MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Dr Megan Woods	**Portfolio**	Energy and Resources
Title of Cabinet paper	Electricity Industry Act 2010 and the Electricity Industry (Enforcement) Regulations 2010: Proposed Amendments	**Date to be published**	4 May 2022

List of documents that have been proactively released		
Date	**Title**	**Author**
February 2022	Electricity Industry Act 2010 and the Electricity Industry (Enforcement) Regulations 2010: Proposed Amendments	Office of the Minister of Energy and Resources
9 February 2022	Electricity Industry Act 2010 and the Electricity Industry (Enforcement) Regulations 2010: Proposed Amendments DEV-22-MIN-0005 Minute	Cabinet Office
January 2022	Regulatory Impact Statement: Electricity Compliance Framework	MBIE

Information redacted **NO**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Regulatory Impact Statement: Electricity Compliance Framework

Coversheet

Purpose of Document	
Decision sought:	*Cabinet agreement to numerous changes to the Electricity Industry Act 2010 and Electricity Industry (Enforcement) Regulations 2010 to bring electricity compliance framework up to date and in line with best practice.*
Advising agencies:	*Ministry of Business, Innovation & Employment*
Proposing Ministers:	*Minister of Energy and Resources*
Date finalised:	*January 2022*

Problem Definition

The 2019 Electricity Price Review recommended the Ministry of Business, Innovation and Employment (MBIE) should review the compliance framework in the Electricity Industry Act 2010 and related enforcement regulations to bring them up to date with best practice, noting findings that the enforcement regulations needed to be less prescriptive, and compliance activities and decisions more transparent. MBIE conducted a review and noted that there is a mismatch between the revenue that could be generated by a breach of the Electricity Industry Participation Code, or the cost of the harm that could arise from a breach, and the maximum penalty that could be applied. It is also unclear whether the penalty may be applied more than once, regardless of the duration of a breach.

Additionally, while MBIE's review found that the current compliance framework gives the Electricity Authority the capacity to address potential breaches promptly, there are gaps in the framework that can be addressed by clarifying existing powers rather than making more fundamental changes.

Executive Summary

The compliance framework within which the Electricity Authority (the Authority) operates consists of the regulatory arrangements to monitor, investigate and enforce the rules of the New Zealand electricity market. These rules are set out in:

- the Electricity Industry Act 2010;
- the Electricity Industry (Enforcement) Regulations 2010; and
- the Electricity Industry Participation Code 2010.

One of the recommendations of the 2019 Electricity Price Review was that the government should review the compliance framework and related enforcement regulations to bring them up to date with best practice. MBIE conducted a review of the compliance framework drawing on advice from the Authority and the Rulings Panel, as well as a previous review of the compliance framework by the Authority. MBIE's review identified a number of issues regarding:

- adequacy of the maximum penalty for breaches;
- ambiguity around continuing and recurrent breaches;

- laying a complaint directly to the Rulings Panel;
- settlement process in the regulations;
- reporting a breach under the regulations;
- treatment of information under the regulations;
- enforcement of mandatory reporting obligations; and
- institutional arrangements of compliance functions

In March 2021, the Ministry of Business, Innovation & Employment (MBIE) conducted a consultation with electricity industry participants, as the parties directly affected, as well as a number of interested parties from other sectors. This consultation sought feedback on a number of proposed improvements to the compliance framework. The most significant of the proposed changes relate to the penalties for breaches of the Electricity Industry Participation Code 2010:

- an increase in the maximum penalty for a breach from $200,000 to $2million; and
- additional fines per day for continuing breaches, as per the Commerce Act and the Telecommunications Act.

Feedback from this consultation has informed the policy proposals presented in this impact statement.

This consultation also sought feedback from affected parties on the impact of the proposed changes, in terms of additional compliance costs, which MBIE viewed as having low impact while resulting in a clearer and more efficient compliance process. The parties, in general, agreed that the proposed changes would likely have a relatively low impact on compliance costs.

Limitations and Constraints on Analysis

There were no significant limitations or constraints on the analysis in this impact assessment. The scope of options considered has been influenced by stakeholders' feedback on the consultation. While the discussion document did outline a number of preferred options, this did not limit consideration of alternative options proposed in submitters' feedback. Additionally, the consultation invited submitters to highlight any other issues not already addressed in the discussion paper which government should consider in relation to the compliance framework. Appropriate consideration was given to all suggested options proposed in the feedback on the consultation and, where feasible, these have been included as options in this impact statement.

Given the technical and procedural nature of the content, it was agreed to undertake a targeted consultation with electricity industry participants, as the parties directly affected as well as participants in other industries – particularly gas and the legal sector – considered to have an interest in case any proposed changes may have the potential to affect them. It was not considered necessary to consult more broadly to include, for example, consumer advocacy groups as any potential changes would be unlikely to be particularly relevant to, or impact, consumers directly.

