

**BEFORE** **The Electricity Rulings Panel**  
**No: C-2022-003**

**BETWEEN** **The Electricity Authority**  
*Complainant*

**AND** **Ecotricity Limited Partnership**  
*Respondent*

**UNDER** The Electricity Industry Act 2010, The Electricity Industry (Enforcement) Regulations 2010, The Rulings Panel Procedures 2017 and The Electricity Industry Participation Code 2010

**IN THE MATTER OF** A complaint made of a breach of clause 11.32A or 11.32B of the Code.

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**Rulings Panel Decision C-2022-003**

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**Decision Date:** 15 May 2023

**Counsel:** R S May and T G Bain for the Authority  
J W J Graham and T F Cleary for Ecotricity

**Finding:** Ecotricity breached clauses 11.32A, 11.32B, 11.32E, 11.32EA and 11.32EB of the Code.

**Orders:** Ecotricity is ordered to pay a pecuniary penalty of \$57,000; and  
Ecotricity is to pay the Authority costs of \$3,820.

**Rulings Panel Members:**

Mel Orange	Chair
Geraldine Baumann	Deputy Chair
Lee Wilson	Panel Member

Contents	
<b>Summary of the Panel’s Decision</b> .....	2
<b>The Agreed Facts</b> .....	3
<b>Breach Finding</b> .....	4
<b>Remedial Order Submissions</b> .....	5
Pecuniary penalty orders .....	5
Starting point .....	6
The circumstances in which the breach occurred .....	6
Length of time the breach remained unresolved .....	8
The severity of the breach and the impact of the breach on other industry participants .....	8
Any benefit that the participant obtained, or expected to obtain, as a result of the breach .....	9
The extent to which the breach was inadvertent, negligent, deliberate, or otherwise .....	9
Overall seriousness .....	10
Aggravating and mitigating factors .....	11
<b>Ruling Panel’s Remedial Order Decision</b> .....	12
<b>Costs</b> .....	12
The Authority’s costs .....	12
The Panel’s costs .....	12
<b>Orders</b> .....	13
<b>Recommendation to Amend the Code</b> .....	13
<b>Right to Appeal</b> .....	14

## Summary of the Panel’s Decision

- [1] The Electricity Authority (the Authority) alleged that Ecotricity Limited Partnership (Ecotricity), an Industry Participant<sup>1</sup>, had breached the Electricity Industry Participation Code 2010 (the Code) by failing to provide consumption data that was lawfully requested from it.
- [2] Ecotricity accepted that it had breached the Code but submitted that there were significant mitigating factors, including that it had breached the Code because of a genuinely held mistaken belief, at the time of the breach, that it could withhold the requested data.
- [3] The Authority and Ecotricity agreed that the overall seriousness of the breaches was in the medium band. The Authority submitted that the appropriate starting point was a fine of \$75,000 with a five per cent reduction for mitigating factors. Ecotricity

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<sup>1</sup> Section 9 of the Electricity Industry Act requires that Industry Participants must register and comply with the Code.

submitted that the appropriate starting point was between \$50,000 and \$60,000 and that a reduction of 25% was appropriate

- [4] The Rulings Panel<sup>2</sup> (the Panel) agreed that the breach was in the medium band of seriousness. It adopted a starting point of \$60,000 and applied a five per cent discount resulting in a pecuniary penalty order of \$57,000. The Panel also decided that Ecotricity is to pay the Authority's costs but that an order for a contribution to the Panel's costs would not be made.

### **The Agreed Facts**

- [5] The Authority and Ecotricity reached an agreement on the facts the Panel should consider when making its decision. In summary, the complaint related to a failure to provide consumer consumption in breach of the Code, which is a set of mandatory rules that Industry Participants must comply with.<sup>3</sup> Clauses 11.32A to 11.32EB of the Code sets out retailers' obligations to provide consumers and their agents with information about the consumers' electricity consumption as follows:

