



23 April 2021

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Building, Resources and Markets
Ministry of Business, Innovation & Employment
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Submission on the Electricity Authority's Compliance Framework

1. This is Vector Limited's (Vector) submission on the Ministry of Business, Innovation and Employment's (MBIE) *Consultation paper – Compliance Framework: Electricity*, dated March 2021.
2. Vector agrees in principle with most of MBIE's proposals and makes a few suggestions for improvement in this submission.
3. We set out below our responses to the consultation questions (in *italics*) using the template provided by MBIE for this consultation.
4. We particularly note the importance of the Electricity Authority (the Authority) making decisions on investigations into alleged breaches of the *Electricity Industry Participation Code 2010* (the Code) in a timely manner. Delays in making these decisions create uncertainty for the relevant industry participants that could have implications on their ability to work towards compliance in a timely manner. These delays could, in turn, cause delays in their operational planning which could have a significant impact on their customers. We discuss our views on this issue in our response to Question 18.
5. We are happy to discuss any aspects of this submission with MBIE officials. Please contact Monica Choy (Senior Regulatory and Pricing Partner) at Monica.Choy@vector.co.nz or 09 978 8381 in the first instance.
6. No part of this submission is confidential, and we are happy for MBIE to publish it in its entirety.

Yours sincerely
For and on behalf of Vector Limited

Neil Williams
GM Market Regulation

Compliance Framework: Electricity - Have your say

Introduction

*** 1. Name (first and last name)***** 2. Email**Monica.Choy@vector.co.nz in the first instance."/>*** 3. Is this an individual submission, or is it on behalf of a group or organisation?**

- Individual
 On behalf of a group or organisation

*** 4. Which group do you most identify with, or are representing?**

- | | |
|--|--|
| <input type="checkbox"/> Industry or industry advocates | <input type="checkbox"/> Electricity retailer |
| <input type="checkbox"/> Market operation service provider | <input checked="" type="checkbox"/> Electricity distributor |
| <input checked="" type="checkbox"/> Metering equipment provider | <input type="checkbox"/> Electricity generator |
| <input type="checkbox"/> Metering equipment owner | <input checked="" type="checkbox"/> Line owner |
| <input checked="" type="checkbox"/> Operator of an approved test house | <input type="checkbox"/> Transpower |
| <input type="checkbox"/> Load aggregator | <input type="checkbox"/> Electricity consumer with direct connection to the grid |
| <input checked="" type="checkbox"/> Ancillary service agent | <input type="checkbox"/> Person who generates electricity that is fed into a network |
| <input type="checkbox"/> Electricity trader | <input type="checkbox"/> Person who purchases electricity from a clearing manager |
| | <input type="checkbox"/> Other (please specify) |

5. Business name or organisation (if applicable)**6. Position title (if applicable)**

*** 7. Important information about your submission (important to read)**

The information provided in submissions will be used to inform the Ministry of Business, Innovation and Employment's (MBIE's) work on the *Electricity Compliance Framework*.

We will upload the submissions we receive and publish them on our website. If your submission contains any sensitive information that you do not want published, please indicate this in your submission.

The Privacy Act 1993 applies to submissions. Any personal information you supply to MBIE in the course of making a submission will only be known by the team working on the *Electricity Compliance Framework*.

Submissions may be requested under the Official Information Act 1982. Submissions provided in confidence can usually be withheld. MBIE will consult with submitters when responding to requests under the Official Information Act 1982.

We intend to upload submissions to our website at www.mbie.govt.nz. Can we include your submission on the website?

Yes

No

*** 8. Can we include your name?**

Yes

No

*** 9. Can we include your organisation (if submitting on behalf of an organisation)?**

Yes

No

10. All other personal information will not be proactively released, although it may need to be released if required under the Official Information Act.

Please indicate if there is any other information you would like withheld.