Responsible Manager(s) (completed by relevant manager)

Osmond Borthwick

Acting Manager,

Energy Markets Policy

Ministry of Business, Innovation & Employment

[Signature]
10 January 2022

Quality Assurance (completed by QA panel)	
Reviewing Agency:	[enter text here]
Panel Assessment & Comment:	[enter text here]

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The government established the Electricity Price Review (EPR) in 2018 to investigate whether the electricity sector is delivering fair and equitable prices to consumers. It also considered whether the electricity market and the regulatory framework will continue to be fit for purpose in the future, particularly with the emergence of new technologies and our goal of moving to a low emissions economy.

One of the recommendations of the EPR was that the government should review the compliance framework in the Electricity Industry Act 2010 and related enforcement regulations to bring them up to date with best practice[1]. It suggested that a review of the Act's compliance framework was long overdue. The framework dates back more than 20 years and is based on contracts between industry participants that were incorporated into the regulatory framework when self-regulation ended in 2003. It has undergone only relatively minor changes since then.

The Authority recently provided a comprehensive update of its 2014 review of the compliance framework, which helped inform MBIE's policy development. The Authority noted that since the 2014 review was originally commissioned, its practice, judicial review of Panel decisions and compliance processes, case law and industry practice have continued to evolve around the existing regulations. This meant that some issues identified in the 2014 review had not arisen as anticipated, while other issues had. The updated review suggested modest process changes to the regulations, and more significant changes to the penalties regime rather than the more fundamental changes suggested in the 2014 review.

Elements of the electricity compliance framework

The compliance framework within which the Authority operates consists of the regulatory arrangements to monitor, investigate and enforce the rules of the New Zealand electricity market. These rules are set out in:

- the Electricity Industry Act 2010 (the Act);
- the Electricity Industry (Enforcement) Regulations 2010 (the Regulations); and
- the Electricity Industry Participation Code 2010 (the Code).

The Act provides the Authority with delegated law-making power to create obligations on electricity industry participants through the Code. The Act sets out jurisdictional limitations on the Authority's Code-making powers and specifies procedural requirements that must be followed to develop new Code provisions.

The Code imposes obligations on all industry participants, including Transpower New Zealand Ltd, other distributors, generators, and retailers. These obligations are intended to maintain the security and reliability of New Zealand's electricity supply, and to promote competition and efficiency.

The Authority is charged with investigating breaches of the Code. Industry participants are obliged to self-report certain Code breaches, and to notify the Authority if they believe that

[1] Recommendation F3: Update the Electricity Authority's compliance framework and strengthen its information-gathering powers.

other industry participants have breached the Code. Any other person may also complain to the Authority about a potential Code breach.

The Act and the Regulations set out the process to apply when an industry participant is alleged to have breached the Code. The Regulations specify how the Authority is to investigate an alleged breach of the Code. Following an investigation, the Regulations provide that the Authority may lay a formal complaint with an independent specialist decision making body, the Rulings Panel. Industry participants may also refer certain matters to the Rulings Panel.

The Rulings Panel determines whether there has been a breach of the Code. Among other remedies, the Act specifies that the Rulings Panel may require participants to take remedial action, pay compensation to those who have suffered loss or pay penalties to the Crown.

MBIE's progress on the EPR's recommendation

Drawing on the Authority's 2014 review, and on advice from the Authority and the Rulings Panel, MBIE developed a discussion document seeking feedback on a number of proposed changes to the Act, the Regulations and the institutional structure for the compliance process. Given the technical and procedural nature of the discussion document, a targeted consultation with electricity industry participants, as the parties directly affected, as well as a number of interested parties from other sectors was undertaken. The discussion document was sent to 53 parties in total. This consultation was conducted in March 2021.

Submissions were received from: the Authority; Business NZ Energy Council (BEC); Electric Kiwi & Haast Energy; Flick; Major Energy Users Group (MEUG); Meridian Energy; Nova Energy; Transpower; Trustpower; and Vector.

The discussion document sought feedback on the following questions regarding the Act:

- Should the maximum penalty set out in s 54 of the Act be increased, or are current penalty levels adequate to deter harmful behaviour? Should additional penalties for a continuing breach be introduced? Are there alternative approaches to penalties which you would recommend?
- How should closely related events be dealt with for breach and penalty purposes? Should the Act clarify that "a series of closely related events" would be treated as a single breach?
- Should s 54 of the Act be amended to allow the Rulings Panel greater discretion to award costs?

The discussion document sought feedback on the following questions regarding the Regulations:

- If the maximum penalty is increased and/or additional penalties for a continuing breach are introduced, should any changes be made to the limits to liability set out in the Regulations?
- Should participants be able to lay complaints directly with the Rulings Panel if the Authority, after making preliminary inquiries, decides not to investigate an alleged breach?
- 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?
- Does the Authority need more oversight and control of the enforcement of settlements? Should a breach of a settlement be enforceable as though it were a breach of the Code?

