23 April 2021

Energy Markets Policy
Ministry of Business, Innovation & Employment
P O Box 1473
Wellington 6140

By email: energymarkets@mbie.govt.nz

Dear Energy Markets Policy team

Re: Consultation Paper – Compliance Framework: Electricity

Flick appreciates the opportunity to submit on MBIE's proposals to revise the compliance framework, as recommended by the Electricity Price Review.

We note that the Electricity Authority (Authority) is responsible for compliance with and investigating breaches of the Electricity Industry Participation Code 2010 (the Code) which is tertiary legislation. The Electricity Industry (Enforcement) Regulations 2010 (the Regulations) specify how the Authority can progress its own investigation by laying a formal complaint with the Rulings Panel.

Institutional structure

Comprehensive and robust compliance monitoring and enforcement is critical to a well-functioning workably competitive electricity market. Therefore it is critical the Authority is well funded and has the capability and capacity to successfully undertake this function.

Flick accepts that it is not clear if the benefits exceed the costs associated with separating the rule making and enforcement functions of the Authority.

However, in our view, it is more about the work the Rulings Panel gets to do. In practice the Authority is the 'gatekeeper' with discretion determining when the Rulings Panel gets involved to apply its expertise to participants' interpretation of the Code and whether a breach has occurred.

MBIE's consultation paper highlights the disconnect between the roles of the Authority and the Rulings Panel:

> *"Panel decisions in relation to breaches of the Code have been uncommon, with only four substantive decisions since 2010. However, the Authority has been involved in investigating allegations that breaches extracted excess revenue in the tens of millions."* (para 27)

This means that Authority staff are implicitly involved in who might be exposed to the penalties the Rulings Panel is authorised to impose.

We query whether this 'gatekeeper' role is appropriate because we are unsure if the Authority is sufficiently well funded to have the capability and capacity to undertake comprehensive compliance monitoring.

Information on the Authority's compliance monitoring website reveals that 121 breaches were investigated in 2020 (similar to 2019) but information on only the results of two investigations, 1 High Court case and two Rulings Panel decisions are published. The Rulings Panel website reveals it made two decisions in 2017, one in 2018, none in 2019 and was relatively busy in 2020 making five decisions in that year (but one was for a breach in 2017).

Publishing information about each breach notification and the outcome of the Authority's review of the breach notification would inform participants about what is compliant and non-compliant application of the Code.

Amendments to the Act

Flick supports increasing the maximum penalty the Rulings Panel can apply to $2m and for the Act to be amended to provide for an additional fine of up to $10,000 for each day (or part thereof) that a breach continues.

A maximum of $2m will be too high for some types of breaches. The Rulings Panel could be expected to provide guidance about the levels of penalties for different types of breaches – as they have done with the current penalty cap.

However, a penalty of $2m is insufficient for breaches of the Code that relate to market manipulation, conduct that distorts prices in the wholesale market, abuses of market power, high standards of trading conduct breaches and conduct that would otherwise lessen competition and anti-competitive trading behaviour.

If the Rulings Panel is to continue to be the enforcement body, they should have access to the same penalties as the Commerce Commission can impose for similar behaviour under the Commerce Act. Section 80 of the Commerce Act provides for penalties that are appropriate for more serious forms of market manipulation and abuses of market power i.e. penalties that are the higher of $10m or 3 times the commercial gain resulting from the contravention.

Flick supports amending the Electricity Industry Act to ensure these types of conduct are prohibited in principle legislation rather than in the Code.

However, overall, our preference would be for the Commerce Act to be amended to prohibit market manipulation, conduct that distorts prices in the wholesale market, high standards of trading conduct breaches and conduct that would otherwise lessen competition in the electricity market.[1] The Commerce

[1] Or maybe the Commerce Act already does cover this type of behaviour and the Authority should refer any suspected behaviour to the Commerce Commission

Commission and Commerce Act has a proven framework for investigating and penalising companies that undertake anti-competitive behaviour.[2]

An alternative is for the Authority and the Rulings Panel to be required to refer any parties suspected of anti-competitive trading behaviour straight to the Commerce Commission for investigation.

Flick notes the Authority/Rulings Panel and Commerce Commission appear to use different tests to assess this type of behaviour – is this a robust compliance framework for electricity?

Awarding costs

Flick does not support the proposed changes to section 54.

Participants breaching other participants is a fundamental structure of this compliance regime – it is inappropriate to assume that this is not undertaken in good faith with the information that is available to the participant at the time. We query how many Code breaches have been initiated by the Authority?

The Authority and Commerce Commission have access to wider information given their information gathering powers. This may ultimately lead to a conclusion that there was no breach.

Awarding costs to the participant when their claim is determined to not be a breach will have a chilling effect on any participant taking further complaints and the compliance and enforcement process the regime is built on.

Flick supports the submission by Electric Kiwi and Haast Energy. In particular, their suggestions that Part XICA of the Australian Competition and Consumer Act 2010 provides a useful precedent for ensuring the penalties are sufficient to remove (more than) the commercial gain from activities that contravene the Code and/or Act.

We welcome the opportunity to discuss our information in this submission with you in more detail.

Yours

Steve O'Connor
Chief Executive

[2] Flick has some concerns about the whether the Rulings Panel is the appropriate body to investigate and apply higher penalties. Courts are able to ask for experts to assist Judges. (para 47 of the consultation paper)