- Clause 11.32A requires a retailer to provide a consumer (with whom the retailer has had a contract within the last 24 months) with information about the consumer's electricity consumption upon their request;
- Clause 11.32B states that a retailer must provide the information no later than 5 business days following the request and that the retailer must not charge a fee for doing so;
- Clause 11.32E states that a retailer must deal with any request from an agent of a consumer if the agent is authorised to do so on the consumer's behalf. The retailer must deal with the agent in accordance with clauses 11.32A and 11.32EB;
- Following receipt of a request from an agent, Clause 11.32EA requires the retailer to make a decision on the request and provide the information requested within 5 days unless there are grounds for refusing the request. If there are grounds for refusing the request, the retailer must consider whether any further information from the agent would address the reasons for the refusal and specifically request any such further information. The grounds for refusal (and reasoning why the ground applies) must be communicated to the agent;
- Clause 11.32EB provides that a retailer must grant the request for information made by an agent unless the retailer believes on reasonable grounds that the consumer has not authorised the request, complying with

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<sup>2</sup> The Rulings Panel is an independent body that assists in enforcing the Electricity Industry Participation Code by dealing with complaints about breaches of the Code. It is established under Electricity Industry Act 2010.

<sup>3</sup> The Code is secondary legislation (Refer section 33 of the Electricity Industry Act). Section 7 defines who an Industry Participant is.

the request would cause the retailer to breach the Privacy Act 1993, or that material provided is incorrect, or the retailer is unable to identify the consumer the request relates to.

- [6] From August 2020 to May 2021, The Utility Company (TUC) made requests on behalf of:
- Quality Laundry Services Limited on 4 and 13 August 2020, 17 September 2020, and 1 December 2020;
  - South Pacific Timber Limited on 29 October 2020 and 9 November 2020;
  - Aquacare AHC Limited on 27 September 2020, 17 October 2020, 26 November 2020, and 1 December 2020;
  - Southpaw Brewing Co Limited on 3 November 2020, 20 November 2020, 26 November 2020, and 1 December 2020; and
  - Scarecrow Limited on 20 May 2021 and 7 June 2021.
- [7] TUC was properly authorised to make each of the requests in terms of clause 11.32E of the Code, with the effect that the requests were made in terms of clause 11.32B of the Code. Ecotricity failed on each occasion to make the information available.
- [8] The Authority and Ecotricity agreed that Ecotricity had breached clause 11.32A of the Code, in conjunction with clauses 11.32B, 11.32E, 11.32EA and 11.32EB, being the conditions upon which information requests must be made and responded to. Alternatively, they agreed that if the operative provision was clause 11.32B, Ecotricity had breached that clause, in conjunction with clauses 11.32B, 11.32E, 11.32EA and 11.32EB.
- [9] The text of clauses 11.32A, 11.32B, 11.32E, 11.32EA and 11.32EB are noted in Appendix A.

### **Breach Finding**

- [10] Part 11 of the Code deals with registry information management. The registry is a database maintained by the Authority to record information about Installation Control Points (ICPs). It facilitates the exchange of information between retailers, metering equipment providers and distributors to manage reconciliation, invoicing and switching processes.
- [11] The provisions in Part 11 of the Code are important. They ensure the free flow of information required to facilitate competition. In this instance, the information sought was consumption data. The Panel notes that the term consumption data is not defined in the interpretation provisions in Part 1 of the Code but that it is in Schedule 12A.1 Appendix C (Default agreement – Provision of consumption data). The Panel has, in this decision, made a recommendation that a definition of consumption data is provided in Part 1.

[12] The Authority and Ecotricity put forward that Ecotricity had breached either 11.32A or 11.32B of Part 11. The Panel finds that the primary obligation to provide consumption data is clause 11.32A. It sets the obligation to provide consumption data. The provisions in clauses 11.32B to 11.32EB provide the requirements and mechanisms in relation to the provision of the consumption data sought. On that basis, the Panel finds that Ecotricity breached clauses 11.32A, 11.32B, 11.32E, 11.32EA and 11.32EB of the Code.

### Remedial Order Submissions

[13] In the Notice of Formal Complaint, the Authority sought the following orders:

- 15.1 *An order that the respondent pay a pecuniary penalty pursuant to s 54(1)(d) of the Act.*
- 15.2 *An order that the respondent pay a sum by way of compensation to any other affected person pursuant to s 54(1)(e) of the Act.*
- 15.3 *An order that the respondent pays the Authority and Rulings Panel the reasonable costs of these proceedings pursuant to s 54(1)(g) of the Act.*
- 15.4 *Any other order the Rulings Panel considers just.*

[14] Both parties filed submissions. The Authority did not pursue an order that Ecotricity pay compensation. Both parties submitted that a pecuniary penalty order was appropriate, and they agreed that Ecotricity should pay the Authority's costs. The Authority and Ecotricity differed as regards payment of the Panel's costs, with Ecotricity submitting that an order should not be made.