- 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? Should the requirement to endeavour to reach a settlement within 30 working days (or longer period agreed in writing by the investigator) in Clauses 22(2) and 23(1) be removed?
- Are there circumstances where mandatory settlement is inappropriate? 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?
- Should the Regulations expressly provide that the Authority can report a breach under Clause 9?
- Are the Authority's obligations in relation to the treatment of information sufficiently balanced? Should the 'must keep confidential' obligations in Clauses 10 and 15 expressly provide that information which is not confidential in nature may be published? Should the 'must publish' obligations in Clauses 28 and 30(3) expressly provide that where appropriate confidential information can be redacted from published reports?
- Should there be an express obligation on parties who receive confidential information during the investigation of a complaint or Rulings Panel process to hold that information in confidence?
- Is it inappropriate that enforcement of the mandatory reporting obligations in the Regulations are undertaken by the Courts? Should the Regulations be amended to allow enforcement by the Rulings Panel of the mandatory reporting obligations as though it were a breach of the Code?
- Have we correctly characterised the impact of the changes, in terms of additional compliance costs?

What is the policy problem or opportunity?

Maximum penalty for a breach of Code

It is important in any regulatory regime that penalties are material enough to incentivise compliance and deter non-compliance. Currently, under s.54 of the Act, the Rulings Panel, on determining that an industry participant has breached the Code, may make a pecuniary penalty order not exceeding $200,000. Each separate breach attracts a separate penalty, so the overall penalty could be higher than $200,000. However, there can be ambiguity around when a breach starts and finishes, and whether it is a single breach event or multiple breach events.

Rulings Panel decisions in relation to breaches of the Code have been uncommon, with only four substantive decisions since 2010. However, the Authority has investigated allegations that breaches extracted excess revenue in the tens of millions. Therefore, a $200,000 penalty may not be a meaningful deterrent to a breach which extracts revenue many times the value of the maximum penalty.

Additional penalties for a continuing breach

There is a lack of clarity around the application of the Act and Regulations to a continuing and recurring breach of the Code, which means that parties are not sufficiently incentivised to correct a breach. There can be ambiguity around:

- when a breach starts and finishes;
- whether it is a single breach event or multiple breach events; and
- whether related events are subject to multiple penalties as recurring breaches or a single penalty as an ongoing breach.

The treatment of an ongoing breach which can be described as a single event is clear – a single penalty would apply. However, this may be inappropriate in cases where a breach has continued for years. If a party has breached the Code, it may take the risk of breaching for an extended, uninterrupted period, given the maximum penalty may only be $200,000.

Series of closely related events

As highlighted above, there is a lack of clarity around whether related events are subject to multiple penalties as recurring breaches, or a single penalty as an ongoing breach. This is especially relevant in the context of an increase to the maximum penalty for a breach of the Code. Continuing potential breach event(s) could be treated as either separate breaches, each subject to the maximum penalty, or a single breach with additional fines for each day or part of a day it continued.

Awarding of costs

Currently the Rulings Panel may only award costs if it finds that there has been a breach of the Code. However, responding to an allegation which is found not to be a breach may impose significant costs on the responding participant. In its recent decision[2] on a complaint made of breaches of Clause 13.2A of the Code by Genesis Energy Limited, the Rulings

[2] Decision available at: https://www.electricityrulingspanel.govt.nz/assets/dms-assets/27/28-Jan-2021-Rulings-Panel-final-decision.pdf

Panel recommended that the Minister consider an amendment to s 54 of the Act to allow the Rulings Panel greater discretion to award costs.

Limits on liability

The Regulations set out limits on the liability of various participants in the electricity market to orders made by the Rulings Panel under the Act, including pecuniary penalty orders. Limiting liability increases competitiveness in the electricity market by reducing barriers to entry, while still providing a good balance between the incentive for providers of services to secure electricity supply and the freedom to take on risks that promote the long-term efficiency of the industry.

The Regulations limit the liability of some (but not all) industry participants for breaches of the Code. As with other provisions in the Regulations, the limits on liability are the result of previous arrangements which were rolled over into the Regulations.

Laying a complaint directly to the Rulings Panel

Under the current Regulations, an industry participant can only lay a complaint with the Rulings Panel if the Authority has investigated an alleged breach and decides not to lay a complaint with the Rulings Panel. If the Authority decides not to investigate the alleged breach then the participant cannot complain directly to the Rulings Panel. The Rulings Panel has been found on appeal to the High Court[3] to lack the jurisdiction to hear a complaint which had not been investigated by the Authority.

Settlement is a mandatory step for investigators

The Regulations currently provide that an investigator "must" attempt to reach settlement between parties where there is an alleged breach of Code. Settlements are a useful enforcement tool because they are faster and cheaper than judicial enforcement. However, not all breaches of Code require, or are capable of, settlement. Where it is clear parties will not settle, this requirement can result in needless administrative burden and costs, as well as ongoing uncertainty for the market.

Under a best-practice compliance framework, settlements should not be compulsory. Instead, it should be just one of a range of options available to deal with non-compliance.

Enforcement of a breach of settlement

Under the current framework, settlement is between the party in breach and the other affected parties. Once a settlement has been agreed, the Authority is powerless to ensure enforcement of that settlement unless a new breach arises. Where a settlement agreement is between a large well-funded participant and a small, less well-funded participant, the latter is unlikely to have the financial means to enforce the agreement through the Court.

