

20 October 2023

To: Consumer Advocacy Council (Deborah Hart, Chair)

From: Government, Competition, and Regulation Team

Subject: Consumer Care Guidelines Consultation | Implications of s 15(2) of the Electricity Industry Act 2010

Introduction

1. The Electricity Authority ("**EA**") is currently consulting on options to update the Consumer Care Guidelines ("**Guidelines**"),¹ through a consultation paper dated 4 September 2023 ("**Consultation Paper**").²
2. You have asked our opinion on whether the EA has applied the correct legal test in the Consultation Paper in light of the Electricity Industry Act 2010 ("**Act**"), as amended by the Electricity Industry Amendment Act 2022 ("**Amendment Act**"). In particular, the Amendment Act gave the EA an additional statutory objective to "protect the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers."³

Context and legislative history

3. In 2019 the Electricity Price Review ("**EPR**") was published which found, among other things, that clarification was needed in respect of the EA's ability to protect the interests of household and small business consumers in light of its then statutory purpose.⁴ The clarification was seen as necessary as a number of participants to the EPR noted that it was ambiguous as to whether such interests could be protected under the former statutory test.⁵ At that stage the EPR recommended introducing an explicit consumer protection function.⁶
4. In response to the findings of the EPR, Parliament amended the Act in 2022 to include an additional statutory objective (the "**additional objective**"⁷) and function, which requires the

¹ Electricity Authority, Consumer care guidelines, effective from 1 July 2021 ("**Guidelines**").

² Electricity Authority, Options to update and strengthen the Consumer Care Guidelines, Consultation paper, 4 September 2023 ("**Consultation Paper**").

³ Electricity Industry Act 2010, s 15(2).

⁴ Electricity Price Review, Final Report, 21 May 2019 at 59 ("**EPR**"); Electricity Industry Act 2010 s 15.

⁵ See, for example EPR, at 59.

⁶ EPR at 59.

⁷ Two new objectives were added, but we are principally concerned with additional objective in s 15(2) of the Electricity Act 2010, as s 15(3) is a guide to what s 15(2) applies to.

EA to protect⁸ the interests of domestic consumers⁹ and small business consumers¹⁰ in relation to the supply of electricity to those consumers, and to undertake measures to do so.¹¹

5. This new statutory objective for the EA is set out in section 15 of the Act, and provides as follows:

- (1) The main objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.
- (2) The additional objective of the Authority is to protect the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers.
- (3) The additional objective applies only to the Authority's activities in relation to the dealings of industry participants with domestic consumers and small business consumers.

6. The Explanatory note to the Bill when introduced noted that the additional objective was introduced to *remove uncertainty* (emphasis added) where:¹²

protecting small consumers in their dealings with industry participants may not necessarily be consistent with the Authority's objective of promoting competition in, and reliable supply by, or efficient operation of the industry.

7. The additional objective was intended to be a "relevant consideration" in relation to industry participants' dealings with small consumers.¹³ To that end, s 15(3) provides that the additional objective *only* applies to the EA's activities in relation to the dealings of industry participants with domestic consumers and small business consumers.¹⁴

8. This has clarified that the EA in the exercise of its functions has the objective of protecting domestic and small business consumers when carrying out activities in relation to the dealings of industry participants with those consumers. In this limited context the EA may act to protect consumers and small businesses, even when this might be considered to be inconsistent with its main (and historic) objective. The EA is therefore clearly acting consistently with its statutory objectives in promulgating and consulting on Guidelines directed at consumer care, whether these be voluntary or mandatory in nature.

⁸ Electricity Industry Act 2010, s 15(2)-(3). As amended by the Electricity Industry Amendment Act 2010.

⁹ **Domestic consumer** is defined in Electricity Industry Act, s 5 as "means a person who purchases or uses electricity in respect of domestic premises".

¹⁰ **Small business consumer** is defined in the Electricity Industry Act, s 5 as "means a consumers that is not a domestic consumers and (a) that is in class specified in regulations made under section 133A; or (b) if no such regulations have been made, that consumes less than 40MWh of electricity per year". Currently no regulations have been made under section 113A.

¹¹ Electricity Industry Act 2010, s 16(1)(ia). As amended by the Electricity Industry Amendment Act 2010.

¹² Electricity Industry Amendment Bill (63-1), Explanatory Note, Part 1.

¹³ Electricity Industry Amendment Bill (63-1), Explanatory Note, Part 1; Electricity Industry Act 2010, s 15(3).

¹⁴ Electricity Industry Act 2010, s 15(3).