### Pecuniary penalty orders

[15] Pecuniary penalty orders are provided for in section 54(d) of the Electricity Industry Act. The provision was amended on 1 September 2022. The amendment increased the maximum penalty from \$200,000 to one not exceeding \$2 million and a further amount not exceeding \$10,000 for every day or part of a day during which a breach continues. Ecotricity's breach of the Code predated the amendment coming into force. As such, the earlier \$200,000 maximum penalty applies.

[16] When a pecuniary penalty order is sought,<sup>4</sup> the Panel must consider the seriousness of the breach of the Code. Section 56 of the Act stipulates:

- (2) *In determining whether to make a pecuniary penalty order and, if so, the amount of the order, the Rulings Panel must consider the seriousness of the breach of the Code, having regard to the following:*
  - (a) *the severity of the breach:*

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<sup>4</sup> Under section 56(1) of the Electricity Industry Act 2010, a pecuniary penalty order can only be imposed if the Authority seeks one.

- (b) *the impact of the breach on other industry participants:*
- (c) *the extent to which the breach was inadvertent, negligent, deliberate, or otherwise:*
- (d) *the circumstances in which the breach occurred:*
- (e) *any previous breach of the Code by the industry participant:*
- (f) *whether the industry participant disclosed the matter to the Authority:*
- (g) *the length of time the breach remained unresolved:*
- (h) *the participant's actions on learning of the breach:*
- (i) *any benefit that the participant obtained, or expected to obtain, as a result of the breach:*
- (j) *any other matters that the Rulings Panel thinks fit.*

[17] The section makes it clear that the overall consideration is seriousness, and whilst the listed factors must be taken into consideration, the Panel is not limited to them.

#### Starting point

[18] In a decision of 27 March 2020, the Panel set out a framework for arriving at the appropriate pecuniary penalty based on the seriousness of the breach and by reference to four bands (low, medium, high and very high) prior to it considering any mitigating and aggravating factors and stepping back and making an overall assessment.

[19] Using that framework, the Authority and Ecotricity agreed that the overall seriousness of the breaches was in the medium band, which places it in the range of \$50,000 to \$100,000. The Authority, however, submitted that the appropriate starting point was a fine of \$75,000 with a five per cent reduction for mitigating factors making the endpoint \$71,250. Ecotricity submitted that the appropriate starting point was between \$50,000 and \$60,000 and that a reduction of 25% was appropriate, placing it in the \$37,500 to \$45,000 range.

[20] The different positions of each were reflected in their submissions on the relevant factors the Panel must consider in section 56(2) of the Electricity Industry Act.

#### The circumstances in which the breach occurred

[21] The Authority noted that there had been 16 refusals in respect of the five customers to which the proceeding relates. The Authority submitted that the refusals had not been rectified. If that is the case, then the conduct could be viewed as a continuing breach, which, in turn, makes it more serious.

[22] Ecotricity responded that whilst the specific requests for consumption data had not been responded to, the intervening period of time has, in effect, made the provision

of that data somewhat irrelevant. Ecotricity also stressed that it is now complying with all data requests and will continue to do so.