Obligation to endeavour to reach settlement within 30 working days

Clause 22(2) requires the investigator to endeavour to reach a settlement within 30 working days (or a longer period agreed in writing by the investigator). This "reasonable endeavours"

[3] Unison Networks Limited v Solar City New Zealand Limited [2017] HZHC 1343, CIV-2017-485-88

obligation is effectively meaningless as in practice settlements are very rarely achieved within 30 days.

Reporting a breach under the Regulations

There is uncertainty under the current Regulations on whether the Authority can report a breach. The Authority takes the view that this is a necessary part of its work and essential to its monitoring and compliance functions. The Regulations are unclear on this point and create confusion for both participants and the Authority.

Treatment of information under the Regulations

The Authority currently has little discretion in what it can choose to publish and not publish under the existing Regulations. The Authority believes that this impedes its ability to undertake proactive education of participants in relation to previously occurring breaches or allegations of breaches.

In addition, the Authority holds the view that sensitive commercial or otherwise confidential information provided by parties during an investigation can be redacted from the investigator's report. This has the advantage of ensuring investigators can be frank in their reporting with the knowledge that sensitive information is not at risk of being published. However, the current Regulations do not expressly provide for this.

Enforcement of mandatory reporting obligations

Regulation 7 provides for mandatory reporting of certain breaches which relate to the common quality and security provisions of the Code and Regulation 8 provides for mandatory reporting of all other breaches of the Code. The obligation and, for Regulation 7, the relevant penalty for failure to report, are set out in the Regulations and require Court action to enforce. The nature of the breach is similar to a breach of the Code and the applicable penalty is relatively low ($20,000).

What objectives are sought in relation to the policy problem?

The objectives sought are to ensure appropriate incentives for compliance, improve the integrity of the regulatory structure and enhance confidence in the compliance regime and, by implication, in the electricity market itself.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

The criteria that have been used to assess the options under consideration are:

- **Effectiveness:** does the option result in a strengthened compliance regime, by providing appropriate incentives to comply;
- **Integrity:** does the option improve confidence that the compliance regime is robust and that it will deliver appropriate outcomes; and
- **Efficiency:** does the option encourage more efficient market decisions and/or reduce unnecessary barriers to access.

What scope will options be considered within?

The scope of options considered has been influenced by stakeholders' feedback on the consultation. While the discussion document did outline a number of preferred options, this did not limit consideration of alternative options proposed in submitters' feedback. Appropriate consideration was given to all suggested options proposed in the feedback on the consultation and, where feasible, these have been included as options in this impact statement.

What options are being considered?

Maximum penalty for a breach of Code

The discussion document proposed that the maximum penalty should be increased to $2 million to create better incentives for compliance. Stakeholders had mixed responses to this problem. the discussion paper's proposal to increase the maximum penalty to $2 million. The Authority and the MEUG were the only parties to fully support the proposal.

Nova Energy was the only party that strongly disagreed with the proposal. It viewed the current maximum penalty as a significant deterrent for industry participants to avoid breaching the Code. It argued that an increase in the maximum penalty may discourage the implementation of new technologies, as new market participants are less likely to be able to meet penalty costs and therefore this could create a barrier to entry for new participants.

BEC, Electric Kiwi and Haast Energy, Flick, Meridian, Trustpower and Vector were less clear on their attitude. BEC and Trustpower favoured an increase to $2 million if it were coupled with institutional changes. While supporting an increase to the maximum penalty, Vector suggested the introduction of a materiality threshold that considers the impact to customers and/or other industry participants and a sliding penalty scale based on market impact. Meridian argued that increasing the penalty to $2 million, which it pointed out represents an increase of 1,000% to the current maximum penalty, goes too far and a more appropriate penalty would be $1 million.

Electric Kiwi and Haast Energy, on the other hand, argued that $2 million may not be enough. They considered the penalties for market manipulation and other abuses of market power should be based on the precedent of s.80 Commerce Act 1986 e.g. the penalty could be a multiple of the commercial gain from the market manipulation or abuse of market power (a view also expressed by Flick). It also pointed to Part XICA of the Australian Competition and Consumer Act 2010 as providing useful precedent. In general, both s.80 and Part XICA provide that the maximum pecuniary penalty for a breach would be the greater of:

- $10 million;
- three times the value of the benefit obtained; or
- ten per cent of annual turnover of the corporation in the preceding twelve months if the value of the benefit cannot be determined.

What options have been considered?

Option One: Status Quo

The existing maximum penalty of $200,000 for a breach of the Code would be retained. There would be no additional fine introduced for every day or part of a day a breach continues.

As was outlined above, the Authority has already investigated allegations that breaches extracted excess revenue in the tens of millions. It is considered that a $200,000 maximum penalty may not be a meaningful deterrent to a breach which extracts revenue many times the value of the maximum penalty. If the status quo were to continue it is unlikely that the electricity sector will have a sufficient incentive to comply.

Option Two: Increase the maximum penalty to $2 million

The maximum penalty would be increased to $2 million for a breach of the Code. A maximum penalty of $2 million was proposed as it more closely aligns with the existing levels on the limits on liability in the current Regulations. Additionally, this would be more proportionate in relation to a breach which extracted a substantial amount of revenue.

