have a clear function to protect small business and household consumers, so that it can integrate that function with its related regulatory and non-regulatory functions that influence the industry's dealings with those consumers.

### *Give the Minister a power to amend the Code if necessary to address specified matters*

84. Some of the regulatory changes the Review recommended are long-standing issues for the electricity industry that have proven challenging to progress. Examples are the long-running review of transmission pricing and efforts to improve the operation of financial markets that help parties manage spot price risk. While I am confident the Electricity Authority will focus its full attention on all of the matters recommended by the Review, I think it desirable to strengthen the incentives on the industry and the regulator to implement specific matters in a timely manner.
85. I propose to amend the Electricity Industry Act to enable the Minister of Energy and Resources to amend the Code if the Minister is not satisfied with the progress on

specified matters at a specified date. I note there is precedent for this approach as it mimics what was done with the establishment of the Electricity Authority in 2010.

86. Officials have expressed reservations about establishing a back-stop regulatory power.
87. However, I believe any adverse effects of a back-stop ministerial power can be kept to a minimum; the Minister's power should only apply for a limited period (no more than two years) and should be used only after the Electricity Authority has had a reasonable period of time (at least two years from enactment) in which to make satisfactory progress. I also propose it apply only to the matters underpinning or relating to the following specified recommendations from the Review:
  - 87.1. Develop a streamlined way for retailers to process consumer requests for consumption data.
  - 87.2. Make distributors offer retailers standard terms for network access.
  - 87.3. Prohibit saves and win-backs.
  - 87.4. Establish a pilot scheme to help non-switching households find better deals.
  - 87.5. Improve the availability of wholesale market information.
  - 87.6. Introduce a mandatory market-making obligation unless the sector develops an effective incentive-based scheme.
  - 87.7. Make generator-retailers release information about the profitability of their retailing activities.

#### *Phase out low fixed charge tariff regulations*

88. The Review recommended phasing out the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004 (the LFC regulations). The LFC regulations were initially intended to encourage energy efficiency and to assist some households. The Review found that the LFC regulations are poorly targeted and also have a number of unintended consequences. The Review concluded that the LFC regulations:
  - 88.1. Help only some households in need and push others into greater energy hardship – the Review estimated that almost half of consumers in the most deprived meshblock areas pay higher prices because of the regulations.
  - 88.2. Promote inefficient choices for the adoption and use of new technologies (such as domestic rooftop solar generation and Electric Vehicles) and for electrifying the economy.
  - 88.3. Increase pricing complexity and confusion, making it harder for consumers to shop around for the right electricity plan, hampering retail competition and likely raising average prices for consumers.
89. I would also note that, because a low fixed charge means a high variable charge, the regulations may be encouraging some consumers to under-heat their homes leading

to adverse health and well-being outcomes. This is particularly concerning for children and elderly in households with higher energy needs.

90. The Review concluded that removing the LFC regulations should lead to lower household electricity prices on average, although low-use households are likely to face increased prices. The Review made recommendations that represent more effective and less distortionary ways to promote energy efficiency and to assist households facing high prices or struggling to pay their power bills.
91. As noted in my September 2019 Cabinet paper, I support the recommendation to phase out LFC regulations, but I note the potential for it to increase costs for households that use little electricity, including some already in energy hardship. I have therefore proposed the phase-out should not be completed in advance of measures being put in place to reduce energy hardship and to help non-switching consumers to find better deals. I also acknowledge there may be implications for the uptake of solar PV and electric vehicles.
92. I have been advised that aligning the LFC regulations phase-out stages with the electricity pricing year, which typically begins on 1 April, will make it easier for retailers and distributors to implement the changes needed in each year of the phase out period. Accordingly, the earliest date that the LFC regulations phase-out period could commence is 1 April 2021.
93. In light of this, rather than reporting to Cabinet now with specific proposals to phase out the regulations as originally intended, I propose taking time to engage with parties most likely to be affected by the phase out. This will enable officials to better understand the likely impacts and to design a phase-out mechanism that balances ensuring a just transition with taking meaningful steps to reduce the harm the regulations create. I consider this engagement will enable development of a more robust and fair approach to phasing out the regulations. I note my Renewable Energy Strategy work programme will also progress in the interim. I now propose to report back to Cabinet in 2020.