- [23] The Panel has no reason to doubt Ecotricity’s assertion that it is now complying and that it will continue to do so. The Panel also considers that time has made compliance with the consumption data requests complained about somewhat redundant. It does not view either matter as a factor which elevates the seriousness of the breaches.
- [24] Ecotricity’s submissions regarding the circumstances of the breach focused on surrounding events. The submissions were supported by an affidavit.<sup>5</sup> An affidavit in reply was filed by Meridian, a party to the investigation.<sup>6</sup> The circumstances, as Ecotricity saw them, deserve some discussion.
- [25] Ecotricity formed the view that Meridian was attempting to sell energy under market prices with the intention of driving small retailers out of the market.<sup>7</sup> It formed that belief partly on what it considered to be predatory pricing, and partly on the basis of a Meridian whistle-blower.<sup>8</sup> On that basis, Ecotricity refused to provide the consumption data, and it complained to the Commerce Commission that Meridian was abusing its market power through predatory pricing strategies.<sup>9</sup> It also made a complaint to the Authority. The Commerce Commission did not take any further action because, with reference to section 36 of the Commerce Act 1986, the Commission did not consider that Meridian possessed a substantial degree of market power.<sup>10</sup> The complaint to the Authority did not allege a breach of any Code provisions and was not pursued by the Authority. Ecotricity later accepted that Meridian’s alleged conduct did not breach any Code provisions.<sup>11</sup> It was subsequently ascertained, in relation to a retail customer that was not part of this complaint, that TUC had misinterpreted the pricing information provided to it by Meridian,<sup>12</sup> which was not below the market price.
- [26] Counsel for Ecotricity submitted that, with the above circumstances in mind, Ecotricity reasonably believed that a predatory pricing situation existed at the time of the breaches. Ecotricity saw a refusal as the only way in which it could protect itself against such conduct. Ecotricity now accepts that it was mistaken and that there were no lawful grounds on which it could refuse to provide the consumption data. Counsel submitted:

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<sup>5</sup> Affidavit of Stephanie Melissa Loveday, Ecotricity Limited Director dated March 2023

<sup>6</sup> Affidavit of Samuel John Flemming, Manager of Regulatory and Government Relations, Meridian Energy Limited, dated 24 March 2023.

<sup>7</sup> Affidavit of Stephanie Melissa Loveday at paragraph 8.

<sup>8</sup> Affidavit of Stephanie Melissa Loveday at paragraph 10.

<sup>9</sup> Affidavit of Stephanie Melissa Loveday at paragraph 8.

<sup>10</sup> Letter from Commerce Commission to Ecotricity dated 14 November 2019, an exhibit to the affidavit of Samuel John Flemming.

<sup>11</sup> Affidavit of Stephanie Melissa Loveday at paragraph 26.

<sup>12</sup> Affidavit of Stephanie Melissa Loveday at paragraph 21, and exhibited emails from TUC to Les Mills dated 14 and 16 December 2020.

7.15 *It is submitted that the evidence clearly shows that Ecotricity was standing on principle in doing what it did, even if it was misguided that such a principle entitled it not to respond to the consumer information requests (as it now admits).*

[27] Whilst the Panel accepts that Ecotricity may have refused the consumption data requests on a genuinely held misconception of the surrounding circumstances in order to protect its position, it does note that there were no grounds in the Code for refusing the requests and at no time did it substantiate a reason under the Code why it could refuse. Ecotricity was concurrently pursuing other avenues to seek redress for what it saw as predatory behaviour. Those may have been appropriate steps to take. The refusal to supply consumption data was not, and it is a matter that goes to the overall seriousness of the breaches.

#### Length of time the breach remained unresolved

[28] The Authority submitted that the breaches persisted for a significant period of time, noting that Ecotricity had, at the time of the investigation, maintained it would not comply with the Code, stating that it “would withhold the data from particular electricity brokers or retailers until such time as it considers the inequity in the market is resolved”.<sup>13</sup> The Authority also questioned whether Ecotricity was now complying with its obligations, a point which Ecotricity refutes. It submitted that it is now complying with the Code obligation and will continue to do so.<sup>14</sup> Ecotricity’s submissions also relied on the surrounding circumstances discussed above to explain its conduct at the time and the reasons why the consumption data has not been provided.<sup>15</sup>

[29] As the agreed facts noted, the consumption data refusals spanned from August 2020 to May 2021. In total, there were 16 requests that were not complied with. The Authority submitted that this was a factor that went to the circumstances of the breach.<sup>16</sup> The Panel considers that it is a factor in respect of the length of time the breach remained unresolved.<sup>17</sup> Both the length of time over which the conduct persisted (nine months) and the number of repeated requests for the same consumption data go to the overall seriousness of the breaches.

#### The severity of the breach and the impact of the breach on other industry participants

[30] The Authority submitted the breaches may have negatively impacted consumers and retailers. The former are not, however, necessarily Industry Participants. It is also noted that the investigator, in his report, did not identify any financial losses. Rather

<sup>13</sup> Appendix to affidavit of Mr Fleming on behalf of Meridian dated 24 March 2023: MEL-1 at 2, and investigator's report at [87].

<sup>14</sup> Refer to paragraphs [21] and [22] herein.