Some stakeholders considered $2 million excessive, but we note that this is a maximum penalty and the Rulings Panel will apply its judgement when making a penalty order and any other remedial orders, including the nature of the conduct and its impact on the market. A participant subject to a penalty order by the Rulings Panel may appeal that order in the High Court.

Option Three: Increase the maximum penalty to match s.80 of the Commerce Act 1986

Some stakeholders suggested the maximum penalty could be set as a multiple of the commercial gain from the breach. Section 80 of the Commerce Act 1986 was given as an example on which this could be based, which is:

- $10 million;
- if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, three times the value of any commercial gain resulting from the contravention; or
- if the commercial gain cannot readily be ascertained, 10 per cent of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.

Penalties that are too high may result in perverse incentives to take actions that avoid penalties, such as unnecessarily conservative behaviour leading to inefficient outcomes. Such incentives may be to the detriment of the market or the compliance regime.

Assessment

	Option One	Option Two	Option Three
Effectiveness	0	++ much more effective penalty to deter non-compliance	++ much more effective penalty to deter non-compliance
Integrity	0	++ higher penalties much more likely to improve confidence	- much higher penalties may result in perverse outcomes
Efficiency	0	0	0
Overall assessment	0	++	+

Conclusion

MBIE recommends that s. 54(1)(d) of the Act be amended to increase the maximum penalty for a breach of the Code to $2 million (Option Two).

Additional penalties for a continuing breach

The discussion document proposed that the Act should provide that for every day or part day that a breach continues an additional fine of up to $10,000 may be imposed. There was almost universal support from stakeholders for this proposal. However, Transpower did suggest that there should be a clear differentiation between knowingly and unknowingly continuing a breach.

What options have been considered?

Option One: Status Quo

No change would be made and there would be continuing uncertainty around continuing and recurring breaches. This may result in parties continuing to not be incentivised to correct a breach.

Option Two: Additional fine of up to $10,000 for every day, or part of a day, a breach continues

This option would introduce an additional fine of up to $10,000 for every day or part of a day that a breach continues. Specifying further penalties for a continuing breach would be consistent with other penalty regimes such as those set out in the Telecommunications Act 2001 and Resource Management Act 1991, which both acknowledge the need to deter continuing breaches.

Section 156M of the Telecommunications Act 2001 provides that for every day or part day that a specified breach continues an additional fine of between $10,000 and $500,000 may be imposed. Section 339(1A) of the Resource Management Act 1991 provides that for every day or part day a breach continues an additional fine of up to $10,000 may be imposed or for lesser offences under s 339(2) a recurring fine of up to $1000 per day or part day.

The use of continuing penalties can make it unclear as to how much a party could be liable for and be disproportionately severe. However, further penalties for a continuing breach of the Code appear to be a desirable deterrent given continuing breaches have a potentially far greater impact than short term breaches.

Assessment

	Option One	Option Two
Effectiveness	0	++ much more effective penalty to deter non-compliance
Integrity	0	++ much more likely to improve confidence
Efficiency	0	++ removes uncertainty
Overall assessment	0	++

Conclusion

MBIE recommends that an additional fine of up to $10,000 for every day, or part of a day, a breach continues be introduced (Option Two).

Series of closely related events

The discussion document proposed that the Act should be clarified and that a "series of closely related events" should be treated as a single breach. There was universal support from stakeholders for this proposal. However, Transpower did note that, if it proves too complex to define a "series of related events" the Rulings Panel should have discretion to determine whether the breach constitutes a series of closely related events or several separate breaches.

What options have been considered?

Option One: Status Quo

There would be no change to the current arrangements and there will be a continued lack of clarity around whether related events are subject to multiple penalties as recurring breaches or a single penalty as an ongoing breach. In the event that the maximum penalty increases, this option would result in a worse outcome for participants. This is not MBIE's preferred option.

Option Two: Clarify a series of closely related events

Under this option a "series of closely related events" will be defined in the Act and will be treated as a single breach. This option is universally supported by stakeholders.

Assessment

	Option One	Option Two
Effectiveness	0	++ much greater clarity
Integrity	0	++ much more likely to improve confidence
Efficiency	0	++ removes uncertainty
Overall assessment	0	++

Conclusion

MBIE recommends that the Act should be clarified and that a "series of closely related events" should be treated as a single breach (Option Two).

Awarding of costs

The discussion document proposed to amend s 54 of the Act to allow greater discretion for the Panel to award costs. Responding to an allegation which is found not to be a breach may impose significant costs on the responding participant. This proposal would allow the responding participant to recover costs from the party laying the complaint.

While most submitters agreed with this proposal, Electric Kiwi and Haast Energy, Flick and Transpower all disagreed. Transpower was unaware of any reasons for changing the Rulings Panel's current power. Both Electric Kiwi and Haast Energy and Flick considered this change to the Rulings Panel's ability to award costs would have a "chilling" impact on participants' willingness to challenge others' conduct, which is a fundamental feature of the compliance regime.

Nova suggested that increased powers to award costs would minimise the risk of frivolous claims. This sentiment was shared by Trustpower which noted that a balance was needed to ensure participants could still challenge others' conduct but trusted the Rulings Panel to exercise its discretion appropriately. Meridian suggested the Rulings Panel be given the same discretion to award costs as the High Court pursuant to the High Court Rules 2016.