### **Review of institutional arrangements for the energy sector**

94. The Review recommended the Government explore new institutional arrangements in the energy sector. This reflects:
  - 94.1. The vital importance of fit for purpose energy institutions in facilitating the transition to a low-carbon economy.
  - 94.2. Recognition that the timing of any review should occur when key elements of the Government's renewable energy strategy are in place.
95. It did not, however, identify any major concerns with the existing arrangements.
96. The Review suggested only that the Government consider alternative ways for its agencies to "co-ordinate energy policies, regulations and programmes" for the purpose of better organising resources in the face of "challenges spanning multiple areas of agency responsibility". The Review also identified a lack of common purpose across the supply chain and a tendency for self-interest to make issues more complicated than perhaps they need to be.

97. As already noted by Cabinet, the need for a comprehensive review must have regard for investor confidence, energy security and affordability, and alignment with the broader renewable energy strategy work programme. I am particularly mindful that a number of decisions and reviews that impact the energy regulatory system are to be implemented over the next 6-12 months, including the Review recommendations approved by Cabinet in September.
98. On this basis, I propose a phased approach to the possibility of a review.
99. It is imperative the Government remain attuned to developments in the energy market and their implications for institutional arrangements. As such, I propose further work be conducted in a number of areas.

*Nature and extent of problem*

100. It is important there be a process to establish the nature and extent of the problem.
101. Improved co-ordination and collaboration is key area of interest.
102. New technologies have the potential to lower costs and realise efficiency gains for electricity consumers and industry as a whole. It is also true, however, that digitalisation and improvements in distributed energy resources, such as solar PV and battery storage, empower individual users in ways, and to an extent, that was not contemplated when the market was established.
103. The democratisation of electricity has brought the tension between decentralising forces and the necessity for centralised decision making, into sharp relief. An expectation on the part of consumers that their individual needs will be met, requires the industry to be responsive from the bottom-up, with qualitative and localised solutions. Yet the need for top-down governance remains. Indeed, it continues to grow in importance. If the technical and commercial impacts of technological change are not managed collectively, it is likely both consumers and industry will be worse off.
104. Fragmentation and the absence of a common purpose across the energy sector also has the potential to compromise the development of large-scale renewable generation and thus delivery of the Government's Renewable Energy Strategy work programme.

*Low-impact options*

105. I propose that MBIE identify if there are any changes to institutional arrangements that can be made which are low impact in terms of investor confidence and the current energy work programme, yet would be of net benefit to the energy sector if implemented.
106. Of relevance is improved co-ordination between regulatory agencies, including the Electricity Authority, Gas Industry Company, Commerce Commission and Energy Efficiency and Conservation Authority. The work would consider, for example, an enhanced role for the Council of Energy Regulators and the merits of bringing the Gas Industry Company under the Electricity Authority by creating an Energy Commission, through Order in Council, using existing provisions of the Gas Act. The Energy Commission option would not, however, involve combining the regulatory

regimes for electricity and gas, as I consider this option to be unduly disruptive in the short-term.

107. Also of interest as a low-impact option is whether policy levers for the Minister of Energy and Resources are warranted on the grounds of market failure. A possible option is the provision of emergency powers to reallocate electricity or gas in situations of acute electricity or gas shortage.

#### *Other preparatory work*

108. In support of this work, I propose the Ministry of Business Innovation and Employment also:
  - 108.1. Map the objectives and functions of existing policy, regulatory and programme delivery agencies.
  - 108.2. Prepare one or more terms of reference for a review of institutional arrangements for the energy sector.
  - 108.3. Consult and conduct other tasks, as required.

#### *Timing*

109. I propose to report back to Cabinet by late 2020.
110. However, depending on the findings of the work, it may be possible to provide advice to Cabinet on particular issues during 2020.

#### **Consultation**

111. In drafting this paper the following agencies were consulted: Ministry for Social Development, Ministry of Health, Ministry of Housing and Urban Development, Ministry for the Environment, Energy Efficiency and Conservation Authority, Kāinga Ora, Electricity Authority, Commerce Commission, Gas Industry Company, Te Puni Kōkiri, Treasury, State Services Commission, Ministry of Justice, and the Department of the Prime Minister and Cabinet.
112. I have consulted the Minister of Commerce and Consumer Affairs and the Minister for Small Business on recommendations that overlap with their portfolios – including establishing a consumer advocacy council.

#### **Financial implications**

113. Any immediate direct financial implications will be accommodated within existing baselines. Constitutional conventions particularly to progress the Review's recommendations to reduce energy hardship and the establishment of the Consumer Advocacy Council.

#### **Legislative implications**

114. Legislation is required to implement the proposals in this paper. The proposed Act will bind the Crown. An Electricity Industry Amendment Bill has been given a priority 5 (drafting instructions will be sent to PCO within the year).