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Compliance Framework: Electricity - Have your say

Areas you wish to provide feedback on

The ***Compliance Framework: Electricity*** discussion document seeks feedback on the Electricity Compliance Framework. The document is divided into five sections:

- Introduction
- Institutional Structure
- Amendments to the Act
- Amendments to the Regulations
- Any other issues

You are invited to provide feedback and respond to questions in as many, or as few of the sections as you would like, depending on your interests.

Submissions on these proposed amendments are sought **by 5pm on Friday 23 April 2021**.

Institutional Structure

Options and impacts

Should the rule-making and enforcement functions of the Authority be split?

Vector generally believes that, in the interest of transparency and independence, the rule-making and enforcement functions of any regulatory body should be separate and distinct. In the case of the Electricity Authority, however, we agree with MBIE that the costs of doing so are likely to outweigh any benefits.

We do, however, support the suggestion that alternative administrative arrangements that would promote independence in decision making be considered, particularly when the Authority is a party to a Rulings Panel proceeding. We suggest that MBIE conduct a cost-benefit analysis to inform the consideration of any potential options.

Are there any examples of problematic ‘blurring of functions’ by the Authority in its decision making?

1

We consider there may be potential for this to occur, for example, in Undesirable Trading Situations and in other situations where the Authority has created template documents that an industry participant is required to adopt and implement (such as the Consumer Care Guidelines or the Default Distributor Agreement). Any disagreement in the interpretation of the template terms and/or ‘rules’ may create a perception that the Rulings Panel is more likely to favour the Authority’s interpretation of the terms or rules rather than the interpretation of the retailer or distributor, as the case may be.

Is there a case for a separate agency approving and publicising settlements?

We have no particular view on this matter. We believe the current process for approving and publicising settlements generally works and is widely understood and accepted by industry participants.

Do the Regulations provide sufficient transparency and definitive guidance for industry through the requirements to publicise approved settlements and decisions by the Authority?

2

Vector does not have a strong view on this matter. We consider that the Electricity Industry (Enforcement) Regulations 2010 (the Regulations) provide sufficient transparency and guidance to industry participants, in principle.

If not, what additional measures would you suggest and why?

Should the Authority continue to be responsible for administrative arrangements for the Panel?

- 3 *As indicated in our response to Question 1, we believe that separating the administrative functions of the Rulings Panel would achieve a degree of independence, in principle. However, as further indicated in the same response, we suggest that any proposed changes to administrative arrangements relating to the Rulings Panel be subject to a cost-benefit analysis.*

Amendments to the Act

Limits on liability

Should the maximum penalty set out in s 54 of the Act be increased, or are current penalty levels adequate to deter harmful behaviour?

Vector considers an increase in the penalty set out in s 54 of the Electricity Industry Act 2010 (the Act) to be a necessary and appropriate deterrent in certain instances. For example, this could be appropriate in Undesirable Trading Situations where, as the consultation paper points out, the current \$200,000 penalty may not be a meaningful deterrent to a breach where the benefit to the party in breach is disproportionately higher than the value of the penalty.

However, the increased penalty would be unduly punitive in other situations, for example, if an audit related compliance breach was to be determined by the Rulings Panel. We would therefore support the introduction of a materiality threshold that considers the impact to customers and/or other industry participants and a sliding penalty scale based on market impact.

4

Should additional penalties for a continuing breach be introduced?

Yes, we support additional penalties for a continuing breach, subject to a materiality threshold. While this proposal makes sense for some wilful act that is causing harm to industry participants and the market, it may not be appropriate for low-level breaches (for example, in the evolving smart metering space) where quite technical points take a while to resolve.

Are there alternative approaches to penalties which you would recommend?

As noted above, we recommend the introduction of a materiality threshold if the maximum penalty is increased to \$2million. Whilst we expect that the Rulings Panel would apply this implicitly, we think express guidance on this via the Code would promote transparency and remove any confusion.

5 If either or both of the above changes are introduced, should any changes be made to the limits to liability set out in the Regulations?

Vector agrees with MBIE's view that the limits to liability set out in the Regulations should remain at their current level.

How should closely related events be dealt with for breach and penalty purposes?