<sup>15</sup> Refer to paragraph [24] herein.

<sup>16</sup> Section 56(2)(d) of the Electricity Industry Act.

<sup>17</sup> Section 56(2)(g) of the Electricity Industry Act.



the report focused on the impact the breaches may have had on market confidence. In this respect, Counsel submitted:

32. *This type of breach undermines the free and prompt flow of customer consumption data from an incumbent retailer to a competitor retailer. Such information is fundamental to competition in the retail electricity market. Actions that prevent such information being shared are likely to have a negative effect on the market for consumers generally.*

[31] Ecotricity submitted that there was no evidence to support claims made of a loss of reputation or impact on other Industry Participants. It did accept that there would have been an impact on the five customers to whom the breaches related. Regarding market confidence, Ecotricity accepted the principle but submitted that in the circumstances where the breach was limited to UTC, there would not have been a more generalised negative effect on the market.

[32] The Panel accepts that Ecotricity's conduct could, in principle, have undermined market confidence, and whilst there is no direct evidence of this, the potential is enough to warrant sanction. The market relies on the free flow of information. As noted earlier, Part 11 of the Code facilitates the exchange of information between retailers, metering equipment providers and distributors to manage reconciliation, invoicing and switching processes. The provisions are important as they facilitate competition. Conduct that might prevent competition should be deterred, and, as such, the potential impact of the breaches on other Industry Participants is a factor the Panel has taken into consideration in determining the overall seriousness of the breaches.

Any benefit that the participant obtained, or expected to obtain, as a result of the breach

[33] The Authority submitted that there may have been a benefit to Ecotricity as its actions may have prevented the customers from shopping around and resulted in Ecotricity retaining the customers. Ecotricity again noted that the breaches were a misguided stand on principle and were not designed to obtain a benefit.

[34] Even if the position taken by Ecotricity was a misguided stand on principle, the Panel finds that it would have benefited from the retention of the customers. It does not, however, consider this to be a significant factor in the overall determination of seriousness.

The extent to which the breach was inadvertent, negligent, deliberate, or otherwise

[35] The Authority submitted that the breach was deliberate and the pecuniary penalty order should deter others:

35. *The breach by Ecotricity was deliberate and intentional in nature and therefore is quite different to most of the breaches dealt with by the Rulings Panel. The Authority submits that a deliberate decision to breach the Code is a serious aggravating factor. The penalty imposed should be significant*

*enough to deter Ecotricity and other participants in the market from similar conduct in future. The penalty must be high enough to not be seen as a mere “license fee”.<sup>18</sup>*

- [36] Ecotricity accepted that the breaches were deliberate, albeit on a mistaken belief that it could refuse. It submitted, however, that weight should be given to the justifications put forward for the breaches.
- [37] The Panel reiterates the comments made in paragraph [26] above. The obligation to provide the consumption data in the Code was clear, and the refusal to provide it was not the appropriate course of action.
- [38] With regard to deliberate breaches, the Panel notes that whilst Subpart 2 of the Electricity Industry (Enforcement) Regulations 2010 provides for limitations of liability, those limitations do not apply to a wilful breach.<sup>19</sup> The Panel considers that this points toward deliberate conduct being a matter that elevates the seriousness of a breach.
- [39] Notwithstanding the comments above, the Panel has noted the genuinely held misguided belief and has taken it into consideration. The Panel does, however, see the deliberate refusal as one of the more significant factors in this matter when determining seriousness.

#### Overall seriousness

- [40] The Authority submitted that the deliberate conduct and potential impact on the market integrity could have warranted a starting point in the high or very-high bands but that, because the actual impact was not as serious as other matters that have come before the Panel, a medium culpability band was appropriate with a starting point of \$75,000.
- [41] Ecotricity agreed that the matter was not as serious as other matters that have come before the Panel. It placed the matter in the lower end of the medium band with a starting point of \$50,000 to \$60,000. Ecotricity referenced the overall circumstances of the breaches and its submission that the market had not been undermined as the reasons for the lower starting point.
- [42] The Panel agreed that the breach was in the medium band of seriousness, which placed it in the \$50,000 to \$100,000 pecuniary penalty order range. Based on the factors it has noted concerning section 56(2) of the Electricity Industry Act, it has adopted a starting point of \$60,000.