## **Impact Analysis**

115. A Regulatory Impact Assessment (RIA) has been prepared and is attached to this paper as Annex One.
116. A Quality Assurance Panel with representatives from the Ministry of Business, Innovation & Employment and the Treasury has reviewed the 'Progressing the Electricity Price Review's Recommendations' Regulatory Impact Assessment (RIA) produced by the Ministry of Business, Innovation and Employment and dated November 2019.
117. The Panel considers that the RIA partially meets the Quality Assurance criteria.
118. 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 Electricity Price Review (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.
119. 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.
120. The Panel recommends that MBIE do further analysis of these two proposals and update the RIA prior to tabling legislation in Parliament.

## **Human Rights**

121. This paper is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

## **Disability Perspective**

122. Disabled people tend to experience greater amounts of energy hardship due to being over represented in terms of living in social housing, being on a benefit and/or being medically dependent. Various surveys have found that disabled people have greater exposure to cold and damp homes compared to non-disabled people. In addition, having a warm and dry home is of particular importance to disabled people because their impairments may reduce their ability to keep warm.

## **Proactive Release**

123. I propose to publish this Cabinet paper, on the Ministry of Business, Innovation and Employment's website, subject to any redactions consistent with the Official Information Act 1982.

## **Recommendations**

1. Note that in September [DEV-19-MIN-0264] I reported back on the Review's recommendations, and agreed that I would report back on some matters in December 2019.

### **Strengthen the consumer voice**

#### *Establish a consumer advocacy council*

2. Note that households and small business consumers struggle to make their voices heard, engaging with, and exert influence over decisions that affect them in the electricity sector.
3. Agree to establish a Consumer Advocacy Council, as a Ministerial Advisory Committee, with the objective of providing evidence-based policy advocacy for small business and residential consumers, which represents their voice to energy regulators.
4. Agree to amend the Electricity Industry Act 2010 to provide for the Minister of Commerce and Consumer Affairs, in consultation with the Minister of Energy and Resources and Minister for Small Business, to appoint a suitably constituted and qualified body to perform the functions of a Consumer Advocacy Council.
5. Agree to amend the Electricity Industry Act 2010 to enable the recovery of all costs of the Consumer Advocacy Council incurred from 1 July 2020 from electricity industry participants, subject to consulting levy payers on the approach for any cost recovery via levy regulations.

6. Constitutional conventions

7. Agree to delegate authority to the Minister of Commerce and Consumer Affairs, Minister of Energy and Resources, and Minister for Small Business to consult with interested parties on a terms of reference for the Consumer Advocacy Council.

8. Invite the Minister of Commerce and Consumer Affairs, in consultation with the Minister of Energy and Resources and Minister for Small Business, to report back:
  - 8.1. To the Cabinet Economic Development Committee in the first half of 2020 on terms of reference for the Consumer Advocacy Council.
  - 8.2. To the Cabinet Appointments and Honours Committee on proposed appointments to the Council, Constitutional conventions and Cabinet agreement to the Council's terms of reference.

#### *Reducing energy hardship*

9. Note the Review found that many households struggle to afford electricity to maintain a healthy home resulting in poor living standards, and that policies need to be carefully designed and co-ordinated in order to tackle this issue.

10. Agree to the Minister of Energy and Resources establishing a cross-sector Energy Hardship Group bringing together senior staff from NGOs and government agencies.
11. Agree that the Minister for Energy and Resources, in consultation with Ministers of Housing, Social Development, Commerce and Consumer Affairs, and Child Poverty Reduction, will appoint the Chair and determine the final make-up of the Energy Hardship Group, and its terms of reference.
12. Agree, Constitutional conventions, the Group will be supported by a small full-time secretariat.
13. Note that the Minister of Energy and Resources has reported back on progress with the following Review recommendations:
  - 13.1. Define energy hardship.
  - 13.2. Establish a network of community-level support services to help consumers in energy hardship.
  - 13.3. Set up a fund to help households in energy hardship to become more energy efficient.

### **Improving the regulatory system**

#### *Clarify the Electricity Authority's information gathering powers*

14. Note that the Electricity Authority has uncertain powers to collect information from industry participants to support reviews or inquiries requested by the Minister.
15. Agree to clarify the Electricity Authority's powers to gather information from industry participants for the purpose of carrying out reviews or investigations requested by the Minister.

#### *Give the Electricity Authority clearer powers to regulate distribution access agreements*

16. Note that the Electricity Authority has limited ability to regulate competitive access to distribution networks, due to a regulatory gap created by legislation governing the jurisdictions of the Electricity Authority and the Commerce Commission.
17. Agree that the Electricity Authority be given jurisdiction to regulate transmission and distribution access terms and conditions, including setting quality standards and information disclosure requirements as those terms are used in the Commerce Act.