Should the Act clarify that "a series of closely related events" would be treated as a single breach?

6 *Yes, Vector believes this should be clearly stated. A single breach in the smart metering space can result in multiple clauses of the Code being breached, and the Act should clearly specify that this ought to be treated as a single breach. For example, in a single ongoing metering breach (e.g. relating to metering certification), it can take time to resolve an issue for batches of meters – this also is a series of closely related events that should be treated as a single (ongoing) breach.*

Awarding of costs

Should s 54 of the Act be amended to allow the Panel greater discretion to award costs?

7 *Yes, Vector agrees in principle that the Act be amended to allow the Rulings Panel greater discretion to award costs.*

Amendments to the Regulations

Options and Impacts

Should participants be able to lay complaints directly with the Panel if the Authority, after making preliminary inquiries, decides not to investigate an alleged breach?

8 *Vector believes that participants should be able to lay complaints directly with the Rulings Panel if the Authority, after making preliminary inquiries, decides not to investigate an alleged breach. This should, however, be subject to a materiality threshold, to avoid an alleged breach being progressed where its impact on other participants and the market is clearly immaterial.*

Do mandatory attempts to settle create needless administrative burden and cost, and ongoing uncertainty?

9 *Yes, Vector considers that mandatory attempts to settle create needless administrative burden and cost, and ongoing uncertainty.*

Should the Regulations provide that an investigator "may", rather than "must", attempt to effect a settlement as part of the enforcement process?

Yes, Vector supports a change to “may” rather than “must” to remove the administrative burden and cost that a mandatory attempt to settle creates.

Does the Authority need more oversight and control of the enforcement of settlements?

Yes, Vector considers that the Authority needs more oversight and control of the enforcement of settlements.

Should a breach of a settlement be enforceable as though it were a breach of the Code?

10

Yes, Vector considers a settlement breach should amount to a breach of the Code. This would be an effective mechanism to ensure settlement outcomes are adhered to.

We also agree with MBIE’s view that bringing this within the jurisdiction of the Rulings Panel would allow for a more cost effective and accessible enforcement option than what is available through the Courts under current arrangements.

Does the requirement for the investigator to endeavour to reach a settlement within 30 working days (or longer period agreed in writing by the investigator) create incentives for efficient process, given that it is rarely completed within this time?

11

No, Vector does not believe this requirement creates incentives for an efficient process. In fact, it could put pressure on the investigator to reach a settlement prematurely, i.e. where the investigation is still incomplete or further enquiry could/should be made. Whilst we think a timeframe provides guidance and some certainty, it needs to be realistic and parties need to be clear on the point at which they may escalate the alleged claim to the Rulings Panel, i.e. when attempts to reach settlement have expired.

Should the requirement to endeavour to reach a settlement within 30 working days (or longer period agreed in writing by the investigator) in Regulations 22(2) and 23(1) be removed?

No, we believe this requirement should not be removed entirely but perhaps be increased to 45 working days or retain the 30-working day requirement with the ability for parties to agree a longer timeframe at the outset or part way through the investigation.

Are there circumstances where mandatory settlement is inappropriate?

Vector has no particular view on this question.

12

Should the Regulations be amended to provide that an investigator “may”, rather than “must”, attempt to effect a settlement as part of the enforcement process?

Yes, we agree that the Regulations be amended to provide that an investigator “may”, rather than “must”, attempt to affect a settlement as part of the enforcement process. Also see our response to Question 11.

