Compliance Framework: Electricity - Have your say

Introduction

* 1. **Name (first and last name)**

* Joel Cook

* 2. **Email**

Joel.cook@transpower.co.nz

* 3. **Is this an individual submission, or is it on behalf of a group or organisation?**

☐Individual
☒On behalf of a group or organisation

* 4. **Which group do you most identify with, or are representing?**

☐ Industry or industry advocates
☐ Market operation service provider
☐ Metering equipment provider
☐ Metering equipment owner
☐ Operator of an approved test house
☐ Load aggregator
☐ Ancillary service agent
☐ Electricity trader
☐ Electricity retailer
☐ Electricity distributer
☐ Electricity generator
☐ Line owner
☒ Transpower
☐ Electricity consumer with direct connection to the grid
☐ Person who generates electricity that is fed into a network
☐ Person who purchases electricity from a clearing manager
☐ Other (please specify)

*5. **Business name or organisation (if applicable)**

Transpower

*6. **Position title (if applicable)**

Regulatory Affairs & Pricing Manager

* 7. **Important information about your submission (important to read)**

The information provided in submissions will be used to inform the Ministry of Business, Innovation and Employment's (MBIE's) work on the *Electricity Compliance Framework*.

We will upload the submissions we receive and publish them on our website. If your submission contains any sensitive information that you do not want published, please indicate this in your submission.

The Privacy Act 1993 applies to submissions. Any personal information you supply to MBIE in the course of making a submission will only be known by the team working on the *Electricity Compliance Framework*.

Submissions may be requested under the Official Information Act 1982. Submissions provided in confidence can usually be withheld. MBIE will consult with submitters when responding to requests under the Official Information Act 1982.

We intend to upload submissions to our website at www.mbie.govt.nz. Can we include your submission on the website?

☒ Yes

☐ No

* 8. **Can we include your name?**

☒Yes

☐No

* 9. **Can we include your organisation (if submitting on behalf of an organisation)?**

☒Yes

☐ No

10. All other personal information will not be proactively released, although it may need to be released if required under the Official Information Act.

Please indicate if there is any other information you would like withheld.

Text contained in our responses in square brackets '[ ]' is sensitive and request that it is removed before our submission is published.

Compliance Framework: Electricity - Have your say

Areas you wish to provide feedback on

The *Compliance Framework: Electricity* discussion document seeks feedback on the Electricity Compliance Framework The document is divided into five sections:

- **Introduction**
- **Institutional Structure**
- **Amendments to the Act**
- **Amendments to the Regulations**
- **Any other issues**

You are invited to provide feedback and respond to questions in as many, or as few of the sections as you would like, depending on your interests.

Submissions on these proposed amendments are sought **by 5pm on Friday 23 April 2021.**

Institutional Structure

Options and impacts

	Should the rule making and enforcement functions of the Authority be split? *We agree with the EPR and MBIE that the benefits of separating out the rule and enforcement functions of the Authority may not outweigh the additional costs. However, as MBIE note, the independence of the Panel is critical to the existing structure.* *There is significant technological change in the industry and the Code can struggle to keep up with this change. This may lead to breaches as parts of the Code become increasingly difficult to comply with. Poorly drafted Code changes can also increase the risk of breaches if they prove impractical and/or compliance is not in the long-term interests of consumers.* *A benefit of separating out the functions of the Authority may be greater scrutiny of whether limitations of the Code could have been a contributing factor to breaches. As a separation of functions may not be practical, it is important that the Panel remain independent and have the flexibility in determining penalties.*
1	Are there any examples of problematic 'blurring of functions' by the Authority in its decision making? *An example of this would be the Under Frequency event (UFE) causer provision. The causer provision is written in such a way that a party can be found to be a 'causer' even when they have not breached the codes and have followed good industry practice (i.e. the interruption/UFE was not caused by negligence). This is convenient for the Authority as it reduces litigation of the matter and ensures a party is almost always found to be a causer for the purpose of paying penalties, regardless of if the party is 'at fault' through their actions or inaction.* *If the rule maker and enforcer functions were separate there may be more scrutiny on this clause. In order to align with the intent of regulation It could be argued that the causer provision should be more focused on penalising actual poor performance, rather than finding a party to carry costs for risks they cannot control or are uneconomical to control (i.e. UFE due to severe weather events).* *Without the separation of rule maker and enforcer functions it is critical that the Panel is able to provide an independent position on these types of issues.*
	Is there a case for a separate agency approving and publicising settlements? *We consider that the current arrangements are appropriate.*