#### *Give the Electricity Authority more powers to regulate distributors' involvement in contestable electricity markets*

18. Note that Part 3 of the Electricity Industry Act 2010 regulates involvements by a distributor in business activities as a generator or a retailer for the purpose of promoting competition, but it does not regulate involvements by Transpower or distributors in other contestable markets, including those for distributed electricity storage and demand management.

19. Note that the Electricity Authority has limited ability to promote its statutory objective in evolving contestable markets in the electricity industry, because the Electricity Industry Participation Code is subordinate to Part 3 of the Electricity Industry Act 2010.
20. Agree to give the Electricity Authority jurisdiction to regulate involvement by Transpower and distributors in contestable electricity markets by:
  - 20.1. Incorporate the substance of sections 76 to 79 in Part 3 of the Electricity Industry Act 2010 into the Electricity Industry Participation Code, at the point of enactment.
  - 20.2. Retain section 75, requiring ownership separation of distribution and large-scale grid-connected generation, together with any provisions necessary for its operation.
  - 20.3. Provide for the enforcement of those provisions transferred into the Code under existing sections 50 to 62 of the Electricity Industry Act.
  - 20.4. Make any other amendments to Part 3, and to the provisions transferred into the Code, that may be necessary or desirable to give effect to this recommendation.

*Improving the protection of consumers*

21. Note that there is regulatory ambiguity in the Electricity Authority's ability to regulate for the protection of household and small business consumers.
22. Agree that the Electricity Authority be given an explicit statutory function under the Electricity Industry Act to protect residential and small business electricity consumers, together with any further amendments necessary to ensure consistency with its statutory objective.

*Back-stop regulatory power*

23. Note that the Electricity Authority has made improvements to the operation of wholesale and retail electricity markets since its establishment but a number of outstanding matters remain and more work is required.
24. Agree the Minister of Energy and Resources be given a time-limited power, lasting no more than two years and commencing no less than two years after the power comes into force, to amend the Electricity Industry Participation Code as if he or she were the Electricity Authority, if the Minister considers the Code's provisions are unsatisfactory in respect of any matters underpinning or relating to the following specified recommendations from the Review:
  - 24.1. Develop a streamlined way for retailers to process consumer requests for consumption data.
  - 24.2. Make distributors offer retailers standard terms for network access.
  - 24.3. Prohibit saves and win-backs.

- 24.4. Establish a pilot scheme to help non-switching consumers find better deals.
- 24.5. Improve the availability of wholesale market information.
- 24.6. Introduce a mandatory market-making obligation unless the sector develops an effective incentive-based scheme.
- 24.7. Make generator-retailers release information about the profitability of their retailing activities.

#### *Phase out low fixed charge tariff regulations*

25. Note the Review recommended phasing out the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004 (LFC regulations) because it found they are poorly targeted and also have a number of unintended consequences.
26. Note that, rather than report back to Cabinet now with specific proposals for phasing out the regulations, the Minister of Energy and Resources has directed officials to engage with parties most likely to be affected to better understand the likely impacts, as input to developing a robust and fair phase out mechanism.
27. Invite the Minister of Energy and Resources to report back to Cabinet in 2020 with specific proposals to phase out the regulations.

#### **Review of institutional arrangements for the energy sector**

28. Agree to take a phased approach to the scope and timeframe for a review of institutional arrangements.
29. Agree that MBIE consult with relevant stakeholders and conduct a scope of work that includes:
  - 29.1. Developing a greater understanding of any concerns with existing arrangements, whether current or future focussed.
  - 29.2. Identifying low-impact options for improved agency co-ordination and potential policy levers that address any identified market failure.
30. Invite the Minister of Energy and Resources to report back to Cabinet by late-2020 on the work conducted by MBIE, with the potential for early advice on certain matters.

#### **Legislation**

31. Invite the Minister of Energy and Resources to issue drafting instructions to the Parliamentary Counsel Office to give effect to those recommendations above that require legislative amendments; and
32. Authorise the Minister of Energy and Resources to make decisions consistent with the overall policy decisions in this paper, including on any minor and technical issues that may arise in the drafting process.

Authorised for lodgement

Hon Dr Megan Woods

**Minister of Energy and Resources**

PROACTIVELY RELEASED

**Annex One: Regulatory Impact Analysis for the Electricity Industry  
Amendment Bill future**

PROACTIVELY RELEASED