13	<p>Should the Regulations expressly provide that the Authority can report a breach under Regulation 9?</p> <p><i>Yes, Vector supports in principle the Regulations expressly providing that the Authority can report a breach under Regulation 9 (Voluntary reporting of breaches).</i></p>
14	<p>Are the Authority's obligations in relation to the treatment of information sufficiently balanced?</p> <p>Should the 'must keep confidential' obligations in Regulations 10 and 15 expressly provide that information which is not confidential in nature may be published?</p> <p>Should the 'must publish' obligations in Regulations 28 and 30(3) expressly provide that where appropriate confidential information can be redacted from published reports?</p> <p><i>Vector has no particular views on the proposals in this section of the consultation paper and agrees in principle with MBIE's views and recommendations.</i></p>
15	<p>Should there be an express obligation on parties who receive confidential information during the investigation of a complaint or Panel process to hold that information in confidence?</p> <p><i>Yes, Vector agrees in principle that there should be an express obligation on parties who receive confidential information during the investigation of a complaint or Rulings Panel process to hold that information in confidence.</i></p>
16	<p>Is it inappropriate that enforcement of the mandatory reporting obligations in the Regulations are undertaken by the Courts?</p> <p><i>Vector agrees it is unlikely and inappropriate for the Courts to decide on the enforcement of mandatory reporting obligations in the Regulations. The penalties associated with these obligations are simply too low for this matter to ever be tested in Court.</i></p> <p>Should the Regulations be amended to allow enforcement by the Panel of the mandatory reporting obligations as though it were a breach of the Code?</p> <p><i>Yes, Vector agrees in principle with amendments to the Regulations allowing the Rulings Panel to enforce the mandatory reporting obligations as though it were a breach of the Code.</i></p>
17	<p>Have we correctly characterised the impact of the changes, in terms of additional compliance costs?</p> <p><i>Yes, Vector believes the impact of the changes in terms of additional compliance costs have been correctly characterised, in general.</i></p>

Any other issues

18	<p>Are there any other issues that we need to consider in relation to the compliance framework for the electricity industry?</p>
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Investigation delays

Vector suggests that MBIE recommend, as part of this review, that a decision on any investigation by the Authority of an alleged Code breach be made within a reasonable timeframe. It has been our experience that an investigation could still be ongoing almost a year following its commencement, without any certainty around the timing of when a decision will be issued, or regular updates from the investigator around timeframes.

Delays in Code breach investigations create uncertainty that could have significant implications for the relevant participants' pending applications for exemption from certain Code provisions, or the actions they intend to undertake in response to various audit recommendations. This could, in turn, potentially have a significant impact on their customers. This lack of certainty could place a participant 'between a rock and a hard place' on how to proceed to address ongoing issues, pending a decision, and make cost-effective operational plans and decisions.

To help further ensure the timeliness of Code breach investigation decisions, we suggest that the Authority be required to ensure its investigators have a good understanding of the Code. This would enable the investigator and the relevant participant(s) to reach a shared understanding of the circumstances of a breach more efficiently (e.g. participants can avoid spending an inordinate amount of time describing/explaining in various ways or multiple times aspects of the breach, or why a self-reported breach is a breach of the Code). This would help avoid lengthy investigation timeframes and reduce the regulatory burden on both parties.

Complexity of some Code provisions

There are processes in the Code that are incredibly complex, making it challenging to ensure compliance, particularly where reliance on third parties for information is required.

Vector supports any further development by the Authority of guidelines and practice notes, in conjunction with industry participants, to help the latter better understand new/amended Code requirements (or even before a Code change is contemplated) and what compliance could look like in practice.

Notification of Code change commencement dates

Vector proposes that the Authority be required to provide a reasonable amount of time between its last notice/reminder to industry participants prior to the 'go live' date of any Code change. This is particularly important where a Code change requires changes to participants' systems and processes that are likely to have a significant impact on customers. Major Code changes take time to 'bed in' and enable participants to fully comply with the new requirements. For example, we do not consider a six-week notice (including the Christmas period) for a major Code change (that requires, for example, a transition period of six months) to be reasonable.

Where Code changes require massive amounts of resources to be mobilised or (re)allocated, we suggest that the Authority err on the side of over-communicating. This also applies where the development of a Code change has been going on for a lengthy period (e.g. at least two years) within which significant market and technological developments may have occurred – something that is not unreasonable to assume in the rapidly evolving electricity sector. A series

of face-to-face and/or virtual forums with participants leading to the 'go live' date would also help avoid any 'surprises'.