

# Review of the force majeure provisions in the Code

---

## Consultation Paper

12 June 2012





## Executive summary

Under Parts 3 and 4 of the Electricity Industry Participation Code (Code), market operation service providers and ancillary service agents are exempted from their Code obligations and certain obligations under the Electricity Industry Act 2010 (Act), should they be unable to perform those obligations because of a force majeure event.

The Electricity Authority (Authority) has identified errors in the drafting of the force majeure provisions in the Code, which need to be corrected to ensure the Code is consistent with the provisions of the Act. These errors arose during the creation of the initial version of the Code in 2010.

The Authority has decided that the correction of these errors is an opportune time to clarify the application of the force majeure Code provisions and also to remove certain inconsistencies.

The Authority proposes to amend the force majeure provisions in the Code that apply to market operation service providers and ancillary service agents so that the provisions:

- (a) do not apply to obligations under the Act; and
- (b) apply to all obligations under the Electricity Industry (Enforcement) Regulations 2010 (Enforcement Regulations); and
- (c) apply to all obligations under the Code, and also make it clear that market operation service providers and ancillary service agents must meet their Code obligations where practicable if a force majeure event occurs.

The purpose of this paper is to consult with interested parties on the proposed amendments to the force majeure provisions in the Code. The paper first provides a background to these provisions, then explains the rationale for the proposed amendments to them, and then assesses the costs and benefits associated with the proposed amendments.



## Glossary of abbreviations and terms

<b>Act</b>	Electricity Industry Act 2010
<b>Authority</b>	Electricity Authority
<b>Code</b>	Electricity Industry Participation Code 2010
<b>Distributed Generation Regulations</b>	Electricity Governance (Connection of Distributed Generation) Regulations 2007
<b>Electricity Governance Regulations</b>	Electricity Governance Regulations 2003
<b>Electricity Governance Rules</b>	Electricity Governance Rules 2003
<b>Electricity Act</b>	Electricity Act 1992
<b>Enforcement Regulations</b>	Electricity Industry (Enforcement) Regulations 2010
<b>Security of Supply Regulations</b>	Electricity Governance (Security of Supply) Regulations 2008



# Contents

<b>Executive summary</b>	<b>A</b>
<b>Glossary of abbreviations and terms</b>	<b>C</b>
<b>1. Introduction and purpose of this paper</b>	<b>1</b>
1.1 Introduction	1
1.2 Purpose of this paper	1
1.3 Submissions	1
<b>2. Background</b>	<b>3</b>
2.1 Background to the force majeure Code provisions	3
2.2 Errors in the drafting of the force majeure Code provisions	5
<b>3. Regulatory Statement</b>	<b>7</b>
3.1 Authority's proposal	7
A) No force majeure exemption for Act obligations	7
Reference to Part 2 of the Act	8
Force majeure exemption from all of Part 2 of the Act is incorrect	8
No relief at all from Part 2 of the Act in a force majeure event?	9
Conclusion – do not provide force majeure relief from any of Part 2 of the Act	10
Reference to Part 4 of the Act	10
Should there be any relief from the obligation to comply with other provisions of the Act?	10
Authority's proposal	11
B) Force majeure exemption for obligations under the Enforcement Regulations	11
Extension of the benefit of the force majeure exemption	12
Authority's proposal	12
C) Apply the force majeure provisions consistently throughout the Code	13
Authority's proposal	13
Requiring Code obligations to be met where practicable	14
Authority's proposal	15
D) Correct an error in the force majeure event definition	16
Summary	16
3.2 Statement of the objectives of the proposed amendment	17
3.3 Evaluation of the costs and benefits of the proposed amendment	17

	Correcting drafting errors in the force majeure provisions	17
	Costs	17
	Benefits	18
	Applying the force majeure provisions consistently throughout the Code	18
	Costs	18
	Benefits	19
	Requiring Code obligations to be met where practicable	19
	Costs	19
	Benefits	19
	Conclusion	19
3.4	Evaluation of alternative means of achieving the objectives of the proposed amendment	19
3.5	Assessment under section 32(1)	20
3.6	Assessment against the code amendment principles	20
3.7	Conclusion	21
<b>Appendix A</b>	<b>Format for submissions</b>	<b>23</b>
<b>Appendix B</b>	<b>Assessment under section 32(1) of the Act</b>	<b>25</b>
<b>Appendix C</b>	<b>Proposed amendment</b>	<b>26</b>
<b>Appendix D</b>	<b>Part 3 of the Code – Existing force majeure provisions</b>	<b>32</b>
<b>Appendix E</b>	<b>Part 4 of the Code – Existing force majeure provisions</b>	<b>34</b>
<b>Appendix F</b>	<b>Sections 29, 58 and 60 of the Act</b>	<b>35</b>

# **1. Introduction and purpose of this paper**

## **1.1 Introduction**

- 1.1.1 The Authority has identified errors in the drafting of the force majeure provisions in the Code, which need to be corrected to ensure the Code is consistent with the provisions of the Act.
- 1.1.2 It is also desirable to clarify that market operation service providers and ancillary service agents must meet their Code obligations where practicable if a force majeure event occurs.
- 1.1.3 Lastly, the Authority wishes to correct an inconsistency in the application of the force majeure provisions, which has arisen from the incorporation of two earlier sets of regulations into the Code -- the Electricity Governance (Connection of Distributed Generation) Regulations 2007 (Distributed Generation Regulations) (Part 6 of the Code), and the Electricity Governance (Security of Supply) Regulations 2008 (Security of Supply Regulations) (Part 9 of the Code).

## **1.2 Purpose of this paper**

- 1.2.1 The purpose of this paper is to consult with interested parties the Authority thinks are representative of the interests of persons likely to be affected by the Code amendment proposal contained within, which relates to proposed changes to the force majeure provisions in the Code.
- 1.2.2 Section 39(1)(c) of the Act requires the Authority to consult on any proposed amendment to the Code and the regulatory statement. Section 39(2) provides that the regulatory statement must include a statement of the objectives of the proposed amendment, an evaluation of the costs and benefits of the proposed amendment, and an evaluation of alternative means of achieving the objectives of the proposed amendment. The regulatory statement is set out in part 3 of this paper.
- 1.2.3 The proposed amendment is attached as Appendix C.
- 1.2.4 The Authority invites submissions on the regulatory statement and the proposed amendment, including drafting comments.

## **1.3 Submissions**

The Authority's preference is to receive submissions in electronic format (Microsoft Word). It is not necessary to send hard copies of submissions to the Authority, unless it is not possible to do so electronically. Submissions in

electronic form should be emailed to [submissions@ea.govt.nz](mailto:submissions@ea.govt.nz) with 'Consultation Paper—Review of the force majeure provisions in the Code' in the subject line.

If submitters do not wish to send their submission electronically, they should post one hard copy of their submission to either of the addresses provided below.