<sup>18</sup> *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [64]-[65]; cited in *Stumpmaster v WorkSafe New Zealand Ltd* [2018] NHZC 2020, [2018] 3 NZLR 881at [65].

<sup>19</sup> **73** *Loss caused by wilful breach or fraud*

- (1) *The limits on liability set out in this Part do not apply if the industry participant wilfully breached the Code or fraudulently caused the loss in question.*
- (2) *Subclause (1) does not apply to the limit on liability in regulation 67(2).*

[43] The Panel’s starting point is less than the Authority’s suggested starting point and at the top of Ecotricity’s range. In determining its starting point, the Panel has factored in that the conduct was deliberate and sustained, which takes it closer to the Authority’s starting point, but that there were surrounding circumstances that should also be considered. Whilst not sanctioning Ecotricity’s conduct in refusing to provide consumption data, the Panel has accepted that it was operating under a genuinely held misguided and mistaken belief.

#### Aggravating and mitigating factors

[44] The Authority noted that Ecotricity has, to a limited extent, cooperated but noted that it did not self-report the breach until after Meridian had reported it. The Authority also noted that Ecotricity initially denied any wrongdoing but that it has now accepted the breaches, which should be recognised. It submitted that a five per cent discount should be applied.

[45] Ecotricity submitted that it has cooperated and that its cooperation warrants a 10 to 15 per cent discount. Further, it submits that there has been an early admission which warranted a 20 to 25 per cent discount. Finally, Ecotricity noted that there had not been any previous breaches, it is remorseful, and it has taken remedial steps.

[46] The Panel is bound by its previous decisions.<sup>20</sup> In the past, it has applied substantial discounts where respondents have self-reported, cooperated and taken action following a complaint. The Panel does not see that Ecotricity’s post-complaint conduct warrants the level of discount that it submits is appropriate.

[47] Firstly, its cooperation has been limited and has come at a late stage. For example, at the investigation stage, Ecotricity denied any wrongdoing, and it did not enter into a settlement,<sup>21</sup> which could have precluded that matter from coming before the Panel. Up until the matter came before the Panel, Ecotricity was somewhat belligerent in the position it took.

[48] Ecotricity did not self-report the breach, and whilst there is no obligation to self-report anything other than a breach of common quality or security,<sup>22</sup> if an industry participant discloses a matter to the Authority, the Panel can take that into consideration.<sup>23</sup>

[49] Further, the Panel does not consider that the remedial steps taken warrant a discount. Ecotricity is now only doing that which it was always obliged to do. With respect to remorse, it is diluted by the continued position that Ecotricity was, at the time, justified in its actions. More importantly, however, the Panel has taken that

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<sup>20</sup> Section 54(2) of the Electricity Industry Act.

<sup>21</sup> Regulation 22 of the Electricity Industry (Enforcement) Regulations requires that an investigator must endeavour to effect an informal resolution (a *settlement*) of every matter under investigation, by agreement between the parties to the investigation.

<sup>22</sup> Regulation 7 of the Electricity Industry (Enforcement) Regulations. Under regulation 8 there is a mandatory requirement to breaches by other Industry Participants.

<sup>23</sup> Section 56(2)(f) of the Electricity Industry Act.

into account in setting the starting point. Finally, the Panel accepts that there had not been any previous breaches and that this is a mitigating factor.

- [50] As noted by the Authority, in *Moses v R*,<sup>24</sup> uplifts and discounts should be calculated as a percentage of the starting point rather than being applied sequentially. On that basis, taking the various matters into account, the Panel has decided that a five per cent discount is to be applied in recognition of the acceptance before the Panel of the breaches. The discount applied is minimal as acceptance has, compared to other matters that have come before the Panel, been late in the proceedings, and it reflects the reality that Ecotricity did not have an arguable case.

### **Ruling Panel’s Remedial Order Decision**

- [51] The Panel has decided that Ecotricity is to pay a pecuniary penalty of \$57,000.

### **Costs**

#### The Authority’s costs

- [52] The Authority and Ecotricity agreed that it would be appropriate for Ecotricity pay the Authority’s reasonable costs in pursuing the formal complaint, calculated by reference to the District Court 2B scale. They quantified the costs payable as \$3,820. Pursuant to section 54(1)(g) of the Electricity Industry Act, Ecotricity is ordered to pay the Authority the sum of \$3,820 for its reasonable costs associated with the complaint.