2	Do the Regulations provide sufficient transparency and definitive guidance for industry through the requirements to publicise approved settlements and decisions by the Authority? *Transpower is generally satisfied with the existing arrangements for publicising settlements and decisions* If not, what additional measures would you suggest and why?
3	Should the Authority continue to be responsible for administrative arrangements for the Panel? *We do not consider that it is desirable for the Authority to continue to make the administrative arrangements for the Panel. This function increases the interaction between the Authority and the Panel, which increases the likelihood, real or perceived, of a conflict of interest. To maintain an independent and objective perspective the Panel should not have ongoing arrangements with the Authority that could grant the Authority greater access to the Panel than other industry participants.* *Requiring other industry participants to 'call out' real or perceived conflicts of interest between the Panel and the Authority is not an ideal situation, as it runs the risk of damaging ongoing working relationships and distracting from the core work of maintaining and enforcing compliance with the code. It would be preferable to reduce the risk of conflicts occurring in the first place by improving the regulatory design and separating out the administration of the Panel from the functions of the Authority.* *The administration of the Panel could be undertaken by another agency, such as MBIE. There does not appear to be any efficiency gains from the Panel being administered out of the Authority rather than another agency. MBIE already administers similar panels and boards and may be well placed to administer this Panel also.* *While it may be challenging to amend legislation to reassign the administration of the ruling* Panel*, there will be a long-term continuing benefit in strengthening the independence of the Panel.*

Amendments to the Act

Limits on liability

4	Should the maximum penalty set out in s 54 of the Act be increased, or are current penalty levels adequate to deter harmful behaviour? *In the context of grid operations, it is unlikely that an increase in penalties will significantly alter the behaviour of the grid owner. As Transpower is rarely if ever in a position to benefit from breaching the code, the existing penalties are* sufficient *to disincentivise such behaviour. We appreciate that the potential harm from a breach of Code provisions relating to common quality and security can exceed the amount the Panel can currently impose as a penalty; however we do not believe that increasing the penalty would improve compliance or be fair and proportionate given the inherent risks involved in running a transmission network.*

Transpower is already regulated via the Commerce Commission's oversight of its price quality path (IPP) regime to ensure we maintain assets and minimise disruptions on the grid. This IPP and Information Disclosure (ID) regulation is a larger factor in driving our investment decision making than penalties for breaches.

The root causes of breaches are often complex. Many of the Transpower breaches that have gone to the Panel have related to incorrectly functioning protection systems, an element that is notoriously complex. A relatively small error, however, can lead to significant fallout. These errors are rare, and it is a significant challenge to eliminate the possibility of them occurring. There is no single fix, as there are many ways these systems can malfunction, and so our best defence is a programme of continual improvement.

When breaches do occur Transpower acts to learn from the breach and improve our systems and processes to prevent similar failures in the future. This process adds value and improves compliance. If Transpower was electing not to address systematic issues, then higher penalties may be warranted, however this is not the case. As mentioned in question 10, strengthening the ability to enforce settlement agreements may be another option to ensure participants are acting to reduce the likelihood of future breaches.