Submissions

Electricity Authority  
PO Box 10041  
Wellington 6143

Submissions

Electricity Authority  
Level 7, ASB Bank Tower  
2 Hunter Street  
Wellington

Tel: 0-4-460 8860

Fax: 0-4-460 8879

- 1.3.1 Submissions should be received by 5pm on Tuesday, 24 July 2012. Please note that late submissions are unlikely to be considered.
- 1.3.2 The Authority will acknowledge receipt of all submissions electronically, where possible. Please contact the Submissions Administrator if you do not receive electronic acknowledgement of your submission within two business days.
- 1.3.3 If possible, submissions should be provided in the format shown in Appendix A. Your submission is likely to be made available to the general public on the Authority's website. Submitters should indicate any documents attached, in support of the submission, in a covering letter and clearly indicate any information that is provided to the Authority on a confidential basis. However, all information provided to the Authority is subject to the Official Information Act 1982.

## 2. Background

### 2.1 Background to the force majeure Code provisions

- 2.1.1 “Force majeure” is a concept that arises in relation to the law of contract. It allows a party to a contract to escape liability for failing to meet its contractual obligations as a result of circumstances beyond its control. These circumstances may include both human and natural acts. Force majeure is related to the contractual doctrines of ‘frustration’ and ‘supervening impossibility’ which, if established, can lead to the termination of a contract.<sup>1</sup>
- 2.1.2 Under Parts 3 and 4 of the Code respectively, market operation service providers and ancillary service agents are exempted from their Code obligations and certain obligations under the Act, should they be unable to perform those obligations because of a force majeure event.
- 2.1.3 In addition, force majeure provisions are referred to in the following parts of the Code:
- (a) Part 6 – in the regulated terms for connection of distributed generation;
  - (b) Part 12 – in the benchmark agreement and in the outage protocol, both of which are incorporated by reference into the Code;
  - (c) Part 13 – the information to be submitted to the information system in regard to a contract for differences or fixed-price physical supply contract must include whether there is a force majeure clause;
  - (d) Part 14 – in the default required terms for hedge settlement agreements lodged with the clearing manager; and
  - (e) Part 17 – in the Part 3 and Part 4 transitional provisions for the changeover from the Electricity Governance Rules 2003 and Electricity Governance Regulations 2003 to the Code.
- 2.1.4 Force majeure provisions are also contained in the contracts between the Authority and market operation service providers,<sup>2</sup> and the contracts between Transpower (as the system operator) and ancillary service agents.

---

<sup>1</sup> In English law, “a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of the entry into the contract.” *Chitty on Contracts*, 29th edition, chapter 23, paragraph 23-001.  
 “Historically, the concept of frustration has been invoked to mitigate the onerous doctrine of absolute contracts where performance of a contract is prevented by supervening events for which neither party to the contract is responsible and loss allocation is required.” Steptoe & Johnson LLP, *The doctrine of frustration in English law*, 2012, page 1.

<sup>2</sup> Other than the market administrator, which the Authority performs in-house.

- 2.1.5 Force majeure provisions are relatively common in contracts because they avoid the uncertainties and delays associated with relying on the applicable law(s) should one or more of the parties to a contract be unable to fulfil its obligations under the contract because of an extraordinary event or circumstance.
- 2.1.6 In effect, force majeure provisions allocate risk between contracting parties in the event of an exceptional circumstance. In the case of the force majeure provisions for market operation service providers and ancillary service agents, by reallocating risk away from the provider of services to the receiver(s) of services, force majeure provisions should increase the attractiveness of being a market operation service provider or an ancillary service agent, and lower the cost of the services.
- 2.1.7 The force majeure provisions in the contracts with market operation service providers and ancillary service agents are long-standing, dating from when these service provision roles were established.
- 2.1.8 In contrast, force majeure provisions were first included in the electricity market rules only after the Electricity Governance Regulations and the Electricity Governance Rules were established.<sup>3</sup>
- 2.1.9 The reason for including force majeure provisions in the Electricity Governance Regulations was to retain the same level of incentive on parties to be service providers and the same level of downward pressure on service provider costs that had existed under the electricity industry self-governance arrangements.
- 2.1.10 If no force majeure provisions existed in the Code, it would be reasonable to expect the fees of market operation service providers and ancillary service agents to increase by an amount reflecting the cost of insuring against potential compliance costs should a force majeure event occur, as assessed by each service provider.<sup>4</sup>
- 2.1.11 The level of competition for service provider roles may also reduce, due to prospective service provider candidates considering the potential compliance

---

<sup>3</sup> The force majeure provisions for market operation service providers were inserted in the initial Electricity Governance Regulations in December 2003, while such provisions were inserted for ancillary service agents in January 2006.

<sup>4</sup> The cost of insurance may be expected to be the lesser of:

- a) the cost of systems and processes to eliminate the impact of a force majeure event and thereby avoid any potential liabilities arising from the non-performance of obligations;
- b) the cost of financial insurance to pay any anticipated liabilities arising from the non-performance of obligations; and
- c) the combined cost of systems and processes to mitigate the impact of a force majeure event and financial insurance to pay anticipated liabilities arising from any remaining non-performance of obligations.

costs to be too high (this is more likely to be the case where parties are unfamiliar with the workings of the electricity market).

2.1.12 The absence of force majeure provisions in the electricity market rules prior to the establishment of the Electricity Governance Regulations can be explained by at least the following factors:

- (a) force majeure provisions in market operation service provider contracts took precedence over the service providers' obligations under the market rules;
- (b) not all providers of ancillary services were subject to the ancillary services market rules; and
- (c) those providers of ancillary services subject to the market rules appeared to have accepted the absence of force majeure provisions from the rules.

## **2.2 Errors in the drafting of the force majeure Code provisions**

2.2.1 A recent review of the force majeure provisions in the Code has identified errors in the drafting of the Code that have created inconsistencies between the Code and the Act. These errors arose when the initial version of the Code was prepared in 2010.

2.2.2 The most significant errors are:

- (a) the Code purports to extend the scope of exemptions that existed under earlier legislation. Market operation service providers and ancillary service agents have exemptions from certain provisions in the Act that they did not have under the previous regime; and
- (b) the Code fails to exempt these participants from certain regulations in the Enforcement Regulations.

2.2.3 The Authority has decided that the correction of these errors is an opportune time to clarify the application of the force majeure Code provisions and also to remove certain inconsistencies.



## 3. Regulatory Statement

### 3.1 Authority's proposal

3.1.1 The Authority proposes to amend the force majeure provisions in the Code that apply to market operation service providers and ancillary service agents so that the provisions:

- (a) do not apply to obligations under the Act; and
- (b) apply to all obligations under the Enforcement Regulations; and
- (c) apply to all obligations under the Code, and also make it clear that market operation service providers and ancillary service agents must meet their Code obligations where practicable if a force majeure event occurs.

