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# BILLS DIGEST

Digest No. 1733

## Electricity Industry Bill 2009

<b>Date of Introduction:</b>	10 December 2009
<b>Portfolio:</b>	Energy
<b>Select Committee:</b>	As at 14 December, 1st Reading not held.
<b>Published: 15 December 2009</b> Prepared by <b>John McSoriley</b> BA LL.B, Barrister  Legislative Analyst  P: (04) 471-9626 (Ext. 9626)  F: (04) 471-1250	Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status.  Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

## Purpose

The aim of the Bill is to replace Subpart 2 of Part 14 and Part 15 of the Electricity Act 1992 and the Electricity Industry Reform Act 1998 and to make minor amendments to Part 4 of the Commerce Act 1986 and consequential amendments to the Gas Act 1992 and other Acts to

- reform the governance arrangements for the electricity industry;
- provide for specific regulatory changes to be made;
- change the overall structure of the sector.

"The Bill also undertakes a general tidy-up and consolidation of provisions relating to the electricity industry"<sup>1</sup>.

<sup>1</sup> Electricity Industry Bill, 2009 No 111-1, Explanatory note, General policy statement, Overview, p. 1.

## Background

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### Ministerial Review of the Electricity Market

in April 2009 the Minister of Energy and Resources set up a Ministerial Review of the Electricity Market. The Review was undertaken by an Electricity Technical Advisory Group and officials.

The " ... Review concluded in brief, that:

- "although a large part of the increase in electricity prices over the last decade is justified, prices to some customer groups (especially residential consumers) have risen faster than justified by underlying increases in generation costs";
- "retail margins for residential consumers are high and increasing and competition is weak outside the main centres, particularly in the South Island";
- "some generators have market power in dry (low hydro inflow) years";
- "although enough new generation is being built, dry years could be better managed";
- "current governance arrangements are unsatisfactory and should be improved".<sup>2</sup>

### The Government's decisions

The Review made a wide range of recommendations to address these issues. The Government considered these recommendations and announced decisions on reforming the electricity industry in December 2009.

This Bill implements those parts of the Government's decisions which require legislation. It is intended to come into effect on 1 October 2010<sup>3</sup>.

The major decisions were set out in a recent media statement<sup>4</sup> issued by the Minister of Energy and Resources, Hon Gerry Brownlee which detailed the following "key initiatives in the Electricity Industry Bill to beef up competition". The "key initiatives" included:

- Transferring Tekapo A and B power stations from Meridian Energy to Genesis Energy, and transferring the government-owned Whirinaki to Meridian Energy;
- Meridian, Genesis and Mighty River Power undertaking "virtual asset swaps" through a 15 year contract, ensuring the ability of each company to provide increased competition in the island where they currently have little to no generation capacity;
- Requiring all major electricity generators to put in place an accessible electricity hedge market;
- Allowing lines companies back into electricity retailing, subject to strict controls;
- Establishing a \$15 million fund over three years to promote customer switching between retailers.
- Requiring generators/retailers to compensate consumers in the event of conservation campaigns or a dry-year power cut;
- Abolishing the reserve energy scheme; and

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<sup>2</sup> Electricity Industry Bill, 2009 No 111-1, Explanatory note, General policy statement, Background, p. 2.

<sup>3</sup> Ibid.

<sup>4</sup> Media Statement, Hon Gerry Brownlee, *Energy sector transformation to benefit consumers*, 9 December, 2009.

- Increasing the attractiveness of gas exploration and development.

The media statement also detailed "Initiatives to ensure effective governance" as follows:

- Abolishing the Electricity Commission and replacing it with a slimmed-down Electricity Authority, with far fewer objectives and functions than the current Commission;
- Establishing a Security and Reliability Council to monitor Transpower's performance and advise on security of supply; and
- Transferring responsibility for grid upgrade approvals to the Commerce Commission.

The Minister said that " ... the new Electricity Authority will have a clear mandate to get on with the job of ensuring the market runs efficiently". The Minister indicated that the Bill would be sent to the Finance and Expenditure Committee.