Further clarification and guidance regarding increased penalties would be required. We note that as a result of the last increase in maximum penalties, the Panel (noted in its decision of 27 March 2020 in a matter between the Authority and Transpower) has taken the view that penalties, for all levels of culpability, should be scaled up from a previous maximum of $20k as a proportion of the new/current $200k maximum penalty. Is the intent of MBIE's proposed changes to increase the maximum penalty for the most egregious breaches, or to increase penalties across the board? While there may be benefit in increasing penalties for deliberate breaches or gross negligence, the argument for increasing penalties where the level of culpability is relatively low is less compelling, especially where there are low or no financial benefits that might be available to the breaching party from its actions.

Should additional penalties for a continuing breach be introduced?

We would appreciate MBIE clarifying whether there will be *a distinction between knowingly and unknowingly allowing a breach to continue; specifically, whether the Panel will have the flexibility to take this into account.*

We consider that in cases where a participant addressed a breach as soon as it was reasonably practicable, it may be unfair to penalise them as if they knowingly let a breach continue. It could be argued the additional penalty may incentivise participants to improve their processes for identifying such breaches; but this is not the rationale for increasing penalties that has been laid out in the paper.

It may be difficult in some cases to identify if a party knowingly or unknowingly permitted a breach to continue. However, this is a factor that should be taken into account by the Panel when deciding if it is appropriate to apply additional penalties.

Transpower's experience is that, for its part and in the case of generation companies with which it interacts, the allegation of breach drives behaviour rather than the threat of penalty, at least in so far as operation of the power system is concerned (as distinct from market behaviour).

Are there alternative approaches to penalties which you would recommend?

	There may be benefit in treating market related breaches differently to breaches of quality and security, as trading breaches may offer different incentives to participants. *Market participants may profit from trade-related breaches, such as in the case of a UTS, whereas breaches by asset owners do not have the same profit incentive, and breaches are more likely to be accidental.* *Penalties for market breaches, where excess revenue has been extracted, should be set with a higher maximum monetary value to reflect the benefit gained by the participant and to act as a stronger deterrent.*
5	If either or both of the above changes are introduced, should any changes be made to the limits to liability set out in the Regulations? *We do not see a compelling reason to increase the limits to liability*.
6	How should closely related events be dealt with for breach and penalty purposes? *A "series of closely related events" should be treated as one event from an investigation and penalty perspective to improve process efficiency. For instance, where the system operator has created a dispatch schedule which includes an error (which may or may not have been a result of an error on its part) the existence of the error may be practicably impossible to know until some other circumstance arises which brings the error into relief, yet all schedules produced since the initial error arose will be wrong. The number of incorrect schedules could be a few or many, depending on when the error is discovered. In one sense each schedule could be seen as a breach, yet the underlying error has been made only once. Each schedule containing an error should be regarded as a series of closely related events.* Should the Act clarify that "a series of closely related events" would be treated as a single breach? *Yes, further clarity would be beneficial if that can be achieved without undue complexity. Otherwise, the Panel should have the authority to determine whether a breach circumstance referred to it constitutes a series of closely related events or several separate breaches*

Awarding of costs

7	Should s 54 of the Act be amended to allow the Panel greater discretion to award costs? *We are unaware of any reason for changing the Panel's current powers in respect of costs and propose that no change is made.*

Amendments to the Regulations

Options and Impacts

8	Should participants be able to lay complaints directly with the Panel if the Authority, after making preliminary inquiries, decides not to investigate an alleged breach? *Yes, there should be an avenue available for complaints should the Authority decline to investigate (i.e. otherwise there would be no right to appeal an Authority decision not to investigate)*
9	Do mandatory attempts to settle create needless administrative burden and cost, and on-going uncertainty? Should the Regulations provide that an investigator "may", rather than "must", attempt to effect a settlement as part of the enforcement process? *The investigator should at least **offer** settlement as an option as part of the enforcement process*
10	Does the Authority need more oversight and control of the enforcement of settlements? *Yes, if the current system for enforcement via the courts is not proving to be fit for purpose then other avenues should be explored to hold participants accountable. An inability to practically enforce settlements undermines the credibility and effectiveness of the scheme* Should a breach of a settlement be enforceable as though it were a breach of the Code? *Yes, as escalating to the courts does not appear to be a practicable solution. Settlement agreements may need to include additional detail, such timeframes for implementation of agreed actions, to ensure the metrics for compliance are clear to all parties.*