#### **A) No force majeure exemption for Act obligations**

3.1.2 The Act required the initial Code that came into force on 1 November 2010 to comprise:

- (a) a consolidation of the following enactments;
  - (i) the Electricity Governance Rules made under section 172H of the Electricity Act 1992 (Electricity Act);
  - (ii) subpart 2 of Part 1 and Parts 2, 2A, and 3 of the Electricity Governance Regulations;
  - (iii) subpart 2 of Part 10 of the Electricity Governance Regulations (the Comalco agreements exemptions);
  - (iv) the Security of Supply Regulations; and
  - (v) the Distributed Generation Regulations;
- (b) provisions referred to in section 8(3) of the Act (concerning the system operator); and
- (c) provisions to give effect to any exemptions granted under subpart 1 of Part 10 of the Electricity Governance Regulations.

3.1.3 As a general principle, it is not possible for the Code to relieve persons from the obligation to comply with the Act. This can only be done either by the Act, or by another Act of Parliament, authorising such relief.

3.1.4 Section 34(1) of the Act required that the initial Code consolidate the enactments listed in paragraph 3.1.2(a) above. This allowed the force majeure exemptions

from regulations 38 and 53B of the Electricity Governance Regulations to be incorporated into the Code.

- 3.1.5 However, the Authority has identified that the Code does not correctly incorporate the force majeure exemptions contained in regulations 38 and 53B of the Electricity Governance Regulations.

### **Reference to Part 2 of the Act**

#### ***Force majeure exemption from all of Part 2 of the Act is incorrect***

- 3.1.6 The Act requires that the initial version of the Code must continue the force majeure exemptions that existed under the Electricity Governance Regulations.
- 3.1.7 Part 2 of the Act contains a number of provisions that previously were in the Electricity Governance Regulations and therefore were subject to force majeure exemptions (being sections 7, 8, 23 to 27, 29, 30, 49, 51 to 53 and 56 to 60 of the Act). Hence, the force majeure exemptions in the initial Code should have continued to apply to these sections of the Act.
- 3.1.8 Part 2 also includes a number of provisions incorporated from the Electricity Act and the Commerce Act 1986. When the Electricity Governance Regulations were in place, the force majeure exemptions contained in them did not extend to the obligations under either of these Acts. Hence, the force majeure exemptions in the initial Code should not have applied to these sections of the Act.
- 3.1.9 Part 2 of the Act also includes a number of new provisions. To be consistent with the Act, the force majeure exemptions in the initial Code should not have applied to these new provisions either.
- 3.1.10 However, during the creation of the Code the force majeure exemption provisions were inadvertently applied to all of Part 2 of the Act rather than referring only to those sections of the Act taken from the Electricity Governance Regulations. As a consequence, the Code's force majeure exemptions encompass provisions from the Electricity Act and the Commerce Act. This is incorrect.
- 3.1.11 It is beyond the power of the Code to create exemptions from an Act of Parliament without authority given by a statute. The force majeure exemptions in the Code applying to those sections of the Act that originated under the Electricity Governance Regulations are authorised by the Act. However, this is not the case for the force majeure exemptions in the Code applying to those sections of the Act that are new provisions, or which originated under the Electricity Act or the Commerce Act. Hence, these exemptions are likely to be unenforceable. The Authority considers they should be removed from the Code.

***No relief at all from Part 2 of the Act in a force majeure event?***

- 3.1.12 Moreover, the Authority considers that the force majeure exemptions applied to the various sections in Part 2 of the Act that come from the Electricity Governance Regulations should also be removed.
- 3.1.13 For the majority of these sections the force majeure exemption is redundant, as there is no obligation placed on market operation service providers and ancillary service agents.
- 3.1.14 For sections 29, 56, 57, 58 and 60 of the Act, which place obligations on market operation service providers and ancillary service agents, the Authority considers that the force majeure exemptions that currently apply to these sections should be removed, and the Act provisions should apply, for the reasons given below.
- 3.1.15 In relation to the obligations contained in section 29 of the Act (to provide updated information), market operation service providers have no need to invoke the force majeure provisions, as they are only required to supply updated information as soon as *practicable* (emphasis added) (refer Appendix F).
- 3.1.16 In regard to sections 56 and 57, the Authority does not consider that the Code should relieve market operation service providers and ancillary service agents from the obligation to comply with either section simply because those provisions were previously included in the Electricity Governance Regulations.
- 3.1.17 Section 56 of the Act provides that the Rulings Panel may make a pecuniary penalty order under section 54(1)(d). Section 54 was previously incorporated in the Electricity Act.<sup>5</sup> The Electricity Governance Regulations did not exempt market operation service providers and ancillary service agents from the obligation to comply with the Electricity Act, and the Code should not relieve market operation service providers and ancillary service agents from the obligation to comply with section 54 or, by extension, section 56. It is beyond the power of the Code to create such an exemption
- 3.1.18 Section 57 of the Act provides that it is an offence to breach certain Rulings Panel orders issued under section 54. As set out above, section 54 was originally incorporated in the Electricity Act. Accordingly, for the same reason that market operation service providers and ancillary service agents should not be relieved of the obligation to comply with section 56 of the Act, and that such an exemption cannot be validly created under the Code, the Authority considers that the Code should not purport to relieve market operation service providers and ancillary service agents from the obligation to comply with section 57 of the Act.

---

<sup>5</sup> As section 172KE.

3.1.19 In relation to sections 58 and 60 (suspension and termination orders made by the Rulings Panel), under section 58 the Rulings Panel has discretion over whether to make such an order against a market operation service provider or ancillary service agent. Given the seriousness associated with making a suspension order or a termination order, and the seriousness of the grounds on which such an order is made, the Rulings Panel would most certainly take into consideration that a force majeure event meant a market operation service provider or ancillary service agent was unable to comply with an order of the Rulings Panel.

3.1.20 Hence, the Authority considers it inappropriate that market operation service providers and ancillary service agents should be able to rely on the force majeure exemption from section 58. As section 60 of the Act simply expands on section 58, the argument for removing the force majeure exemption from section 58 also applies, by extension, to section 60.

***Conclusion – do not provide force majeure relief from any of Part 2 of the Act***

3.1.21 It is the Authority's view that market operation service providers and ancillary service agents should not be relieved of their obligations to comply with any of the provisions of Part 2 of the Act if a force majeure event occurs, and that the current force majeure exemptions should be removed.

**Reference to Part 4 of the Act**

3.1.22 During the creation of the Code the force majeure exemption provisions were inadvertently applied to subpart 1 of Part 4 of the Act.

3.1.23 Subpart 1 of Part 4 of the Act relates to the dispute resolution scheme that previously was referred to in section 158G of the Electricity Act (as the "Complaints resolution system"). The complaints resolution system was never subject to the force majeure provisions under the Electricity Governance Regulations and the Electricity Governance Rules.