## Main Provisions

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### Electricity Authority

The Bill provides for the establishment of the Electricity Authority (the Authority) which is an independent Crown Entity for the purposes of Section 7(1) of the Crown Entities Act 2004. Independent Crown entities are generally independent of government policy and are named in Part 3 of Schedule 1 of that Act. The Authority would have between 5 and 7 members. Under Section 28(1) of that Act, appointment of members of independent Crown entities are made by the Governor-General, on the recommendation of the responsible Minister. The Bill provides that when recommending a person for membership of the Authority, the Minister must have regard to the need to ensure that the Authority has amongst its members knowledge and experience of, and capability in, the electricity industry, consumer issues; and business generally. The Minister may not recommend a person for membership of the Authority unless he or she has first publicised an invitation from interested parties and considered any nominations received. A member of the Authority is required to act independently of any organisation to which the member belongs or of any particular industry participant or group of industry participants.

The objective of the Authority is to promote competition in the electricity industry, a reliable supply of electricity, and the efficient operation of that industry for the long term benefit of consumers.

The functions of the Authority are as follows:

- to maintain a register of industry participants (*cf. Part 2, Subpart 2*), and to exempt industry participants from the obligation to be registered;
- to make and administer the Electricity Industry Participation Code (*Part 2, Subpart 3*);
- to monitor compliance by industry participants with the Code (*Part 2, Subpart 4*);
- to investigate, and take enforcement action in respect of, breaches and possible breaches of the Code by industry participants (*Part 2, Subpart 4*);
- to monitor and enforce compliance with the Act and regulations generally (*Part 2, Clause 21*);
- to undertake market-facilitation measures (such as providing education, guidelines, information, and model arrangements), and monitoring the operation and effectiveness of market facilitation measures (*Part 2, Clause 21*);
- to undertake industry monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry (*Part 2, Clause 21*);

- to contract for market operation services (but the Authority itself may carry out the functions of market administrator and, on a temporary basis, other market operation services);
- to contract for system operator services;
- to promote to consumers the benefits of comparing and switching retailers;
- to perform any other specific functions imposed on it under this Bill or any other Act.

The Bill provides that the Authority must have regard to statements of Government policy concerning the electricity industry (*Part 2, Subpart 1, Clauses 14-21*).

### Security and Reliability Council, other advisory groups and the Rulings Panel

The Bill provides that the Authority must establish a Security and Reliability Council (the Council). The functions of the Council are to advise the Authority on the performance of the electricity system and the system operator and on reliability of supply issues. The Authority must establish one or more other advisory groups to provide advice to the Authority on the development of the Electricity Participation Code (the Code - see below) and on market facilitation. The Bill continues the Rulings Panel currently established by the Electricity Governance Regulations 2003. (*Part 2, Subpart 1, Clauses 22-29*).

### Participants and Registration

The Bill lists the industry participants which include generators, distributors, retailers and service providers as well as Transpower. The basic obligations of every industry participant are to register with the Authority and to comply with the Code (unless exempted) (*Part 2, Subpart 1, Clauses 9-13; Subpart 2, Clauses 30-34*).

### Electricity Industry Participation Code

The Bill provides for the Code which may contain any provisions necessary or desirable to promote any and all of the following, consistent with the objective of the Authority:

- competition in the electricity industry;
- the reliable supply of electricity to consumers;
- the efficient operation of the electricity industry;
- the performance by the Authority of its functions;
- any other matter specifically referred to in this Bill as a matter for inclusion in the Code.

The Bill also provides that the Code may not:

- impose obligations on any person other than an industry participant or a person acting on behalf of an industry participant; or
- purport to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986; or
- purport to regulate any matter dealt with in or under the Electricity Act 1992.

