

BEFORE

The Electricity Rulings Panel

BETWEEN

A Participant Under the Electricity Code

and

Meridian Energy Limited, and

The Electricity Authority

UNDER

**The Electricity Industry Participation Code 2010, and
The Electricity Industry Act 2010, and
The Electricity Industry (Enforcement)Regulations 2010**

IN THE MATTER OF

**A dispute brought by a participant under part
10(50) of the Code**

**Decision concerning request
for
non-publication of Rulings Panel Decision of 8 May 2018**

Dated : 13 July 2018

Rulings Panel Members

Peter Dengate Thrush	- Chairperson
Sue Roberts	- Panel member
Nicola Wills	- Panel member

Introduction

1. On 20 July 2017 the Participant made a request to the Rulings Panel that, in these proceedings, there be no publication of his email address as it contained their employer's name. On 21 July 2017 the Rulings Panel asked for submissions from the parties, received and considered those, and on 8 May 2018 issued a formal decision (the "Confidentiality decision") in the matter.
2. In the Confidentiality decision, on matters relevant to the present issue, the Rulings Panel held:
 - (1) That it was clear to the Rulings Panel and to the parties that the proceedings had been brought by the Participant personally, not their employer;
 - (2) References to the employer and to the Participant's work email address would not be required to be disclosed by the Rulings Panel for the purposes of carrying out the Rulings Panel's obligations and duties in determining and publishing a decision in relation to the substantive application; and
 - (3) That it would not make any formal orders.
3. On 16 May 2018, having checked with the Rulings Panel that there were no reasons to withhold publication of the Confidentiality decision, and after being told there were none, the Authority informed the Rulings Panel and all parties that it intended to publish the decision, pursuant to what it saw as its obligation to publish Rulings Panel decisions under regulation 44(1) of the Electricity Industry (Enforcement) Regulations 2010 on 22 May 2018.
4. On 17 May 2018 the Participant:
 - (1) Withdrew the substantive matter before the Rulings Panel; and
 - (2) Requested "*no publication of any kind to appear in Authority media*".
5. Correspondence between the Rulings Panel, the Authority and the Participant followed. On 18 May 2018 the Rulings Panel made an interim decision under regulation 44(2) that the Confidentiality decision should not be published (which had the effect of staying publication by the Authority) and invited submissions from the Participant as to why the Confidentiality decision (and this subsequent decision) on the matter should not be published. The Participant filed timely submissions and the other parties responded.

The Regulations dealing with the Rulings Panel's obligations to publish and powers to prohibit publication

6. Regulation 43 in Part 2 (Rulings Panel consideration of complaints) provides:

The Rulings Panel must use reasonable endeavours to make its decision on each complaint under its consideration within 40 working days after the date on which it receives all written and oral submissions on the matter.
7. Regulation 44 in Part 2 (Rulings Panel consideration of complaints) provides:
 - (1) The Authority must publicise the terms of every decision made by the Rulings Panel under this part, together with the reasons for the Panel's decision, within 10 working days after receiving the decision from the Rulings Panel.

(2) However, the Authority must not publicise any part, or all, of any particular decision if the Rulings Panel advises the Authority that there are special circumstances that justify the non-publication.

8. Regulation 117 in Part 4 (Membership and operation of Rulings Panel) is permissive. It provides:

117 Rulings Panel may prohibit publication of information

(1) The Rulings Panel may prohibit the publication or communication of any information or document –

- (a) that is, or is intended to be, supplied or given or tendered to, or obtained by, the Rulings Panel under these regulations or Code; or
- (b) in connection with any notification, investigation, report or procedure under Part 2 or 3.

(2) The Rulings Panel may make the prohibition only after it has had regard to the following factors:

- (a) whether the information or document is confidential, commercially sensitive, or otherwise unsuited to publication or communication; and
- (b) whether the publication or communication is required to enable the Rulings Panel to carry out its obligations under the Regulations or the Code; and
- (c) whether the publication or communication is compelled by a law other than the Regulations or the Code; and
- (d) the rules of natural justice.

The Participant's submissions

9. The Participant submitted:

(1) The Panel's obligation to publish decisions under regulation 44 does not apply in this instance because regulation 44 only applies to the publication of a decision on the substantive complaint. The Participant relies on regulation 43 in support of that submission, and in particular the reference to the decision in that regulation being a decision on the "complaint", in this case the substantive complaint.