3.1.24 To be consistent with section 34(1) of the Act, the Code needs to be amended to remove the reference to subpart 1 of Part 4 of the Act.

**Should there be any relief from the obligation to comply with other provisions of the Act?**

3.1.25 The Authority has considered whether the Code should relieve market operation service providers and ancillary service agents from the obligation to comply with any other provisions of the Act. In the Authority's view, the Code does not need to relieve those participants from complying with their obligations in any other provisions of the Act.

3.1.26 The only provision of the Act that was previously incorporated in the Electricity Governance Regulations or the Electricity Governance Rules (other than those

provisions in Part 2) is section 6 (previously regulation 5(1)). However, section 6 does not place obligations on market operation service providers or ancillary service agents.

### **Authority's proposal**

3.1.27 It is proposed:

Market operation service providers and ancillary service agents are not relieved of their obligation to comply with the Act if a force majeure event occurs.

**Q1. Do you agree with the proposal that market operation service providers and ancillary service agents not be relieved of their obligation to comply with the Act if a force majeure event occurs?**

**If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the Authority's statutory objective in section 15 of the Act.**

## **B) Force majeure exemption for obligations under the Enforcement Regulations**

3.1.28 The Enforcement Regulations include a number of provisions previously incorporated in the Electricity Governance Regulations – specifically, regulations 5 to 17, 19 to 31, 33 to 75, 78, 80 to 95 and 97 to 118.

3.1.29 Therefore, at a minimum, as required by section 34(1) of the Act, the initial version of the Code should have provided that market operation service providers and ancillary service agents are entitled to look to the force majeure provisions to relieve them from the obligation to comply with these regulations. However, during the creation of the Code the force majeure exemption provisions inadvertently were not applied to the Enforcement Regulations. The Authority wishes to correct this.

3.1.30 However, instead of referring specifically to these individual regulations within the Enforcement Regulations, the force majeure provisions in the Code could be amended so that they refer to the Enforcement Regulations in their entirety. This is because those regulations in the Enforcement Regulations that are not from the Electricity Governance Regulations place no obligations on market operation service providers or ancillary service agents. There would be no change to the effect of the scope of the force majeure provisions, but their application would be simpler and easier for industry participants to understand.

### **Extension of the benefit of the force majeure exemption**

- 3.1.31 One effect of incorporating the Electricity Governance Regulations into the Code is that the Code applies to a wider class of persons than did regulation 38 of the Electricity Governance Regulations.
- 3.1.32 Specifically, the wholesale information trading system provider was not defined as a "service provider" under the Electricity Governance Regulations, but is defined as a market operation service provider under the Act. Hence, while prior to 1 November 2010, the wholesale information trading system provider was not subject to a force majeure exemption, from 1 November 2010 it is subject to that exemption.
- 3.1.33 This is also the case for the FTR manager service provider role.
- 3.1.34 The Authority's view is that it is appropriate for the wholesale information trading system provider and the FTR manager to have the benefit of force majeure provisions. The Authority considers the force majeure provisions should apply to all persons who fall into the category of market operation service provider, not just those persons who were service providers immediately before 1 November 2010.

### **Authority's proposal**

- 3.1.35 It is proposed:

Clauses 3.7 and 4.1 of the Code should provide that, in the instance of a force majeure event, market operation service providers and ancillary service agents may look to the force majeure provisions to relieve them of their obligations to comply with the Electricity Industry (Enforcement) Regulations 2010 in their entirety, rather than only those regulations drawn from the Electricity Governance Regulations 2003.

**Q2. Do you agree with the proposal that clauses 3.7 and 4.1 should provide that, in the instance of a force majeure event, market operation service providers and ancillary service agents may look to the force majeure provisions to relieve them of their obligations to comply with the Electricity Industry (Enforcement) Regulations 2010 in their entirety rather than only those regulations drawn from the Electricity Governance Regulations 2003?**

**If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the Authority's statutory objective in section 15 of the Act.**

### **C) Apply the force majeure provisions consistently throughout the Code**

- 3.1.36 When consolidating the enactments referred to in paragraph 3.1.2(a) of this document, the drafters of the initial Code were only permitted to include whatever changes to the text of the enactments necessary or reasonably required to ensure the Code:
- (a) was consistent with the Act, the regulations,<sup>6</sup> and any amendments made to other enactments by the Act; and
  - (b) was accurate and coherent; and
  - (c) addressed any transitional issues.
- 3.1.37 As section 34(1) of the Act provides only for the preservation of the force majeure exemptions in the Electricity Governance Regulations, the initial Code could not include new force majeure exemptions. Therefore, it was not possible to extend the force majeure provisions in the initial Code to apply to Part 6 (previously the Distributed Generation Regulations) and Part 9 (previously the Security of Supply Regulations).
- 3.1.38 To achieve the consistent application of the force majeure provisions throughout the Code, the force majeure exemptions contained in Parts 3 and 4 should now be extended so that they apply to Parts 6 and 9. In particular this will remove the anomaly of the system operator, as a market operation service provider, not being subject to the force majeure provisions under Part 9, which is contrary to the original intent of the Electricity Governance Regulations (now Part 3 of the Code).
- 3.1.39 Although there are currently no obligations on market operation service providers or ancillary service agents under Part 6, this may change in the future, requiring an extension of the force majeure provisions at the time. It would be more cost-effective to extend the force majeure provisions to Part 6 now than to have to repeat the exercise at some time in the future.

#### **Authority's proposal**

- 3.1.40 It is proposed:
- Clauses 3.7 and 4.1 of the Code should provide that market operation service providers and ancillary service agents are relieved of their obligations to comply with the Code in its entirety if a force majeure event occurs, for so long as and to the extent that they are unable to comply as a result of the force majeure event.

---

<sup>6</sup> Where "regulations" refer to the Electricity Industry (Enforcement) Regulations 2010, the Electricity Industry (Levy of Industry Participants) Regulations 2010, and the Electricity (Low Fixed Charge Tariff Option for Domestic Consumers) Regulations 2004.