The Code may incorporate by reference any of the following:

- New Zealand standards, or standards, requirements, or recommended practices of any overseas or international body;

- codes of practice issued under Part 4 of the Electricity Act 1992;
- any other written material dealing with technical matters that, in the opinion of the Authority is too long to publish as part of the Code or it is impracticable to publish as part of the Code.

The initial Code is a consolidation of existing rules and regulations. The Code is a regulation for the purposes of the Regulations (Disallowance) Act 1989 (i.e. is scrutinised by Parliament and may be disallowed by Parliament) but is not a regulation for the purposes of the Acts and Regulations Publications Act 1989 (i.e. it is not published in the regulations series). The Code is subordinate to any other enactment and if any provision of the Code conflicts with this Bill or any Act, or with any regulation made under this Bill or any other Act, the Bill, the Act or the regulation prevails. The Bill sets out the process for amending the Code by addition, omission or replacement and prescribes detailed consultation provisions which must be complied with before such amendment. The Bill also carries forward section 172KA of the Electricity Act 1992, which allowed Electricity Governance Rules to require Transpower to enter into transmission agreements relating to the national grid (*Part 2, Subpart 3, Clauses 35-47*).

### Monitoring and enforcing Code

The Bill provides for the enforcement by the Authority of the Code including the ability to apply for interim injunctions against an industry participant in relation to a breach of the Code and the power to obtain information from participants, permit their officers and employees to be interviewed, allow access to premises, and provide all other assistance to enable the Authority to carry out its functions and exercise its powers (*Part 2, Subpart 4, Clauses 48-54*).

### Rulings Panel's powers and procedures and appeals

The Bill provides for the Rulings Panel to hear complaints concerning breaches by industry participants of the Code and regulations. It has remedial powers including the power to order payment of a pecuniary penalty of up to \$2 million, to make compliance and compensation orders, and to terminate rights to bid or offer under the Code. These are the same remedial powers as it currently has and they will continue to be subject to limitations set out in the regulations. The procedures of the Rulings Panel are, and will continue to be, set out in regulations. A right of appeal on questions of law and certain defined issues (such as the amount ordered by the Rulings panel under a pecuniary penalty order) lies to the High Court with a right of further appeal to the Court of Appeal. Judicial review actions are not precluded (*Part 2, Subpart 4, Clauses 55-73*).

### Separation of distribution from certain generation and retailing

The Bill provides for separation rules principally as follows:

- ownership separation rules if a person is involved both in a distributor and in a generator with more than 100 MW of generation connected to the national grid;
- corporate separation and arm's-length rules if a person is involved both in a distributor and in either or both of: a generator that generates more than 10 MW of generation connected to the distributor's network; a retailer that retails more than 5 Giga Watt hours per year to customers connected to the distributor's network;
- use-of-systems agreement rules if a connected retailer retails more than 5 Giga Watt hours per year to customers connected to the distributor's network;
- rules preventing persons involved in distributors from paying retailers in respect of the transfer of the retailer's customers;
- no-discrimination rules that apply when distributors, and electricity trusts or customer co-operatives that own them, pay dividends or rebates (*Part 3, Subpart 1, Clauses 74-81*).

The Bill provides specifically for enforcement of these rules. The main features are as follows:

- various remedies are available from the High Court. These are pecuniary penalties, injunctions, damages, and other orders. These remedies are carried forward from the Electricity Industry Reform Act 1998;
- Penalties may be ordered by the High Court ( for a corporate body, the maximum penalty would be the greater of \$10 million or three times the value of any commercial gain or ten percent of the turnover);
- appeals against High Court decisions can be made in accordance with the general rules in the Judicature Act 1908 about appeals to the Court of Appeal;

The Commerce Act 1986 applies with modification to enforcement powers (*Part 3, Subpart 2, Clauses 82-96*).

### Industry participants and consumers

The Bill provides for dispute resolution schemes for consumers and others. Transpower and every distributor and retailer must be a member of the scheme. The scheme is either an approved scheme (designed and established to deal with both electricity and gas) or the regulated scheme (*Part 4, Subpart 1, Clauses 97-100*).

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