

15 March 2009

The Chair
Finance and Expenditure Committee
Parliament Buildings
P O Box 18041
Wellington 6160

ELECTRICITY INDUSTRY BILL

- 1 This submission is made by the Legislation Advisory Committee (LAC).
- 2 The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
- 3 The terms of reference of the LAC include:
 - (a) to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues:
 - (b) to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

Introduction

- 4 In relation to this Bill, the LAC is mainly concerned that the legislation be clear and accessible, that where important new powers are conferred the criteria for their exercise be clearly spelled out, and that there be sufficient safeguards against the possible unreasonable exercise of such powers.

Exemptions

- 5 The Electricity Authority (EA) can exempt industry participants from some of the Bill's requirements (cls 12, 13, 92). Class exemptions can also be made by regulation or by the Minister (cls 12, 13, 98, 117, 118). The exemptions relate to registration, compliance with the Code, membership of the dispute resolution

process, and the separation of ownership and arms-length rules. These requirements form the core of the regulatory system established by the Bill.

- 6 Only one of the provisions (cl 92 relating to the separation of ownership and arms-length rules) sets out criteria as to when the exemption power may be exercised. The exemptions in cls 12 and 13 do not set out any process or timeframe for the granting or revocation of an exemption.
- 7 The LAC considers there is a strong case that the Bill should provide guidance as to when the other exemptions can be granted. Specifying criteria would make any decision-making process relating to exemptions more transparent and reduce the possibility of any appearance of unfairness as to the treatment of industry participants. Since industry participants are likely to actively seek exemptions it would also assist the EA in its task.
- 8 Further, since exemptions may be varied or revoked at any time, the inclusion of statutory criteria and a process which, as a minimum, sets out a notice period would provide protection to industry participants against exercises of the power that could have a substantial impact on their interests.
- 9 The LAC draws the Committee's attention to Chapter 8, Pt 4 of the LAC guidelines, relating to the creation of a public power. The guidelines state:

Clear policy decisions are critical to ensure that the power is stated clearly in the legislation. The legislation should state:

- What the power is.
- In what circumstances can it be exercised? (What judgments must be made before exercising the power? Is the exercise of the power discretionary or mandatory once the circumstances are established?)
- What matters should, may, or must not be considered?
- For what purposes may or must the power be exercised, and what purposes are improper?

Appeals

- 10 Clause 56 sets out the orders that can be made by the Rulings Panel. Clauses 64 to 73 relate to appeals from Panel decisions. At present, cl 65 provides for appeal to the High Court on a question of law only. Clause 66 qualifies this by providing for general appeals against suspension or termination orders, and appeals against the amount of pecuniary and compensation orders.
- 11 Chapter 13 of the LAC guidelines relate to appeals. The guidelines state:

It is generally desirable for legislation to provide a right of appeal against the decisions of officials, tribunals and other bodies that affect important rights, interests, or legitimate expectations of citizens ... Appeals serve a private and a public purpose. The private purpose is to scrutinise and correct specific decisions of first instance decision-makers ... The public purpose of appeals is to maintain a high standard of public administration and public confidence in the legal system.
- 12 The guidelines go on to note that, generally, the cost and delay of the appeal process will not be justified where the matter in issue is relatively unimportant or where there is an overwhelming need for finality. It is not clear to the LAC that these mitigating factors are present here.

- 13 The LAC suggests that it would be desirable for a general merits appeal against Panel decisions to be included in the Bill. As a minimum, the gravity of the orders contained in cl 56(1)(b) (power to issue a public warning or reprimand) and cl 56(1)(f) (compliance order) and their respective reputational and financial impacts on the industry participant warrant a full appeal to the High Court.