**Q3. Do you agree with the proposal that clauses 3.7 and 4.1 of the Code provide that market operation service providers and ancillary service agents are relieved of their obligations to comply with the Code in its entirety if a force majeure event occurs, for so long as and to the extent that they are unable to comply as a result of the force majeure event?**

**If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the Authority's statutory objective in section 15 of the Act.**

### **Requiring Code obligations to be met where practicable**

- 3.1.41 While acknowledging the benefits of the force majeure provisions in the Code, the Authority wishes to minimise, as far as practicable, any potential adverse impacts on the workings of the overall electricity industry that may arise as a result of these provisions.
- 3.1.42 A particular area of concern in this regard is the potential impact of the force majeure provisions on those industry processes governed by the Code that build on themselves. For example, creating installation control points (ICPs) for new points of connection, and the recording of those newly created ICPs on the registry, is a precursor to customer switching and to reconciliation and settlement.
- 3.1.43 Continuing with this example, if a market operation service provider responsible for performing one or more activities in such a process is affected by a force majeure event, the outcome that best furthers the Authority's objective and functions under the Act is for that service provider to still fulfil its obligations under the Code. If ICPs created for new points of connection are not recorded on the registry due to the unavailability of the registry, amongst other things electricity consumers may not be able to switch electricity retailers, incorrect financial settlement allocations between electricity traders would arise, and traders may not pay their correct share of distribution line charges.
- 3.1.44 Hence, the Authority's statutory objective is best met through the Code requiring any market operation service providers or ancillary service agents affected by a force majeure event to still meet, albeit over a longer period of time, any obligations on them during the period in which they are unable to perform their obligations because of the force majeure event. Of course, in some instances this may not be possible or practicable, and the force majeure provisions should allow for this.
- 3.1.45 Although currently the Code could be read as requiring market operation service providers and ancillary service agents affected by a force majeure event to still meet any obligations on them during the period in which they are unable to

perform their obligations because of the force majeure event, Parts 3 and 4 can be clarified to make this requirement explicit.

### **Authority's proposal**

3.1.46 It is proposed:

Clauses 3.7 and 4.1 of the Code should provide that a market operation service provider or ancillary service agent that is unable to comply with the Code as a result of a force majeure event must take all steps that are necessary to restore it to a position of compliance as soon as reasonably practicable.

The Code should require the market operation service provider or ancillary service agent to notify the Authority of:

- a) the steps it intends to take to restore it to a position of compliance; and
- b) a proposed timeline for completing the process.

The market operation service provider or ancillary service agent must advise the Authority at least once a month of progress towards the completion of that process.

**Q4.** Do you agree with the proposal that clauses 3.7 and 4.1 of the Code should provide that a market operation service provider or ancillary service agent that is unable to comply with the Code as a result of a force majeure event must:

- a) take all steps that are necessary to restore it to a position of compliance as soon as reasonably practicable; and
- b) notify the Authority of:
  - i) the steps it intends to take to restore it to a position of compliance; and
  - ii) a proposed timeline for completing the process; and
- c) advise the Authority at least once a month of progress towards the completion of that process.

If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the Authority's statutory objective in section 15 of the Act.

## D) Correct an error in the force majeure event definition

- 3.1.47 During the creation of the Code the definition of “force majeure event” in Part 1 of the Code inadvertently included a reference to “industry service providers”.
- 3.1.48 This is incorrect, as the definitions of force majeure event previously contained in the Electricity Governance Regulations related only to market operation service providers and ancillary service agents.<sup>7</sup>
- 3.1.49 Therefore the Code needs to be amended to remove the reference to “industry service providers” from the definition of force majeure event.
- 3.1.50 The Authority notes this change is a technical and non-controversial amendment.

### Summary

- 3.1.51 The table below summarises the various recommendations for progressing a Code amendment proposal in regard to the force majeure provisions in the Code.

Table 1: Summary of force majeure Code amendment recommendations

	Option	Proceed?
1.	Do not exempt market operation service providers and ancillary service agents from any of Part 2 of the Act in a force majeure event	✓
2.	Do not exempt market operation service providers and ancillary service agents from any of subpart 1 of Part 4 of the Act in a force majeure event	✓
3.	Do not exempt market operation service providers and ancillary service agents from any other section in the Act in a force majeure event	✓
4.	Exempt market operation service providers and ancillary service agents from all regulations in the Enforcement Regulations in a force majeure event	✓
5.	Extend the benefit of the force majeure exemption to the wholesale information trading system provider and the FTR manager	✓
6.	Extend the force majeure provisions in the Code to cover Parts 6 and 9 of the Code	✓
7.	Clarify the force majeure provisions in the Code to require market operation service providers and ancillary service agents affected by a force majeure event to still meet any obligations on them during the period in which they are unable to perform their obligations because of the force majeure event	✓
8.	Correct the error in the definition of force majeure event	✓

<sup>7</sup> In the Electricity Governance Regulations there were two separate (but identical) definitions of “force majeure event” – one applying to market operation service providers and the other applying to ancillary service agents. When the initial Code was drafted, these two definitions were merged and moved to Part 1 of the Code.

## 3.2 Statement of the objectives of the proposed amendment

3.2.1 The primary objectives of the proposed amendment are as follows:

- (a) to ensure the Code is consistent with the Act by correcting errors in the drafting of the Code;
- (b) to address inconsistencies in the application of the force majeure provisions; and
- (c) to ensure the Code requires industry participants affected by a force majeure event to still meet any obligations on them during the period of the force majeure event, where this is practicable.

## 3.3 Evaluation of the costs and benefits of the proposed amendment

3.3.1 This section analyses the costs and benefits of the proposed amendment to the force majeure provisions in the Code.

3.3.2 The analysis treats the current arrangements as the counterfactual, since they will remain in place if no Code amendment is made.

### Correcting drafting errors in the force majeure provisions

3.3.3 It is noted this amendment goes further than just correcting drafting errors in the force majeure provisions. It also removes from the Code the force majeure exemption from three sections of the Act (sections 29, 58 and 60) that market operation service providers and ancillary service agents currently have.

### Costs

3.3.4 The upfront cost of making this amendment is relatively small – less than \$10,000.

3.3.5 The cost imposed on the electricity industry from the removal of the exemption from sections 29, 58 and 60 of the Act is also considered to be relatively small, most likely zero. The reasons for this are set out in paragraphs 3.1.15, 3.1.19 and 3.1.20 of this document.

3.3.6 In regard to section 29 of the Act, the obligation on market operation service providers and ancillary service agents is not affected by force majeure events. In regard to sections 58 and 60 of the Act, when exercising its discretion as to whether to make a suspension order or a termination order, the Rulings Panel would most certainly take into consideration that a force majeure event meant a

market operation service provider or ancillary service agent was unable to comply with an order of the Rulings Panel.

- 3.3.7 Therefore, the Authority does not expect the removal of the exemption from sections 29, 58 and 60 of the Act to increase service provider fees (i.e. by an amount reflecting the marginal cost of insuring each service provider's assessment of its potential additional compliance costs). The Authority does not expect the removal of the exemption from sections 29, 58 and 60 of the Act to reduce the level of competition for service provider roles.

### **Benefits**

- 3.3.8 The clauses of the Code affected by this drafting error are currently likely to be ultra vires and unenforceable. Should they ever be relied upon by industry participants (except in regard to sections 29, 58 and 60 of the Act), avoidable costs will be incurred. Compliance costs alone incurred by affected parties (which would include the Authority) could potentially be several times higher than the cost of the Code amendment.
- 3.3.9 The primary benefit of removing the force majeure exemption from sections 29, 58 and 60 of the Act is the removal of an anomaly in the electricity industry governance arrangements. As noted earlier in this document, as a general principle, it is not possible for the Code to relieve persons from the obligation to comply with the Act because the Act does not provide for the Code to include such provisions. That these three sections of the Act are subject to a force majeure exemption contained in the Code appears to have arisen more by accident than design.