What options have been considered?

Option One: Status Quo

There would be no changes implemented and participants responding to an alleged breach and found not to have infringed the Code may continue to face significant costs, even where the allegations have been frivolous. The Rulings Panel would remain unable to award costs where there has not been a breach of Code. This option would be contrary to the Rulings Panel's recommendation to the Minister.

Option Two: Greater discretion to award costs

Section 54 of the Act would be amended to allow the Rulings Panel greater discretion to award costs in the event that there has not been a breach of Code. MBIE agrees with Trustpower's view on this issue – noting the balance between ensuring participants could challenge each other while trusting the Ruling Panel to exercise its discretion appropriately in the awarding of costs.

Assessment

	Option One	Option Two
Effectiveness	0	+ minimises risk of frivolous claims
Integrity	0	+ likely to improve confidence
Efficiency	0	+ increases protection from frivolous claims
Overall assessment	0	+

Conclusion

MBIE recommends that s 54 of the Act be amended to allow the Rulings Panel greater discretion to award costs (Option Two).

Limits on liability

The discussion document considered whether the current limits are still appropriate, particularly with regard to the proposed increased in the maximum penalty for breaches of the Code.

The majority of submitters agreed that the limits on liability should remain the same. Trustpower, however, pointed to an expert report[4], commissioned by the Authority in 2014, which concluded there were net benefits in having a specific liability limit for the relevant service providers, structured using a combination of per event liability and absolute liability caps. It also set out suggested limits for each category of service provider. Trustpower recommends the advice in this expert report be adopted instead.

What options have been considered?

Option One: Status Quo

The limits remain at their current level as set out in the Regulations. This would still give scope for the increased penalties and clearer treatment of recurring breaches to 'bite' for relevant industry participants, but would preserve the incentives created by the limits.

Option Two: Adopt the Authority's 2014 expert report limits

Adopt the liability arrangements set out in the 2014 expert report[5] commissioned by the Authority. This would introduce a specific liability limit for the relevant service providers, structured using a combination of per event liability and absolute liability caps. While this option would reduce liability limits for the majority of industry participants, in particular for clearing managers, it would introduce or increase limits for others, in particular for the system operator.

[4] Available at: https://ea.govt.nz/assets/dms-assets/18/18082TDB-Liability-Arrangements-Final-Report-140909.pdf

[5] It would be necessary that these limits be reviewed before any changes are implemented given the time that has passed since they were calculated.

Assessment

	Option One	Option Two
Effectiveness	0	+ possibly more appropriate levels of liabilities
Integrity	0	- lack of support may diminish confidence
Efficiency	0	0
Overall assessment	0	0

Conclusion

In line with the views of the majority of stakeholders, MBIE recommends there should be no changes to the limits on liability. As the expert report noted, the liability arrangements in the Regulations are only one component of the overall incentive and risk management regime in the electricity industry. MBIE believes that, with the changes proposed, there will be appropriate arrangements to incentivise compliance without additional changes to the limits on liabilities.

Laying a complaint directly to the Rulings Panel

The discussion document proposed that, in the event of the Authority declining to investigate a breach of the Code, the affected participant should be able to lay a complaint directly with the Rulings Panel.

The majority of stakeholders agreed with the proposal in the discussion document that affected participants should be able to lay a complaint directly with the Rulings Panel, should the Authority choose not to investigate an alleged breach. Trustpower noted that the possibility of awarding of costs should deter complaints which have no basis or are vexatious.

However, Meridian was of the opinion that if participants could lay complaints directly with the Rulings Panel it would lead to a proliferation of complaints which would clog up the Rulings Panel's time.

What options have been considered?

Option One: Status Quo

Industry participants would continue to be unable to lay a complaint with the Rulings Panel should the Authority choose not to investigate a breach. The Authority may act in a "gatekeeper" role, dismissing complaints which it believes have no basis or are vexatious, even when the Panel might have a different view.

Option Two: Lay complaints directly with the Rulings Panel

The Regulations would be amended to give the Rulings Panel the required jurisdiction to consider complaints which the Authority decided not to investigate. While the majority of stakeholders supported this option during consultation, some stakeholders were concerned that it would lead to a proliferation of complaints, which would clog up the Rulings Panel's time, without the Authority acting as a "gatekeeper". However, as other stakeholders noted,

and MBIE agrees, Rulings Panel's authority to award costs (as proposed above) would deter complaints which have no basis or are vexatious.

Assessment

	Option One	Option Two
Effectiveness	0	++ fixes a gap currently in the framework
Integrity	0	+ likely to improve confidence
Efficiency	0	++ much better access to effective resolution
Overall assessment	0	++

Conclusion

MBIE recommends that participants should be able to lay complaints directly with the Rulings Panel if the Authority chooses not to investigate them, provided the Rulings Panel has authority to award costs (Option Two).

Settlement is a mandatory step for investigators

The discussion document suggested amending the Regulations to provide that an investigator "may", rather than "must", attempt to effect a settlement.

