

5 October 2026

Ministry of Business, Innovation and Employment
Wellington

By email: electrifynz@mbie.govt.nz

Tēnā koe,

Feedback on improving the efficiency of electricity distribution businesses

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide the Ministry of Business, Innovation and Employment (**MBIE**) with feedback on its *Improving the efficiency of electricity distribution businesses* discussion document (**discussion document**). This submission has been prepared with input from the Law Society's Commercial and Business Law Committee.¹

2 General comment

- 2.1 The Law Society's submission raises issues relating to the effectiveness, practical workability, and unintended consequences of the proposed options and identifies issues that should be considered when reviewing which reform options to progress for the future regulation of electricity distribution businesses (**EDBs**).
- 2.2 We note that the intended aims of the reform of EDBs are to improve the efficiency, innovation, and capability to enable rapid electrification at least cost to consumers, by:
- (a) improving collaboration and standardisation;
 - (b) providing a more tailored approach to economic regulation; and
 - (c) strengthening governance arrangements.²
- 2.3 As necessary background to the reforms, we note that the intention is to deliver changes to Part 4 of the Commerce Act 1986 (**the Act**), and other institutional arrangements. This means that any proposed reform should be aligned with the purpose of Part 4 of the Act, which is:³

¹ More information about our Commercial and Business Law Committee is available on the Law Society's website: <https://www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/commercial-li/>.

² Ministry of Business, Innovation and Employment *Discussion document for the electricity distribution businesses* (19 August 2026) at 5.

³ See sections 52 and 52A of the Commerce Act 1986.

... to promote the long-term benefit of consumers in markets [where there is little or no competition and little or no likelihood of a substantial increase in competition] by promoting outcomes that are consistent with outcomes produced in competitive markets such that suppliers of regulated goods and services—

- (a) have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and
- (b) have incentives to improve efficiency and provide services at a quality that reflects consumer demands; and
- (c) share with consumers the benefits of efficiency gains in the supply of the regulated goods or services, including through lower prices; and
- (d) are limited in their ability to extract excessive profits.

2.4 The discussion document identifies aspects of the new water services regime as possible models for adaptation to the electricity distribution sector. While that regime may offer useful insights, the two sectors differ in important respects. In addition, the water services regime is still at an early stage of implementation, and its practical operation and longer-term effects have not yet been fully tested. Any proposal to adapt its features for EDBs should therefore be preceded by careful analysis of the differences between the sectors and the suitability of those features within the established electricity regulatory framework.

2.5 We note that, while the maturity of the electricity distribution regime is not, itself, a reason to preclude reform, it does mean that significant long-term investment decisions, financing arrangements, and business practices have developed around the current framework. Any proposal to transplant elements of a different regulatory regime should therefore be carefully assessed to ensure the likely benefits outweigh the costs and unintended consequences of altering well-established settings. Particular consideration should be given to transition risks, including regulatory uncertainty, implementation costs, and the potential impact on future investment incentives. Consideration should also be given to whether changes could affect competition within the sector or create unintended distortions between market participants. Similarly, it would be important to assess how any new framework would interact with existing consumer protection mechanisms, and whether the proposed changes would deliver demonstrably better outcomes for consumers than those achieved under the current arrangements.

2.6 If reform is progressed, consideration should be given to whether additional transitional safeguards are required to ensure that consumers do not bear disproportionate costs or experience adverse impacts on service quality, reliability, or access to essential infrastructure services during the implementation period.

2.7 Further, we consider that a definitive cost-benefit analysis of any proposed changes may assist in clarifying whether the change will be worthwhile for consumers, as the intended recipients of the benefit of the reform.

3 Collaboration and standardisation

3.1 The Law Society acknowledges the recommendations in Frontier Economics' review of electricity market performance. Although market design and economic management are outside the scope of this submission, we note that proposals to increase collaboration

and standardisation should be assessed carefully, including the legal and practical implications of any mandatory amalgamation of existing EDBs.

- 3.2 In considering the proposed changes to create efficiencies through greater collaboration and standardisation, the Law Society has some concerns regarding the legal risks which may arise, including:
- (a) risk of increased or authorised cartel conduct; and
 - (b) risk of anti-competitive acquisition conduct.
- 3.3 These should be thoroughly investigated and analysed to ensure the proposed methods will, in fact, continue to protect consumers and, where possible in a regulated market, promote competition without unintentionally causing an anti-competitive effect.
- 3.4 On the first issue, EDBs are regulated monopolies and generally do not compete, or compete only to a limited extent, to provide connections for electricity retailers. However, competition may arise in some circumstances, such as for connections to new subdivisions. In those circumstances, an arrangement to standardise pricing could engage the cartel provisions of the Act—for example, if it has the purpose, effect, or likely effect of fixing, controlling, or maintaining the price charged for competing connection services.
- 3.5 As to the second issue, we consider that increasing collaboration on shared services could have the practical effect of reducing competition for acquisition of upstream goods or services such as transformers and cables.
- 3.6 The Law Society recommends that officials should take specialist competition law advice on these issues.