## **Applying the force majeure provisions consistently throughout the Code**

### **Costs**

- 3.3.10 The upfront cost of making this amendment can be quantified as being less than \$10,000.
- 3.3.11 Although there are currently no obligations on market operation service providers or ancillary service agents under Part 6,<sup>8</sup> this may change in the future, requiring an extension of the force majeure provisions at the time. It is more cost-effective to extend the force majeure provisions to Part 6 now than to wait.

---

<sup>8</sup> Recalling that the counterfactual to each proposed Code amendment in this cost-benefit analysis is the current industry/Code arrangements.

### **Benefits**

- 3.3.12 The benefit of extending the force majeure provisions to at least Part 9 of the Code may potentially be a number of times higher than the cost. Should the system operator's compliance with Part 9 be affected by a force majeure event, the compliance costs incurred by affected parties (which would include the Authority) may potentially be several tens of thousands of dollars in aggregate.

### **Requiring Code obligations to be met where practicable**

#### **Costs**

- 3.3.13 The upfront cost of making this amendment can be quantified as being less than \$10,000.

#### **Benefits**

- 3.3.14 A reduction in unnecessary compliance and administration costs is the primary benefit from clarifying that market operation service providers and ancillary service agents affected by a force majeure event to still meet any obligations on them during the period in which they are unable to perform their obligations because of the force majeure event.
- 3.3.15 These unnecessary costs incurred by affected parties (which would include the Authority) could potentially be several times higher than the cost of the Code amendment.

### **Conclusion**

- 3.3.16 Overall, the cost-benefit analysis for this Code amendment proposal indicates the proposal is superior to the current arrangements. Although the anticipated benefits are not considerable in absolute terms, they are material relative to the cost of making them.

## **3.4 Evaluation of alternative means of achieving the objectives of the proposed amendment**

- 3.4.1 As noted above, the primary objectives of the proposed amendment are as follows:
- (a) to ensure the Code is consistent with the Act by correcting errors in the drafting of the Code;
  - (b) to address inconsistencies in the application of the force majeure provisions; and

- (c) to ensure the Code requires industry participants affected by a force majeure event to still meet any obligations on them during the period of the force majeure event, where this is practicable.

3.4.2 The Authority is not aware of any alternative mechanism(s) to address the identified shortcomings of the existing force majeure provisions.

### **3.5 Assessment under section 32(1)**

3.5.1 Section 32(1) of the Act provides that Code provisions must be consistent with the Authority's objective and be 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 performance by the Authority of its functions;
- (e) any other matters specifically referred to in this Act as a matter for inclusion in the Code.

3.5.2 Appendix B contains a table setting out an assessment of the proposed amendment against the requirements of section 32(1) of the Act.

### **3.6 Assessment against the code amendment principles**

3.6.1 When considering amendments to the Code, the Authority is required by its Consultation Charter to have regard to the following Code amendment principles, to the extent that the Authority considers they are applicable.

3.6.2 *Principle 1 – Lawfulness:* The Authority and its advisory groups will only consider amendments to the Code that are lawful and that are consistent with the Act (and therefore consistent with the Authority's statutory objective and its obligations under the Act).

3.6.3 The proposed amendment has been legally reviewed and is consistent with the Act.

3.6.4 *Principle 2 – Clearly Identified Efficiency Gain or Market or Regulatory Failure:* Within the legal framework specified in Principle 1, the Authority and its advisory groups will only consider using the Code to regulate market activity when:

- (a) it can be demonstrated that amendments to the Code will improve the efficiency of the electricity<sup>9</sup> industry for the long-term benefit of consumers;
- (b) market failure is clearly identified, such as may arise from market power, externalities, asymmetric information and prohibitive transaction costs; or
- (c) a problem is created by the existing Code, which either requires an amendment to the Code, or an amendment to the way in which the Code is applied.

3.6.5 The regulatory failure in this instance is the existence of errors in the drafting of the force majeure provisions in the Code. The proposed Code amendment is designed to address these errors, and remove anomalies or inconsistencies in the force majeure Code provisions, and in their application.

3.6.6 *Principle 3 – Quantitative Assessment:* When considering possible amendments to the Code, the Authority and its advisory groups will ensure disclosure of key assumptions and sensitivities, and use quantitative cost-benefit analysis to assess long-term net benefits for consumers, although the Authority recognises that quantitative analysis will not always be possible. This approach means that competition and reliability are assessed solely in regard to their economic efficiency effects. Particular care will be taken to include dynamic efficiency effects in the assessment, and the assessment will include sensitivity analysis when there is uncertainty about key parameters.

3.6.7 A quantitative analysis on the expected effects of the proposed Code amendment is set out earlier in this paper. Overall, the cost-benefit analysis for this Code amendment proposal indicates the proposal is superior to the current arrangements. Although the anticipated benefits are not considerable in absolute terms, they are material relative to the cost of making them.

## 3.7 Conclusion

3.7.1 This Code amendment proposal is necessary to ensure the Code is consistent with the Act. In addition, the proposed clarifications and removal of inconsistencies in the force majeure Code provisions are expected to deliver benefits to industry participants and consumers, primarily through a reduction in the potential for unnecessary costs to be incurred. Although these benefits are not expected to be considerable in absolute terms, relative to the cost of making them they are material.

---

<sup>9</sup> Where efficiency refers to allocative, productive and dynamic efficiency, and improvements to efficiency include, for example, a reduction in transaction costs or a reduction in the scope for disputes between industry participants.