(2) The non-publication decision is not a formal decision of the Panel because the Panel decided there was no need to grant the order sought.

(3) There is no context to the decision being published and no current case entry to inform other participants of the substantive issue under consideration.

(4) Publication of the Panel's decision does nothing but draw attention to the potential issue it was supposedly preventing, which is a perverse outcome that should not be given effect to.

(5) The Panel's decision is not material to the substantive complaint – it is procedural in nature and there is no public interest in publication.

(6) The substantive complaint has been withdrawn, and if the Panel's decision is affirmed as a formal decision under regulation 44 it will be open to a vexatious appeal by Meridian.

Meridian Submissions

10. Meridian submitted:

(1) Regulation 44 applies to both substantive and procedural decisions of the Panel.

(2) The Participant's use of their employer's email address (and copying in other employees) creates confusion as to whether the allegation of a breach of the Code was in an individual capacity or on behalf of their employer.

(3) That the Participant has not provided any reasons why the publication ought to be prohibited.

(4) That having regard to the factors set out in regulation 117(2) it does not seem warranted (without further elaboration of this point).

The Authority's position

11. The Authority indicated it would not make further submissions and would abide the Rulings Panel decision.

Decision

Part 3 applies to this dispute

1. The Rulings Panel, after further review, considers that the original request for approval of publication by the Authority of the Confidentiality decision (see para 3 above) was in error, as was the Rulings Panel's response. In essence, the Rulings Panel applied regulation 44 to a dispute under Part 3 when that regulation applies only to Part 2 complaints.
2. Part 2 of the Regulations (including regulations 43 and 44) are specifically directed to "complaints" about breaches of the Code. Having regard to the limitation contained in regulation 33 (that complaints under Part 2 are those that proceed by way of regulation 30 and 31 regulation), it is clear that Part 2 does not apply to this case.
3. The substantive case the participant has brought before the Rulings Panel in this case is a dispute under Part 10 (50) of the Code. It is a fact, and possibly a confusing one for all parties, that the dispute has been framed as a complaint about a breach of the Code. The language in the Code itself sometimes uses these words interchangeably. Be that as it may, Part 10(50) explicitly provides that disputes of this nature may be resolved either between the

parties, or by a complaint to the Authority. If either approach does not determine the issue, the participant has an express right to bring the matter before the Rulings Panel.¹

4. Part 3 of the Regulations sets out how the Rulings Panel shall deal with disputes. It does not contain any provision requiring the Authority to publish decisions of the Rulings Panel under Part 3.. We contrast that with the express publication obligations created by regulation 29 in relation to matters arising from the Authority's response to complaints in the three cases specified by regulations 21(2), 23(3) and 27(1), and the obligations under regulation 44. We conclude that this specific inclusion in two places in the regulations but its omission in Part 3 indicates that publication is not required in Part 3 cases.
5. To the contrary in Part 3 cases, the Panel has a wide discretion to "make any order in respect of a dispute that it considers is just and reasonable in the circumstances" (see regulation 87(1)), in addition to specific powers to prohibit publication (regulation 117). Accordingly we hold that publication of the Confidentiality decision is not required under the regulations.

Considerations under Regulation 44

6. As we have received submissions from the parties on the point, and in case we are wrong, we set out below our views on the matter, in the context of regulations 44 and 117.
7. Part 2 of the regulations deals with the Rulings Panel's consideration of dispute and complaints. Regulation 44 does not specify the obligation to publish decisions is limited to substantive determination of any complaint. In that sense it could be interpreted to include procedural decisions (including for example Rulings Panel directions for the filing of submissions) and interlocutory decisions.
8. Part 2 follows a logical order dealing with obligations on the Rulings Panel when considering complaints. The Rulings Panel is obliged to notify parties (regulation 33), hold hearings in certain circumstances and issue notices of hearings (regulations 34 and 35), decide whether to have a public hearing and provide parties with notice of its decision in that regard (regulation 36). Regulations 37 and 38 deal with the rights of parties at hearings and when no hearing is held and regulations 39 to 42 set out provisions relating to evidence, the requirement of further information, the Rulings Panel obtaining advice, and the right for any party to make written submissions subject to deadlines set by the Rulings Panel.