All parties that responded to this proposal agreed with the discussion document's suggestion, noting that it appeared straight forward and sensible.

What options have been considered?

Option One: Status Quo

Investigators would continue to attempt to reach settlements in all cases, even where it is clear no settlement could be reached.

Option Two: "May" rather than "must"

Clause 22 of the Regulations would be amended to provide that an investigator "may" rather than "must" endeavour to reach settlement. The Authority will publish guidance on the situations where an investigator will try to reach settlement and the situations where they will not. This will provide clarity to participants during the compliance process.

All stakeholders that responded to this proposal agreed with this option, noting it appeared straight forward and sensible.

Assessment

	Option One	Option Two
Effectiveness	0	++ would adhere to best practice
Integrity	0	++ much more likely to improve confidence
Efficiency	0	++ would reduce unnecessary barriers
Overall assessment	0	++

Conclusion

MBIE recommends that Clause 22 of the Regulations should be amended to provide that an investigator "may", rather than "must", attempt to effect a settlement (Option Two).

Enforcement of a breach of settlement

The discussion document suggested that a breach of a settlement should be treated as though it were a breach of the Code. This would allow the Authority's compliance process to apply and bring it within the jurisdiction of the Rulings Panel. This would provide for a much more cost effective and accessible enforcement option than is currently available through the Court under present arrangements.

All submitters were in agreement that with this proposal. However, some, most notably Meridian but also Transpower and Nova, suggested that further evidence should be presented that there is a pattern of flagrant non-compliance with settlements.

What options have been considered?

Option One: Status Quo

Participants will continue to have limited options for redress outside the Court system in the event of a breach of settlement. This may be particularly challenging to smaller, less well-funded participants.

Option Two: Treat breach of settlement as a breach of Code

The Regulations will be amended to allow a breach of settlement to be treated as though it is a breach of the Code. This will allow the Authority's compliance process to apply and bring it within the jurisdiction of the Rulings Panel, resulting in a much more cost-effective and accessible enforcement option. All submitters supported this proposal.

Assessment

	Option One	Option Two
Effectiveness	0	++ best practice
Integrity	0	+ likely to improve confidence
Efficiency	0	++ reduces costs and improves access to resolution
Overall assessment	0	++

Conclusion

MBIE recommends that a breach of a settlement should be treated as though it were a breach of the Code (Option Two).

Obligation to endeavour to reach settlement within 30 working days

What options have been considered?

The discussion document proposed removing the requirement to endeavour to reach settlement within 30 working days.

All submitters seemed to accept that the 30-working day requirement was aspirational rather than realistic. However, many seemed to be of the view that having a timeframe for settlement created incentives for an efficient process. Vector suggested that this be increased to 45 working days while Transpower suggested 90 working days. Meridian suggested keeping the 30-working day expectation to retain the expectation of an efficient process.

Option One: Status Quo

Retain requirement for investigators to endeavour to reach settlement within 30-working days. This target will continue to be rarely achieved.

Option Two: Remove 30-day target

Amend the Regulations to remove the requirement to reach a settlement within 30-working days as set out under Clause 22(2). Instead, the Authority will publish ‘guiding principles’ outlining that in its investigations it will endeavour to reach a speedy settlement where possible – as suggested by Trustpower in its submission. This will essentially remove a clause which was ineffective while retaining the spirit of the regulation in published guidance.

Assessment

	Option One	Option Two
Effectiveness	0	+ removes unrealistic target
Integrity	0	++ much more likely to improve confidence
Efficiency	0	0 will not change existing arrangements
Overall assessment	0	+

Conclusion

MBIE recommends adopting Trustpower's suggestion of replacing a target settlement date with 'guiding principles' which stressed the importance of early resolution of complaints and seeking settlement in suitable circumstances (Option Two).

Reporting a breach under the Regulations

The discussion document proposed that the Regulations should expressly provide that the Authority can report a breach under Clause 9.

All submitters agreed with this proposal – noting it appeared straightforward and sensible. However, Meridian noted that additional changes around the Authority's institutional structure would also be required for participants to have confidence that the rule-making and enforcement divisions of the Authority remained independent.

What options have been considered?

Option One: Status Quo

No changes to the Regulations, which would result in continued uncertainty as to whether the Authority can report an alleged breach. It is likely that this will be the subject of a challenge in the High Court at some point.

Option Two: The Authority can report a breach

Amend the Regulations to expressly provide that the Authority can report a breach. This would line up with the policy intent behind the Regulations and will provide greater clarity for participants. All submitters agreed with this proposal.

Assessment

	Option One	Option Two
Effectiveness	0	++ provides greater clarity for participants
Integrity	0	++ much more likely to improve confidence
Efficiency	0	++ removes a potential barrier for the Authority to report a breach
Overall assessment	0	++

Conclusion

MBIE recommends that the Regulations should be amended to expressly provide that the Authority can report a breach (Option Two).

Treatment of information under the Regulations

The discussion document proposed amending Clauses 10 and 15 to expressly provide that information which is not confidential in nature may be published and amending Clauses 28 and 30(3) to expressly provide that, where appropriate, confidential information can be redacted from published reports. The discussion document also proposed that introducing an obligation on parties who receive confidential information during the investigation of a complaint or Rulings Panel process to hold that information in confidence. This would bring the process in line with standard practice during litigation.