4 More responsive economic regulation

- 4.1 The discussion document outlines issues seen with the current monitoring framework provided by Part 4 of the Act and the ability of consumers to hold EDBs to account for their performance and the costs passed on to consumers.⁴ The Commerce Commission (**the Commission**) uses the information disclosure regime from Part 4 to share information with consumers about EDBs performance. The issues raised by the discussion document are:
- (a) a lack of comparative analysis and ranking of EDB performance; and
 - (b) concerns about non-regulated activities EDBs invest and engage in.
- 4.2 It is suggested that together these two issues affect the ability of consumers to draw accurate conclusions about the efficiency of investment and performance of EDBs, which would be desirable to promote accountability and establish a reputational incentive to drive improvements in EDB performance.
- 4.3 The Law Society does not take a view on whether this is or is not the case. However, we raise below some relevant considerations we suggest should be taken into account before decisions are made on whether to progress the proposed options for reform.

⁴ At 15–16.

Benchmarking

- 4.4 Currently, comparative benchmarking is prohibited in the Act in recognition of the heterogeneity of EDBs.⁵ The proposal to remove this prohibition (Option 1A) raises some concerns about the practical effectiveness of benchmarking when different EDBs face different cost and demand pressures. It is unclear how such issues should be addressed to ensure the outcome of the change is a more effective model of comparison and accountability of EDBs for consumers, which minimise the risk of false comparisons and inefficient (or even harmful) decisions that flow from such comparisons.
- 4.5 As a starting point, we recommend taking a close look at the way the Australian Energy Regulator, and other comparable overseas jurisdictions, consider and treat operating environment factors (**OEFS**) when undertaking their comparative benchmarking. If this proposed option is progressed, this could potentially address some of the concerns about external differences that can impact an EDB's efficiency in a way that is outside of their control.
- 4.6 We further recommend carefully considering other necessary safeguards to ensure the comparative benchmarking tool would have the intended effect and would not unfairly punish companies for costs outside of their control. In addition to adjusting benchmarking data using OEFS, the Australian Energy Regulator provides guidance on classification of certain overheads as capital versus operating expenditure,⁶ develops the benchmarking model with forecast guidelines, and extensively consults with EDBs to enable data to be corrected and engagement on important issues to be considered.⁷

Non-regulated activities

- 4.7 The discussion document also proposes expanding the Commission's information-gathering powers to require EDBs to disclose information relating to non-regulated services. Doing so would enable monitoring of compliance and ongoing capability to raise finance for regulated EDB services, if there are concerns that such activities are impacting regulated services (Option 1B).
- 4.8 As noted above, EDBs form part of a monopoly market where there is limited scope for competition. Part 4 powers are designed to produce outcomes similar to outcomes that would occur in a competitive market and thereby improve services and reduce cost to consumers. The distinction between regulated and non-regulated services is therefore a key feature of the Part 4 framework and provides essential certainty for businesses, investors, consumers and regulators as to the scope of regulated activities.
- 4.9 As such, we suggest that in the interests of legal certainty and workability, caution should be exercised in extending the regulatory requirements beyond regulated activities. If this proposal is progressed, we suggest it is essential that there is a clear and

⁵ See section 53P(10) of the Commerce Act 1986.

⁶ See the Australian Energy Regulator *How the AER will assess the impact of capitalisation differences on benchmarking* (26 May 2023), available here: <https://www.aer.gov.au/industry/registers/resources/guidelines/how-aer-will-assess-impact-capitalisation-differences-our-benchmarking-guidance-note/final-decision>

⁷ See the Australian Energy Regulator *Expenditure forecast assessment Guidelines* (October 2024), available here: <https://www.aer.gov.au/documents/aer-expenditure-forecast-assessment-guidelines-october-2024>

direct connection between the regulated service and the non-regulated activity to be monitored. The insertion of regulatory requirements that impact non-regulated activities should also be demonstrably necessary to achieve the purposes of the regime. Without such a close nexus the proposed change may result in unclear boundaries between regulated and unregulated activities, causing uncertainty and potentially affecting competition in unregulated industries. It may also make it less clear to regulatory authorities how to practically implement the regime changes in a consistent manner, adding further to the uncertainty and unpredictability.