## Appendix A Format for submissions

Question No.	Question	Response
Q1.	<p>Do you agree with the proposal that market operation service providers and ancillary service agents not be relieved of their obligation to comply with the Act if a force majeure event occurs?</p> <p>If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the Authority's statutory objective in section 15 of the Act.</p>	
Q2.	<p>Do you agree with the proposal that clauses 3.7 and 4.1 should provide that, in the instance of a force majeure event, market operation service providers and ancillary service agents may look to the force majeure provisions to relieve them of their obligations to comply with the Electricity Industry (Enforcement) Regulations 2010 in their entirety rather than only those regulations drawn from the Electricity Governance Regulations 2003?</p> <p>If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the Authority's statutory objective in section 15 of the Act.</p>	

<p>Q3.</p>	<p>Do you agree with the proposal that clauses 3.7 and 4.1 of the Code provide that market operation service providers and ancillary service agents are relieved of their obligations to comply with the Code in its entirety if a force majeure event occurs, for so long as and to the extent that they are unable to comply as a result of the force majeure event?</p> <p>If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the Authority's statutory objective in section 15 of the Act.</p>	
<p>Q4.</p>	<p>Do you agree with the proposal that clauses 3.7 and 4.1 of the Code should provide that a market operation service provider or ancillary service agent that is unable to comply with the Code as a result of a force majeure event must:</p> <ul style="list-style-type: none"> <li>a) take all steps that are necessary to restore it to a position of compliance as soon as reasonably practicable; and</li> <li>b) notify the Authority of: <ul style="list-style-type: none"> <li>i) the steps it intends to take to restore it to a position of compliance; and</li> <li>ii) a proposed timeline for completing the process; and</li> </ul> </li> <li>c) advise the Authority at least once a month of progress towards the completion of that process.</li> </ul> <p>If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the Authority's statutory objective in section 15 of the Act.</p>	

## Appendix B Assessment under section 32(1) of the Act

Section 32(1) requirements:	Response
The proposed amendment is consistent with the Authority's objective under section 15 of the Act, which is as follows:	
(a) to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers	<p>The proposed amendment is designed to address the existence of errors, inconsistencies and anomalies in the drafting and application of the force majeure provisions in the Code. The proposed Code amendment is designed to address these errors, inconsistencies and anomalies, and is expected to deliver benefits to industry participants and consumers, primarily through a reduction in the potential for unnecessary costs to be incurred.</p> <p>Removing this potential inefficiency will assist the Authority to achieve better the competition and efficiency limbs of its statutory objective under section 15 of the Act.</p>
The proposed amendment is necessary or desirable to promote any or all of the following:	
(b) competition in the electricity industry;	Refer above.
(c) the reliable supply of electricity to consumers;	Not applicable.
(d) the efficient operation of the electricity industry;	Refer above.
(e) the performance by the Authority of its functions;	Refer above.
(f) any other matter specifically referred to in this Act as a matter for inclusion in the Code.	Not applicable.

## Appendix C Proposed amendment

### Electricity Industry Participation Code 2010

#### Part 1 Preliminary provisions

**force majeure event**, for the purposes of Parts 3 and 4,—

- (a) means an event or circumstance beyond the reasonable control of a **market operation service provider**, ~~industry service provider~~, or an **ancillary service agent** that results in, or causes, an inability by the **market operation service provider**, ~~industry service provider~~, or **ancillary service agent** to perform any of its obligations under this Code ~~or (except Parts 6 and 9) and Part 2 subpart 1 of Part 4 of the Electricity Industry (Enforcement) Regulations 2010 Act~~; and
- (b) includes (without limitation)—
  - (i) fire, flood, storm, earthquake, landslide, volcanic eruption, or other act of God; and
  - (ii) explosion or nuclear, biological, or chemical contamination; and
  - (iii) sabotage, terrorism, or act of war (whether declared or not); and
- (c) includes an act or omission by a party under an agreement with a **market operation service provider** (not being the **Authority**), ~~industry service provider~~, or an **ancillary service agent** only if—
  - (i) the act or omission is a breach of an obligation under that agreement; and
  - (ii) the obligation is in all material respects the same as an obligation in the **market operation service provider agreement**, ~~the industry service provider agreement~~, or the **ancillary service agent's** agreement with the **system operator**; and
  - (iii) the act or omission would have been a **force majeure event** if it had been done by the **market operation service provider**, ~~industry service provider~~, or **ancillary service agent** and not by the third party; and
- (d) does not include the fact that a **market operation service provider**, ~~an industry service provider~~, an **ancillary service agent**, or any other person—
  - (i) is unable or unwilling to pay any amount necessary to meet the obligations under this Code ~~(except Parts 6 and 9) and Part 2 and or subpart 1 of Part 4 of the Electricity Industry (Enforcement) Regulations 2010 Act~~; or
  - (ii) is unable to pay its debts; or
  - (iii) calls a meeting for the purpose of Part 14 of the Companies Act 1993; or
  - (iv) has been adjudicated bankrupt; or
  - (v) in the case of a company, society, or partnership, has a receiver or statutory manager or similar person appointed in respect of it or of all or any of its assets; or
  - (vi) is put into liquidation; and

- (e) does not include an event that could have been prevented by the **market operation service provider**, ~~industry service provider~~, or **ancillary service agent** by the exercise of a reasonable standard of care

# Electricity Industry Participation Code 2010

## Part 3 Market operation service providers

### Contents

#### *Force majeure provisions relating to market operation service providers*

- 3.7 Relief of obligation because of force majeure
- 3.8 Effect of relief
- 3.9 Authority may contract elsewhere during force majeure event
- 3.10 Authority may terminate market operation service provider agreements

---

#### *Force majeure provisions relating to market operation service providers*

### 3.7 Relief of obligation because of force majeure

- (1) A **market operation service provider** is relieved of an obligation under this Code ~~(except Parts 6 and 9) and Part 2 and Subpart 1 of Part 4 of~~ under the Electricity Industry (Enforcement) Regulations 2010 Act to the extent that, and for so long as, it is unable to perform the obligation as a result of a **force majeure event**.
- (2) Subclause (1) applies only if, ~~and for so long as,~~ the **market operation service provider**—
  - (a) promptly notifies the **Authority** in writing of—
    - (i) the full details of the **force majeure event**; and
    - (ii) the obligation that cannot be performed; and
    - (iii) the likely duration of the inability to perform the obligation; and
    - (iv) the actions it intends to take to overcome the inability to perform the obligation and to remove or mitigate the effect of the force majeure event;
    - and
    - (v) a proposed timeline for completing those actions; and
  - (b) uses its reasonable endeavours to complete the actions notified under subclause (2)(a)(iv) within the timeline notified under subclause (2)(a)(v); and
  - (c) provides the Authority with a written report by the 10<sup>th</sup> business day of each month. The report must include an update on the information described in subclause (2)(a) and any other matters that the Authority, in its reasonable discretion, asks the market operation service provider to report on overcome the inability to perform the obligation and to remove or mitigate the effect of the force majeure event.
- (2) The Authority must publicise the report within a reasonable time of its receipt.

Compare: SR 2003/374 r 38

### 3.8 Effect of relief

If a **market operation service provider** is relieved of an obligation under clause 3.7,—

- (a) the **market operation service provider** is not liable for a breach of this Code ~~(except Parts 6 and 9) or Part 2 or Subpart 1 of Part 4 of~~ the [Electricity Industry \(Enforcement\) Regulations 2010 Act](#) in respect of that obligation during the period for which the relief applies under that clause; and
- (b) any costs arising from the relief from the obligation lie where they fall, except that the **Authority** and the **market operation service provider** may agree to adjust the remuneration of the **market operation service provider**.

