

# New Zealand Law Society

## Submission on Electricity Industry Bill

### Introduction

- 1 The Society raises only a few issues in relation to this Bill. An issue that arises in several places is a lack of objectives or criteria to guide what are otherwise unfettered discretionary powers. The Society recommends that this be addressed wherever it arises.

### Clause 4: Purpose

- 2 This purpose statement does not add anything to the interpretation or understanding of the Bill, and could be deleted.

### Clause 6: Definitions of industry service providers identified in section 9

- 3 The definition of “load aggregator” could be simplified slightly by removing the words “to balance supply”, without any loss of clarity.

### Clause 12: Exemption from obligation to register

- 4 Clause 12 provides the Minister and the Authority with the power to exempt an industry participant from the obligation to register in clause 11. No objective or criteria is specified in the legislation to guide this power, and as provided it is unfettered.
- 5 As a general principle, legislation should not grant unfettered discretionary power. The Society believes that objectives or criteria should be provided to guide the decision making by the Minister or the Authority.

### Clause 13: Exemption from obligation to comply with Code

- 6 Clause 12 provides the Minister and the Authority with the power to exempt an industry participant from the obligation to comply with the Code. No objective or

criteria is specified in the legislation to guide this power, and as provided it is unfettered.

- 7 As a general principle, legislation should not grant unfettered discretionary power. The Society believes that objectives or criteria should be provided to guide the decision making by the Minister or the Authority.

**Clause 16: Independence of members**

- 8 As currently drafted, clause 16(1) implies that a member of the Authority, when acting as a member, may promote the interests of an organisation to which the member does not belong.

- 9 This gap can be addressed by redrafting clause 16(1) as follows:

No member of the Authority, when acting as a member, may represent, or promote the interests or views of, any particular organisation, or any particular industry participant or group of industry participants.

**Clause 57: Restrictions on remedies**

- 10 Clause 57(4) could be usefully clarified to state that it does not detract from clause 57(3) (assuming that is the intent).

**Clause 73: Judicial review not precluded**

- 11 This clause is not needed, and by reference to the general principle that legislation should only include what is necessary, it could be deleted.

**Clause 79: Use-of-systems agreements**

- 12 Clause 79(1)(b) requires the relevant directors to ensure that the terms of the use-of-system agreement between the distribution business and the connected retailer or connected generator do not discriminate in favour of one business and do not contain arrangements that include elements that the business usually omits, or omits elements that the business usually includes, in use-of-system agreements with arms length parties.

- 13 The boundaries of this prohibition are unclear, and yet the penalties for non-compliance can be severe (see clauses 79(4) and 82). The concept of “discrimination” is essentially an empty one, until the grounds of prohibited discrimination are specified. For example, the Human Rights Act 1993 specifies some grounds of prohibited discrimination (race, gender) and not others (eg hair colour).
- 14 In the current context, simply using the term discrimination without specifying the grounds of prohibited discrimination risks leaving directors uncertain as to when they can have regard to differences between generators or retailers, and the magnitude of different treatment that is permissible. This has the potential to create uncertainty and exposure for directors (the penalty in clause 79(4) is a maximum fine of \$200,000) and a reduction in the appetite to explore new contractual arrangements.
- 15 This uncertainty could be addressed by either:
- 15.1 deleting the reference to discrimination and relying on the prohibition of terms that would not be found in an arms length agreement (which gets to the heart of the matter); or
  - 15.2 including greater specificity as to the prohibited grounds of discrimination and the degree of differentiation that will be permissible.

#### **Clause 98: Membership of dispute resolution scheme**

- 16 Clause 98 provides the Minister with the power to exempt a person from the obligation to join a dispute resolution scheme. No objective or criteria is specified in the legislation to guide this power, and as provided it is unfettered.
- 17 As a general principle, legislation should not grant unfettered discretionary power. The Society believes that objectives or criteria should be provided to guide the decision making by the Minister or the Authority.

#### **Clause 107: Continuance of distributor’s supply obligation**

- 18 Clause 107(1) identifies the distributors that are subject to s107. As drafted, to identify that group of distributors, the reader of the legislation needs to go back to s62 of the Electricity Act 1992, which will have been repealed by this Bill.

- 19 In the interests of making this Bill as accessible and user friendly as possible, clause 107(1) could instead define or identify directly the distributors to whom the section will apply.

**Clause 112: Regulations relating to charges for line function services**

- 20 The Explanatory Note suggests that this delegated power to the Minister to make regulations is intended to address fairness concerns. However, as drafted, this power is a broad price control power that could be used to set the price of line function services to all domestic premises, and rural consumers.
- 21 The contrast here is with Part 4 of the Commerce Act 1986, which introduces a comprehensive price control regime (applying to electricity line services supplied to all consumers, among other services) which includes:
- 21.1 a clear economic framework for arriving at appropriate pricing, including statutory standards against which pricing decisions can be assessed;
  - 21.2 delegation of the role of price setting to the Commerce Commission, an independent and expert regulator;
  - 21.3 a requirement that before prices are set a rigorous process is completed to produce detailed input methodologies that give market participants a high degree of certainty as to future pricing outcomes, and therefore greater certainty to make investment and other business decisions; and
  - 21.4 limited rights of merits review.
- 22 The Society does not comment on choices of policy, but the unfettered power in clause 112 to regulate price does raise issues of institutional design and minimum standards of legality. In this context we only observe:
- 22.1 the clause 112 power has the potential to cut across price control decisions made by the Commerce Commission under Part 4 of the Commerce Act 1986 (notwithstanding clause 115, which does not answer the question as to how a distribution business should respond to a situation where it faces two, different price caps);
  - 22.2 as currently drafted, the clause 112 power is not limited to matters of “fairness” as indicated in the explanatory note, and in fact is unfettered; and
  - 22.3 to the extent that Parliament has recently determined that matters of price control require the level of independence and expertise established in Part 4

of the Commerce Act 1986, then this unfettered political power is a significant departure from that standard.

**Clause 117: Class exemptions relating to sections 11 and 12**

**Clause 118: Class exemption relating to section 98**

23 As discussed above in context of clauses 12, 13 and 98 these regulatory powers to grant exemptions from the obligation to register or comply with the code, would benefit from some objectives or criteria to guide the discretionary power.

**Clause 126: Levies**

24 Clause 126(3)(c) delegates to the Minister the power to allocate a portion of the costs of the Energy Efficiency and Conservation Authority to the electricity industry participants to pay pursuant to a levy. This power must be exercised after consultation, but no objectives or criteria are specified. Again, this unfettered discretion would benefit from specifying objectives or criteria.

25 The Society wishes to be heard.

John Marshall QC  
President  
23.3.10