#### The Panel’s costs

- [53] The Panel, in C-2022-001<sup>25</sup> the Panel set out principles on which an order to pay the Panels costs might be made. The Panel noted that each matter must be decided on its own merits and in light of an overall public or industry service element afforded by matters being brought before the Panel and that it did not want to deter industry participants from using it. The Panel also noted that, at the same time, there should be an element of user pays so that there is not an unwarranted burden on other industry participants. The question for the Panel is to determine which matters should attract a Panel’s costs order. In C-2022-001, the Panel noted that matters where there have been continued or wilful breaches might attract an order. It is noted that the current matter involves a wilful breach.
- [54] C-2022-001 was decided in July 2022. The Panel notes that the settlement process required by the Electricity Industry (Enforcement ) Regulations occurred prior to the decision being released. As such, it would not have been a matter that was taken into consideration by Ecotricity in deciding whether it would settle. In essence, the Panel considers that, at that time, Industry Participants were not yet on notice of the

<sup>24</sup> [2020] NZCA 296, [2020] 3 NZLR 583

<sup>25</sup> *Electricity Authority v Transpower* [2022] Rulings Panel Decision – C-2022-002

Panel’s finding in C-2022-001. Those factors do not, however, preclude an order being made.

- [55] Of greater significance in this matter is Ecotricity’s genuinely held mistaken belief that it could refuse to provide the consumption data. Whilst the mistaken belief is not a defence to the breach, it is a factor that the Panel can take into account in deciding whether an order should be made. As such, taking it into account, the Panel has decided it will not make an order as whilst the breach was wilful, the genuinely held mistaken belief has offset the wilful nature of the breach.
- [56] Notwithstanding the decision not to order Ecotricity to contribute toward the Panel’s costs, the Panel considers Industry Participants are now on notice that the Panel can make such orders.

### **Orders**

- [57] The Rulings Panel declares that Ecotricity breached clauses 11.32A, 11.32B, 11.32E, 11.32EA and 11.32EB of the Code.
- [58] The Rulings Panel orders:
- (a) Ecotricity is required to pay the Crown a pecuniary penalty of \$57,000; and
  - (b) Ecotricity is to pay costs to the Electricity Authority of \$3,820.
- [59] This decision is, in accordance with regulation 44 of the Electricity (Industry) Regulations, to be published by the Electricity Authority within ten (10) working days of receipt.

### **Recommendation to Amend the Code**

- [60] Section 54(1)(h) of the Electricity Industry Act states that, on determining a complaint, the Rulings Panel recommend to the Authority that a change should be made to the Code.
- [61] The Panel notes that the term consumption data is not defined in the interpretation provisions in Part 1 of the Code but that it is in Schedule 12A.1 Appendix C (Default agreement – Provision of consumption data).
- [62] Part 1 of the Code does provide a definition of consumption information: “consumption information” means the information describing the quantity of electricity conveyed during the period for which the information is required, which may be directly measured or calculated from information obtained from a metering installation, or calculated in accordance with this Code.
- [63] The definition of “consumption data” in Schedule 12A.1 Appendix C, is: “consumption data” means electricity consumption data collected by the Trader or the Trader’s Metering Equipment Provider for each ICP the Trader supplies, and which the Trader or the Trader’s Metering Equipment Provider holds or obtains, but

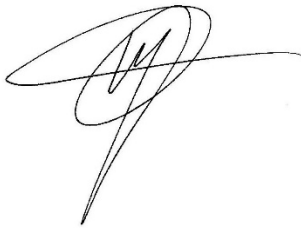
does not include aggregated and anonymised information contained in documents, reports, analyses, or other materials that are prepared for a Permitted Purpose or Other Purpose.

[64] Given the reference to consumption data in Part 11, the Panel considers that a definition of the term should be provided in Part 1 to aid Industry Participants with the interpretation of obligations in Part 11.

### **Right to Appeal**

[65] The right to appeal Panel decisions is set out in sections 64 and 65 of the Act.

Issued this 1<sup>st</sup> day of June 2023

A handwritten signature in black ink, appearing to be 'M.J. Orange', written in a cursive style with a long horizontal stroke extending to the right.

