

annex one: drafting suggestions for corporate separation / arm's-length rules

32 Content of Code

- (1) The Code may contain any provisions that are consistent with the objectives of the Authority and are necessary or desirable to promote any or all of the following:
 - (a) competition in the electricity industry;
 - (b) the reliable supply of electricity to consumers;
 - (c) the efficient operation of the electricity industry;
 - (d) the protection of the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers;
 - (e) the performance by the Authority of its functions;
 - (f) any other matter specifically referred to in this Act as a matter for inclusion in the Code.
- (2) The Code may not—
 - (a) impose obligations on any person other than an industry participant or a person acting on behalf of an industry participant, or the Authority (other than in accordance with **subsection (3)**); or
 - (b) purport to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 4 of the Commerce Act 1986 (other than in accordance with **subsection (4)**); or
 - (c) purport to regulate any matter dealt with in or under the Electricity Act 1992.
- (3) **Subject to subsection (3A),** the Code may impose obligations on industry participants or specified persons for the purpose of restricting relationships between 2 classes of industry participants, where those relationships may not otherwise be at arm's length and as a consequence competition in the electricity industry is likely to be substantially lessened.
- (3A) Before making any provision under **subsection (3)**, the Authority must be satisfied:
 - (a) there is scope for the exercise of substantial market power by distributors or Transpower in relation to the supply of goods or services other than line function services, as a result of which competition for the supply of those goods or services is likely to be substantially lessened, taking into account the effectiveness of existing regulation or arrangements (including ownership arrangements); and
 - (b) the benefits of restricting relationships between classes of industry participants materially exceed the costs of those restrictions, having regard to:
 - (i) material effects on allocative, productive, and dynamic efficiency;
 - (ii) material distributional and welfare consequences on suppliers and consumers; and

Commented [CT1]: The EIAB doesn't include a specific empowering provision. Rather, it relies on the general empowering provision in subsection (1). Subsection (3) extends the Code-making power to non-industry participants. We have suggested making subsection (3) a specific empowering provision in relation to separation and arm's length rules.

Commented [CT2]: Makes explicit the purpose for which the power is conferred on the Authority.

Commented [CT3]: This is adapted from the Commission's Part 4 inquiry power in the Commerce Act, on the basis that is an existing model for how to undertake a regulatory intervention on competition grounds.

Commented [CT4]: Makes explicit that the concern is with lines companies leveraging their market power into adjacent contestable markets.

Commented [CT5]: The Authority must demonstrate that there is an actual risk to competition; i.e. it is not enough that the Authority apprehends a theoretical risk that it wishes to pre-emptively address.

Commented [CT6]: For example: (i) Part 2 of the Commerce Act addresses restrictive trade practices including abuse of dominance, (ii) Part 3 prohibits anticompetitive acquisitions and mergers, (iii) the related parties rules under Part 4 require that transactions with a related party (including an unregulated part of the regulated business) are on demonstrably arm's length terms.

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(iii) the direct and indirect costs and risks of any type of regulation considered, including administrative and compliance costs, transaction costs, and spill-over effects.

- (4) The Code may contain provisions that do any of the following, regardless of whether such a provision would otherwise be prohibited under **subsection (2)(b)**:
- (a) set quality or information requirements for Transpower or 1 or more distributors, in relation to the terms and conditions for access to transmission or distribution networks:
 - (b) set pricing methodologies for Transpower or 1 or more distributors.
- (5) **Subsections (3) and (4)** do not limit **subsection (1)**.
- (6) In this section,—

pricing methodologies has the meaning given in section 52C of the Commerce Act 1986

specified person means a person (other than an industry participant) who is involved in both classes of industry participant that are the subject of any provisions made in accordance with subsection (3).

Commented [CT7]: This is similar to the considerations the Commission takes into account when doing a Part 4 inquiry.