11	Does the requirement for the investigator to endeavour to reach a settlement within 30 working days (or longer period agreed in writing by the investigator) create incentives for efficient process, given that it is rarely completed within this time? *If the investigator is unable to influence the time it takes for a settlement to be reached, then the incentive on the investigator to meet the timeframe will be ineffective. Experience shows the Authority is generally unable to meet the 30 day deadline and the current timeframe is probably an impracticable one. At least some of the failure is likely to be a lack of sufficient resources available to carry out the required work. But this should not diminish the value of the settlement process which, at its heart, is a good one.* *We have observed that there is often a long lag time between when a breach is reported and when it is investigated. It is more time consuming for us to revisit and collate evidence an event a year or longer after it occurred, as it requires additional double handling. If the breach was investigated in a timelier manner, we may be more efficient in supplying the required information to investigators, as it will better align with when we are doing our own internal investigation.* Should the requirement to endeavour to reach a settlement within 30 working days (or longer period agreed in writing by the investigator) in Regulations 22(2) and 23(1) be removed? *If the process is not time bound it may reduce timely access to resolution. But as noted above, the current time is probably impracticable. Therefore, an option is to increase the timeframe rather than remove it entirely i.e. 90 days. The existing wording already permits an investigator to reach a settlement in a period longer than 30 days if agreed in writing by the investigator. Implementing a more realistic time period may improve workability without abandoning accountability regarding resolution timeframes.*
12	Are there circumstances where mandatory settlement is inappropriate? *We do not have a view on whether mandatory are inappropriate in some circumstances.* Should the Regulations be amended to provide that an investigator "may", rather than "must", attempt to effect a settlement as part of the enforcement process? *Please see our response to question 9.*
13	Should the Regulations expressly provide that the Authority can report a breach under Regulation 9? *Yes.*

14	Are the Authority's obligations in relation to the treatment of information sufficiently balanced? *We have no specific view on this question.* Should the 'must keep confidential' obligations in Regulations 10 and 15 expressly provide that information which is not confidential in nature may be published? *We consider that for transparency and educational purposes, non-confidential data that is pertinent to a decision and will affect behaviour should be published.* Should the 'must publish' obligations in Regulations 28 and 30(3) expressly provide that where appropriate confidential information can be redacted from published reports? *Yes, these amendments improve the consistency and administration of the regulations and align with principles of confidentiality.*
15	Should there be an express obligation on parties who receive confidential information during the investigation of a complaint or Panel process to hold that information in confidence? *Yes, this would maintain consistency with principles of confidentiality*.
16	Is it inappropriate that enforcement of the mandatory reporting obligations in the Regulations are undertaken by the Courts? *We consider that the enforcement should be proportionate to the breach.* Should the Regulations be amended to allow enforcement by the Panel of the mandatory reporting obligations as though it were a breach of the Code? *We consider that the enforcement should be proportionate to the breach.*
17	Have we correctly characterised the impact of the changes, in terms of additional compliance costs? *We agree that MBIE's proposal should have a relatively low impact on compliance costs.*

Any other issues

18	Are there any other issues that we need to consider in relation to the compliance framework for the electricity industry? *In the case where no other participants join an investigation a settlement cannot be reached as there is no other 'party' to settle with. This means the matter may have to be dropped or proceed to the Panel, possibly unnecessarily. While the compliance framework is being reviewed, it may be worth considering what should occur in such situations. Participants may have limited interest in joining investigations, but in some cases, there may still be benefit in in developing a settlement like obligation for the breaching party to take steps to prevent further breaches.*