**M.J. Orange**  
Rulings Panel Chair

## Appendix A: Electricity Industry Participation Code Clauses

### 11.32A Retailers must give information about consumer electricity consumption

- (1) Each retailer must, if requested by a consumer with whom the retailer has a contract to supply electricity, or with whom the retailer has had such a contract in the last 24 months, give the consumer any of the information specified in subclause (2) that the consumer requests.
- (2) The information referred to in subclause (1) is information relating to any period in the 24 months preceding the request—
  - (a) about the consumer’s consumption of electricity relating to each ICP at which the retailer supplied electricity to the consumer; and
  - (b) used by the retailer to—
    - (i) calculate the amount of electricity consumed by the consumer at each ICP; or
    - (ii) provide any service to the consumer.

### 11.32B Requests for information

- (1) A retailer to which a request is made must give the information to the consumer no later than 5 business days after the date on which the request is made.
- (2) In responding to a request, the retailer must comply with the procedures, and any relevant EIEP, published by the Authority under clause 11.32F.
- (3) A retailer must not charge a fee for responding to a request, but if 4 requests in respect of a consumer’s information have been made in a 12 month period, the retailer may impose a reasonable charge for further requests in that 12 month period.

### 11.32E Agents

If a consumer authorises an agent to request information under clause 11.32B on behalf of the consumer, a retailer must deal with any request from the agent for information about the consumer under clause 11.32B in accordance with:

- (a) clauses 11.32A and 11.32EB;
- (b) clause 11.32ED, if a request:
  - (i) includes a statement from the agent that the agent has obtained, or the request is accompanied by, a written authority from the consumer in the form and containing the information required by Schedule 11.6; and
  - (ii) the request is made through the EIE System; and
- (c) the Privacy Act 1993, where applicable.

**11.32EA Retailer actions on receipt of requests from agents**

- (1) A retailer, after receiving a request under clause 11.32B from an agent on behalf of a consumer, must:
  - (a) make a decision on the request, and advise the agent of that decision, as soon as reasonably practicable; and
  - (b) provide the information requested within the timeframe required by clause 11.32B unless there are grounds for refusing the request under clause 11.32EB.
- (2) If the retailer considers, in accordance with subclause (1), that there are grounds for refusing the request, the retailer must, before refusing the request:
  - (a) consider whether any further information could reasonably be provided by the agent to satisfy the retailer; and
  - (b) request any such further information from the agent, specifying the further information required in detail.
- (3) If further information is provided under subclause (2)(b), the retailer upon receiving the further information must:
  - (a) make a final decision on the request, and advise the agent of that decision, as soon as reasonably practicable; and
  - (b) provide the information requested within the timeframe required by clause 11.32B as calculated from the time the retailer receives the further information, unless there are grounds for refusing the request under clause 11.32EB.
- (4) If a retailer decides to refuse a request, in advising the agent of that decision, the retailer must:
  - (a) indicate the ground or grounds under clause 11.32EB(1) that the retailer is relying on to refuse the request; and
  - (b) provide the agent with the detailed reasons as to why that ground or grounds applies or apply.
- (5) If a retailer decides to grant a request in full, the retailer meets the obligation to advise the agent of that decision by providing the information to the agent in accordance with subclauses (1)(b) and (3)(b).
- (6) The obligations in subclauses (1)(a) and (3)(a) do not detract from the obligations in subclauses (1)(b) and (3)(b), respectively.

**11.32EB Decisions on requests**

- (1) A retailer that receives a request under clause 11.32B from an agent on behalf of a consumer must grant the request and provide the information unless the retailer believes on reasonable grounds:



- (a) that the consumer has not authorised the request;
  - (b) that complying with the request would otherwise cause the retailer to breach its obligations under the Privacy Act 1993 (where it applies); or
  - (c) that:
    - (i) if the request is accompanied by a written authority in the form and containing the information required by Schedule 11.6 or the agent subsequently provides a copy of such an authority, any of the information required by Schedule 11.6 is incorrect in a material way, such that the retailer cannot be satisfied of the matters in paragraphs (a) or (b) or is unable to identify the consumer the request relates to; or
    - (ii) in any other situation, the retailer is unable to identify the consumer the request relates to.
- (2) A retailer may not refuse a request under clause 11.32B from an agent on behalf of a consumer on the basis that the request or any authorisation relating to the request is not in a particular form, or does not follow a particular process.