- 4.10 If regulatory mechanisms are expanded in the proposed way, there may also be broader concerns about their potential to influence how revenue and assets are managed and deployed. This could give rise to questions about the appropriate scope of the regulatory framework and the extent to which obligations designed for monopoly services are being applied. Departures from the established distinctions between regulated and non-regulated activities should be supported by a clear evidential basis and robust justification grounded in the purpose of the legislation.
- 4.11 To the extent that concerns exist regarding the performance, resilience, investment, or quality of regulated services, it may be preferable for those concerns to be addressed through the regulatory tools that apply directly to those services. For example, quality standards, performance measures, expenditure assessment processes, and other existing Part 4 mechanisms provide more transparent and administratively workable means of influencing regulated outcomes. Such an approach preserves the integrity of the statutory framework, maintains clarity regarding the scope of regulation, and reduces the risk of uncertainty arising from interventions affecting activities that sit outside the regulated regime.

Responsive regulation under Part 4

- 4.12 The discussion document acknowledges stakeholder concerns about a need for more flexibility in the regulatory framework to support investment in electrification and resilience. It proposes three options.
- 4.13 Option 2A would provide the Commission with a greater range of tools to apply to all EDBs (Option 2A), following similar processes as that set under the water services regime. The tools proposed include:
- (a) revenue thresholds;
 - (b) performance requirements;
 - (c) quality-only regulation;
 - (d) financial ring-fencing rules;
 - (e) investment rules for significant investments;
 - (f) more flexibility to set the length of regulatory periods; and
 - (g) comparative benchmarking.
- 4.14 Option 2B sets out changes that could be made to the process for applying price-quality regulation to consumer-owned EDBs by either removing the requirement for a consumer petition before exempt status can be lost, or applying price-quality regulation to all EDBs.

4.15 Option 2C considers introducing individualised price-quality paths for EDBs rather than customised price-quality paths.

4.16 The Law Society has some concerns, discussed below, about Options 2B and 2C but does not express a view about which option would be preferable.

Price-quality regulation under Option 2B

4.17 Applying price-quality regulation to all EDBs could impose compliance costs on smaller EDBs that are disproportionate to the expected benefits, while also increasing the Commission's regulatory costs. We suggest that careful analysis of the cost-benefit projections should be completed before progressing Option 2B.

Price-quality paths under Option 2C

4.18 Any power enabling the Commission to move EDBs between different forms of price-quality or price-cost regulation should be subject to clear statutory criteria, transparent processes, and robust procedural safeguards.

4.19 Given the significance of such a decision, regulated businesses should have certainty about when the power may be exercised and the process that will be followed. At a minimum, this should include:

- (a) clear threshold tests;
- (b) advance notice;
- (c) disclosure of the information relied upon;
- (d) meaningful consultation;
- (e) an opportunity to respond;
- (f) reasoned decision-making; and
- (g) appropriate review or appeal rights.

4.20 The electricity distribution sector is characterised by high fixed costs, long asset lives, and investment horizons extending over several decades. EDBs make investment and financing decisions in reliance on the applicable regulatory framework. A broad discretion to move suppliers between different regulatory pathways risks increasing regulatory uncertainty and reducing confidence in the stability and predictability of that framework.

4.21 If such a power is introduced, it should be exercised only in clearly defined and exceptional circumstances and be subject to measures that promote regulatory stability. For example, once an EDB has been moved onto a particular regulatory pathway, there could be a lengthy minimum period before a further transfer may occur (for instance, ten years), except where exceptional circumstances exist. This would reduce the risk of repeated regulatory changes and provide EDBs with a reasonable opportunity to operate under, and respond to, the applicable regulatory settings.

4.22 More generally, powers that materially alter the regulatory framework applying to a supplier should be accompanied by safeguards that ensure decisions are transparent, evidence-based, proportionate, and consistent with principles of natural justice and regulatory certainty.

5 Next steps

- 5.1 We hope this feedback is useful. Please feel free to get in touch with Shelly Musgrave, Law Reform and Advocacy Advisor (shelly.musgrave@lawsociety.org.nz) if you have any questions or wish to discuss this feedback further.

Nāku noa, nā

A handwritten signature in blue ink, appearing to read 'Mark Sherry', with a large, stylized loop at the end.

Mark Sherry
Vice President