9. The legislative history and statutory provisions themselves do not, however, suggest that the additional objective was designed to supplant the EA's role in promoting competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers. Nor is the additional objective intended to be an absolute. The EA is not *required* to act inconsistently with its main objective. As an expert body, the EA will ultimately need to draw the boundaries, or limits, of consumer protection in the substantive content of any final Guidelines, and in any associated amendments to the Electricity Industry Participation Code,¹⁵ taking into account its main and additional objectives.¹⁶

Consultation Paper

10. The current Guidelines first came into effect from 1 July 2021, and are currently voluntary. Following a review of retailers' self-assessed alignment with the Guidelines, the EA decided to consult on work to update and strengthen the Guidelines.¹⁷ The EA considered that some of the reasons for originally giving the Guidelines voluntary status no longer stand, including because the EA now has the additional objective and function.¹⁸
11. The Consultation Paper seeks to address any issues with the current Guidelines, and presents four options for advancing the Guidelines.¹⁹ These options include maintaining the status quo; keeping the Guidelines voluntary but clarifying certain interpretation issues; and codifying different parts of the Guidelines.²⁰
12. The EA acknowledges that the scope of the Consultation Paper is limited to the current content of the Guidelines, and that it will carry out further consultation on other issues in mid-2024, including on minimum standards for small business consumers.²¹
13. The Consultation Paper notes that its "policy objective is to deliver on the purpose and intended outcomes of the Guidelines."²² In this context, paragraph 4.3 of the Consultation Paper notes that:²³

The Guidelines' intended outcomes aim to balance domestic consumer and retailer interests. This acknowledges that while retailers should seek to keep

¹⁵ Electricity Industry Act 2010, s 32, which was amended by the Electricity Industry Amendment Act 2022 to "remove ambiguity in the Authority's ability to amend the Code for the purpose of protecting domestic and small business consumers", Electricity Industry Amendment Bill (63-1), Explanatory Note. As a result, the Code may contain provisions that are consistent with the objectives of the Authority and are necessary or desirable to promote any or all of the following: [...] the protection of the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers under s 32(1)(d) of the Electricity Industry Act 2010.

¹⁶ *Unison Networks Limited v Commerce Commission* [2007] NZSC 4, [2008] 1 NZLR 42 at [55]; Electricity Industry Act 2010, s 13. See also comments in *Major Electricity Users' Group Inc v Electricity Commission* [2008] NZCA 536 at [56] and in *New Era Energy Inc v Electricity Commission* [2010] NZRA 63 HC at [68] regarding the Authority's "expert" and "specialist" nature. See also *Unison Networks Limited v Commerce Commission* [2007] NZSC 4, [2008] 1 NZLR 42 at [53] citing *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, at p 1030 per Lord Reid, and at [55] regarding the exercise of the expert body's powers.

¹⁷ Consultation Paper at 2.

¹⁸ Consultation Paper at 2.

¹⁹ Consultation Paper at 2.

²⁰ Consultation paper at 3.

²¹ Consultation Paper at 2, [5.2(a)], [5.4].

²² Consultation Paper, at [4]: "Policy Objective".

²³ Electricity Authority, Options to update and strengthen the Consumer Care Guidelines, Consultation paper, 4 September 2023, at [4.3].

customers connected and provide help, they also have a right to be paid for electricity supplied.

14. We are not entirely sure what the EA means in the first sentence of this paragraph. However, on its face, the first sentence seems to mis-state the statutory test that should guide the EA in the policy objective and the Guidelines, and the substantive content of the Guidelines themselves. If the first sentence means that, as a starting point, the objective of the Guidelines is some kind of "balancing exercise" between retailer and consumer interests, this is in our view inconsistent with the new approach required by s 15(2). Paragraph 4.3 therefore, on its face, reflects an unduly constrained approach taken in the Consultation Paper. This includes a consultation process limited to the current content of the Guidelines.
15. We consider it would have been open to the EA, in light of the additional objective, to have revised the Guidelines, or that have suggested certain amendments to the Guidelines, before commencing the consultation process. For example, instead of (apparently) using the balancing of small consumer and retailers interests as the starting point for the Guidelines, it could have been open to the EA to start from the perspective of protecting domestic and small business consumers as permitted by the additional objective.

The two objectives

16. We note the EA's position in the Consultation Paper that:²⁴

The interaction between these two objectives, including the effect of any potential conflicts that may arise between the main and additional objectives, has not yet been formally tested. However, the Authority's current view is that, given the content of the Guidelines, these fall squarely within the additional objective, and they are also consistent with the main objective.

17. This opinion does not address the interaction between the two objectives, which as the EA acknowledges, is untested. In light of this, we consider it is open to the Consumer Advocacy Council to contend that, as proposed at 15 above, the EA ought to have consulted on a revised version of the Guidelines, as opposed to the approach taken by the Consultation Paper (which focuses on the current content of the Guidelines) and that the substantive content of the Guidelines could have been different in some areas.

Conclusion

18. The additional objective applies to the EA's activities in relation to the dealings of industry participants with domestic consumers and small business consumers in relation to the supply of electricity to those consumers. The additional objective clarifies that the EA can take steps to protect domestic consumers and small business consumers in circumstances where the EA would otherwise risk compromising, or inconsistency with, its main objective.

²⁴ Electricity Authority, Options to update and strengthen the Consumer Care Guidelines, Consultation paper, 4 September 2023, at [4.13].

19. Where, as in aspects of the Consultation Paper, the EA appears to start from the basis of balancing domestic consumers²⁵ and retailer interests, the EA could be suggested to have:
- (a) failed to fully take into account its additional objective;
 - (b) from a process point of view, taken an unduly narrow approach to the consultation process in not consulting on a new or revised set of Guidelines; and
 - (c) not taken the opportunity provided by the consultation process (and ultimately the re-drafting of the Guidelines) to advance protective measures in the interests of domestic consumers (and small business consumers).

²⁵ Reflecting that, at this stage, the Guidelines only apply to domestic consumers and do not include small business consumers.