Criminal and civil penalties

- 14 The Bill's provisions are to be enforced by a combination of criminal and civil penalties. The relationship between the civil and criminal penalties contained in Part 3 of the Bill (relating to the promotion of competition and arms-length rules) is unclear. Breaches of cll 79–81 are punishable by criminal offences. In addition, breaches of any of the provisions of the Part are punishable by pecuniary penalty of up to \$500,000 (in the case of an individual) or \$10 million (in the case of a body corporate) (see cl 82). The LAC submits that there should be some further guidance in the Bill as to when one form of penalty is to be preferred over another.
- 15 In addition, the LAC considers that the level of pecuniary penalty that can be imposed by the Rulings Panel is of concern. Clause 56(1)(d) provides that the Panel can make a pecuniary penalty order for an amount up to \$2 million. Clause 58 sets out criteria relevant to the amount of the penalty that should be imposed, but there is no guidance as to when a pecuniary order should be made. As noted above, appeal against a pecuniary order is limited to quantum. The LAC submits that the Rulings Panel's decision-making would be assisted by inclusion in the Bill of guidance relating to the making of pecuniary orders.
- 16 The LAC wishes to inform the Committee that it believes it would be desirable to have a more principled framework for the use of civil penalties in general. They are a relatively new development, and have developed in an ad hoc fashion. The LAC has the development of guidelines on its agenda.

Transmission agreements

- 17 Clause 47 provides that the Code may require Transpower and one or more industry participants to enter into "transmission agreements". Transmission agreements are "binding on both parties and enforceable as if it were a contract between the parties that had been freely and voluntarily entered into". Since the agreements are imposed on parties, the terminology is, at best, unusual.
- 18 Also, the status and nature of the "agreements" is not clear. First, while they are imposed at the outset and their terms "may be prescribed in the Code" the provision also states that their terms may be "amended or replaced, but only by mutual consent of the parties".
- 19 Secondly, if parties do not comply with a requirement to enter into an agreement, the "terms prescribed in the Code are binding on both parties and enforceable as if they were a transmission agreement". It is not clear why an agreement would be imposed if parties are bound, nonetheless, by the Code.

- 20 The LAC submits, as a minimum, that the terminology should be amended. Use of the term “agreement” seems inappropriate given their apparent status, and could establish an undesirable precedent.

Asset reconfiguration

- 21 Clauses 123 to 125 appear under the heading “Miscellaneous”. Given the significance of these clauses, the LAC submits they should have a separate heading. Their full import may not be appreciated if they are hidden under a heading normally reserved for minor, residual matters.

- 22 Clause 124 confers a far-reaching power on the share-holding Ministers to issue directions to state-owned enterprises. Of particular concern are clauses 124(2)(b) and (c). The Minister may give:

“(b) a direction requiring the transfer of ownership (such as by way of sale and purchase agreement) from Meridian Energy Limited to Genesis Energy Limited of all assets and any rights and obligations relating to Tekapo A and Tekapo B generating stations:

(c) a direction requiring Meridian Energy Limited to purchase from the Crown all assets and any rights and obligations of the Crown relating to the Whirinaki generating station:”

- 23 This is in the nature of a property taking which could have a substantial effect on the financial position of the state enterprise in question, and one would have expected to find provisions ensuring that the monetary return is adequate. The LAC submits that, at the least, the Bill should make provision for settling a price in the event of the two entities being unable to reach agreement. Both Meridian and Genesis are state enterprises which, by virtue of the State-Owned Enterprises Act 1986 have as their principal objective:

“4(1) ... to operate as successful businesses and, to this end, to be—(a) As profitable and efficient as comparable businesses that are not owned by the Crown ...”

- 24 To be directed that such an enterprise must divest itself of a very substantial asset, with no provision for how compensation is to be assessed, is not obviously consistent with that objective.

- 25 It is not clear what the effect of complying with a direction might have on existing contracts or other legal obligations. Nor is it clear what effect complying with a direction might have on the rights of third parties. We suggest consideration be given to protecting Meridian Energy Limited against possible action for breach of contract or any other legal obligation and to ensuring that rights of third parties can be enforced against the transferee. There are examples in existing statutes which could be used to address these issues.

- 26 The LAC does not seek to be heard on this submission.