All submitters agreed with these proposals. Meridian noted that a process should also be put in place to cover a scenario where participants and the Authority disagree about whether a particular piece of information disclosed is confidential.

What options have been considered?

Option One: Status Quo

No changes are implemented. This is likely to result in continued uncertainty over the treatment of information by the Authority.

Option Two: A balanced approach to the treatment of information

Clauses 10 and 15 are amended to expressly provide that information which is not confidential in nature may be published. In addition, Clauses 28 and 30(3) are amended to expressly provide that sensitive information provided by parties during an investigation can be redacted from the investigator's report. Also, this option would add a new clause into the Regulations to introduce an obligation on parties who receive confidential information during the investigation of a complaint or Rulings Panel process to hold the information in confidence.

These changes will help the Authority undertake proactive education initiatives in relation to previously occurring breaches or allegations of breaches, which will help improve overall compliance. Changes to Clauses 28 and 30(3) will help allow for investigators to be frank in their reporting. Introducing an obligation on parties to hold information in confidence will bring the process in line with standard practice during litigation.

Taken together, these changes would improve the way information is protected and used throughout the compliance process.

Assessment

	Option One	Option Two
Effectiveness	0	++ improve compliance
Integrity	0	++ much more likely to improve confidence
Efficiency	0	++ improves Authority's ability to publicise issues with recurring breaches
Overall assessment	0	++

Conclusion

MBIE recommends that:

- Clauses 10 and 15 be amended to expressly provide that information which is not confidential in nature may be published by the Authority;
- Clauses 28 and 30(3) be amended to expressly provide that, where appropriate, confidential information can be redacted from published report; and
- a new clause be added to require that parties who receive confidential information during the investigation of a complaint or Rulings Panel process hold that information in confidence.

Enforcement of mandatory reporting obligations

The discussion document proposed the Regulations be amended to allow enforcement of the mandatory reporting obligations as though it were a breach of the Code.

The majority of submitters agreed that it was inappropriate for the Courts to decide on this issue, as it is not considered an efficient use of the Courts' time. All submitters agreed that failure to report a breach should be treated as a breach of Code.

What options have been considered?

Option One: Status Quo

Enforcement of a failure to report a breach would continue to require resolution through the Court. The maximum penalty would also remain at the relatively low level of $20,000. This is not considered to be a satisfactory situation as it is an inefficient use of the Court's time and there is a low penalty for an action which is similar to a breach of Code.

Option Two: Enforcement of mandatory reporting obligations as though it were a breach of Code

Amend the Regulations to allow enforcement of the mandatory reporting obligations as though it were a breach of the Code. This would allow the Authority's compliance process to address breaches of mandatory reporting obligations, instead of the Court, which is considered by stakeholders to be more appropriate.

Assessment

	Option One	Option Two
Effectiveness	0	++ much more appropriate penalty for non-compliance
Integrity	0	++ much more likely to improve confidence
Efficiency	0	++ much better access to resolution for breaches
Overall assessment	0	++

Conclusion

MBIE recommends that breaches of mandatory reporting obligations under the Regulations should be enforced as though they were breaches of the Code (Option Two).

What are the marginal costs and benefits of the option?

This consultation sought feedback from affected parties on the impact of the proposed changes, in terms of additional compliance costs, which MBIE viewed as having low impact while resulting in a clearer and more efficient compliance process. The parties, in general, agreed that the proposed changes would likely have a relatively low impact on compliance costs..

Section 3: Delivering an option

How will the new arrangements be implemented?

Changes to the Act will be incorporated into the Electricity Industry Amendment Bill currently before the Economic Development, Science and Innovation select committee. The Ministry's Departmental Report to the committee will recommend the required changes be adopted. The select committee is due to report back to the House by 31 March 2022. It is expected that the Bill should be passed no later than September 2022.

Changes to the Regulations will require an Order in Council. It is anticipated this process will be initiated in early 2022. Changes to the Act and to the Regulations are independent of one another, as they relate to distinct aspects of the compliance regime.

How will the new arrangements be monitored, evaluated, and reviewed?

There is no formal process in place to monitor and evaluate the new arrangements. However, the Authority regularly reviews its internal procedures, policies, guidelines and systems to ensure they're up to date and provide an effective mechanism for regulation of the electricity industry.

In this regard, the Authority recently undertook a consultation to develop a compliance strategy to structure its compliance approach and focus its resources on the most serious and highest-priority risks. It is opportunities like this which will allow for evaluation of the new arrangements to the compliance framework.

Additionally, the Rulings Panel can make recommendations to the Minister to consider whether amendments may be required to different aspects of the compliance framework where it judges there to be a gap. The Rulings Panel recently recommended[6] that the Minister consider an amendment to s. 54 of the Act to allow the Rulings Panel greater discretion to award costs.

[6] Decision available at: https://www.electricityrulingspanel.govt.nz/assets/dms-assets/27/28-Jan-2021-Rulings-Panel-final-decision.pdf