¹ The Rulings Panel contrasts the difference between the dispute resolution provisions in Part 10.50 applicable here, in which reference to the Authority is voluntary, from those in the Solar case (Schedule 6.3) in which reference of the complaint to the Authority was a mandatory step.

9. Regulations 43 to 46 are set out under the heading “Decisions, orders and directions”. Regulation 43 requires the Rulings Panel to use reasonable endeavours make its decision on each complaint within 40 working days after it receives all written and oral submissions. Regulation 44 follows with an obligation on the Authority to publish the “terms of every decision made by the Rulings Panel under this Part”. In light of the surrounding regulations we consider regulation 44 is intended to be limited to substantive decisions of the complaint and does not encompass procedural or interlocutory matters. To interpret otherwise would require publication of every direction decision made by the Rulings Panel, directions which are at present sometime issued somewhat informally by email. We can discern no logical purpose in requiring publication of such decisions.
10. For the reasons set out above although we do not consider that we are called upon to decide the matter in this case, we record our interpretation is that the requirement is to publish “every decision made by the Rulings Panel under this Part” as directed by regulation 44, means only the substantive decision, excluding interlocutory and preliminary decisions made under this Part in the course of arriving at a substantive decision.
11. On this view, the Authority would not be required by regulation 44 to publish the Confidentiality decision. We note, however, that we consider that many interlocutory matters provide useful guidance of the Rulings Panel’s view or approach to an aspect of the Act, Code and regulations and it is the Panel’s intention to continue to publish interlocutory or procedural decisions of that nature.
12. If the matter were required to be published, publication could nevertheless be withheld if there were circumstances that justified non-publication. We turn to review whether there are such circumstances in this case. We agree with the Participant. We think that the fact that the substantive matter has been withdrawn substantially changes the nature of the public interest. There is now no public context in which to frame an understanding of the case, so the utility of the decision, particularly as a precedent, is very much reduced. Although slight, there is a risk that publication would identify or involve the participant’s employer in some way. Although we have not been provided with any evidence of the harm that might result, it is alleged, and has not been rebutted by the other parties.
13. Accordingly, if the matter had arisen under regulation 44, we would have relied on regulation 44(2) and found that special circumstances existed to justify non-publication.

Non-publication under Regulation 117

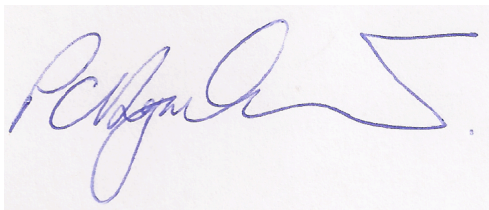
14. We consider that the Confidentiality decision is a document that falls within regulation 117 (1)(b), being a document produced in connection with a procedure under either Part 2 or Part 3 of the regulations.

15. Having regard to the matters required by regulation 117(2) set out above, we conclude (1) the decision is unsuited to publication (2) publication is not required to allow the Rulings Panel to carry out its obligations, (3) publication is not compelled by law, regulation or the Code, and there is no affront to natural justice in withholding publication. Accordingly, if it were applicable, we would require that publication should be prohibited under regulation 117(1).
16. We return to the consideration of the appropriate orders under the discretion provided to the Rulings Panel by regulation 87 (1). For the reasons set out in paragraphs 10 to 15 above, we hold there are circumstances that justify the non-publication of the Confidentiality decision of 8 May 2018. The interim non-publication order is made permanent. We order the Authority not to publish the Confidentiality decision.

Publication of this decision

17. In our request for submissions, we asked the parties to address the issue of publication of this decision. We have not received submissions on that point. We think these matters are of genuine public interest. This decision has been anonymised so as to prevent disclosure of the identity of the Participant, and, more importantly, does not contain reference to the email address at the heart of the issue. Even if the participant and their employer could be discerned from the available information, the issue of concern was the appearance or impression that the dispute was in some sense being brought by the employer. We think there is a *de minimis* risk of that mis-understanding arising in these circumstances. Accordingly, we will pass this decision to the Authority for publication.

Issued 13 July 2018

A handwritten signature in blue ink, appearing to read 'P.C. Dengate Thrush', with a stylized flourish at the end.

P.C. Dengate Thrush
Chair, Electricity Rulings Panel