Compare: SR 2003/374 r 39

### 3.9 Authority may contract elsewhere during force majeure event

For the duration of a **force majeure event**, the **Authority** may contract with others for the performance of an obligation that the **market operation service provider** fails to perform in accordance with this Code ~~(except Parts 6 and 9) or Part 2 or Subpart 1 of Part 4 of~~ [with the Electricity Industry \(Enforcement\) Regulations 2010 Act](#), or the relevant **market operation service provider agreement**.

Compare: SR 2003/374 r 40

### 3.10 Authority may terminate market operation service provider agreements

If a **force majeure event** results in a **market operation service provider** being relieved of a material obligation for more than 30 continuous days, the **Authority** may terminate the relevant **market operation service provider agreement** by written notice with immediate effect.

Compare: SR 2003/374 r 41(1)

# Electricity Industry Participation Code 2010

## Part 4

### Force majeure provisions relating to ancillary service agents

#### Contents

- 4.1 Relief of obligation because of force majeure
  - 4.2 Effect of relief
- 

#### 4.1 Relief of obligation because of force majeure

- (1) An **ancillary service agent** is relieved of an obligation under this Code ~~(except Parts 6 and 9) and Part 2 and Subpart 1 of Part 4 of~~ under the Electricity Industry (Enforcement) Regulations 2010~~Act~~ to the extent that, and for so long as, it is unable to perform the obligation as a result of a **force majeure event**.
- (2) Subclause (1) applies only if the ancillary service agent—
  - (a) ~~the ancillary service agent~~ advises the **system operator**, immediately after becoming aware of the existence of the **force majeure event**,—
    - (i) that the obligation cannot be performed; and
    - (ii) of the likely duration of the inability to perform the obligation; and
    - (iii) of the actions it intends to take to overcome the inability to perform the obligation and to remove or mitigate the effect of the force majeure event;
    - and
    - (iv) of a proposed timeline for completing those actions; and
  - (b) uses its reasonable endeavours to complete the actions notified under subclause (2)(a)(iii) within the timeline notified under subclause (2)(a)(iv); and
  - (c) provides the system operator and the Authority with a written report by the 10<sup>th</sup> business day of each month. The report must provide the full details of the force majeure event and include an update on the information described in subclause (2)(a) and any other matters that the Authority, in its reasonable discretion, asks the ancillary service agent to report on.
- (2A) The Authority must publicise the report within a reasonable time of its receipt.
  - ~~(b) and for so long as, the ancillary service agent uses its reasonable endeavours to overcome the inability to perform the obligation and to remove or mitigate the effect of the force majeure event; and~~
  - ~~(c) the ancillary service agent, as soon as practicable, advises the system operator and the Authority in writing of the full details of the force majeure event.~~
- (3) To avoid doubt, the relief in subclause (1) applies only if an **ancillary service agent** is acting in its capacity as an **ancillary service agent** under an **ancillary service arrangement**.

Compare: SR 2003/374 r 53B

#### 4.2 Effect of relief

If an **ancillary service agent** is relieved of an obligation under clause 4.1,—

- (a) the **ancillary service agent** is not liable for a breach of this Code ~~(expect Parts 6 and 9) or Part 2 or Subpart 1 of Part 4 of~~ of the [Electricity Industry \(Enforcement\) Regulations 2010](#)~~Act~~ in respect of that obligation during the period for which the relief applies under that clause; and
- (b) any costs arising from the relief from the obligation lie where they fall, except that the **system operator** and the **ancillary service agent** may agree to adjust the remuneration of the **ancillary service agent**.

Compare: SR 2003/374 r 53C

## Appendix D Part 3 of the Code – Existing force majeure provisions

### Electricity Industry Participation Code 2010

#### Part 3 Market operation service providers

##### Contents

##### *Force majeure provisions relating to market operation service providers*

- 3.7 Relief of obligation because of force majeure
- 3.8 Effect of relief
- 3.9 Authority may contract elsewhere during force majeure event
- 3.10 Authority may terminate market operation service provider agreements

---

##### *Force majeure provisions relating to market operation service providers*

#### **3.7 Relief of obligation because of force majeure**

- (1) A **market operation service provider** is relieved of an obligation under this Code (except Parts 6 and 9) and Part 2 and Subpart 1 of Part 4 of the **Act** to the extent that, and for so long as, it is unable to perform the obligation as a result of a **force majeure event**.
- (2) Subclause (1) applies only if, and for so long as, the **market operation service provider**—
  - (a) promptly notifies the **Authority** in writing of—
    - (i) the full details of the **force majeure event**; and
    - (ii) the obligation that cannot be performed; and
    - (iii) the likely duration of the inability to perform the obligation; and
  - (b) uses its reasonable endeavours to overcome the inability to perform the obligation and to remove or mitigate the effect of the **force majeure event**.

Compare: SR 2003/374 r 38

#### **3.8 Effect of relief**

- If a **market operation service provider** is relieved of an obligation under clause 3.7,—
- (a) the **market operation service provider** is not liable for a breach of this Code (except Parts 6 and 9) or Part 2 or Subpart 1 of Part 4 of the **Act** in respect of that obligation during the period for which the relief applies under that clause; and
  - (b) any costs arising from the relief from the obligation lie where they fall, except that the **Authority** and the **market operation service provider** may agree to adjust the remuneration of the **market operation service provider**.

Compare: SR 2003/374 r 39

### **3.9 Authority may contract elsewhere during force majeure event**

For the duration of a **force majeure event**, the **Authority** may contract with others for the performance of an obligation that the **market operation service provider** fails to perform in accordance with this Code (except Parts 6 and 9) or Part 2 or Subpart 1 of Part 4 of the **Act**, or the relevant **market operation service provider agreement**.

Compare: SR 2003/374 r 40

### **3.10 Authority may terminate market operation service provider agreements**

If a **force majeure event** results in a **market operation service provider** being relieved of a material obligation for more than 30 continuous days, the **Authority** may terminate the relevant **market operation service provider agreement** by written notice with immediate effect.

Compare: SR 2003/374 r 41(1)

## Appendix E Part 4 of the Code – Existing force majeure provisions

### Electricity Industry Participation Code 2010

#### Part 4

#### Force majeure provisions relating to ancillary service agents

##### Contents

- 4.1 Relief of obligation because of force majeure
  - 4.2 Effect of relief
- 

#### 4.1 Relief of obligation because of force majeure

- (1) An **ancillary service agent** is relieved of an obligation under this Code (except Parts 6 and 9) and Part 2 and Subpart 1 of Part 4 of the **Act** to the extent that, and for so long as, it is unable to perform the obligation as a result of a **force majeure event**.
- (2) Subclause (1) applies only if—
  - (a) the **ancillary service agent** advises the **system operator**, immediately after becoming aware of the existence of the **force majeure event**,—
    - (i) that the obligation cannot be performed; and
    - (ii) of the likely duration of the inability to perform the obligation; and
  - (b) and for so long as, the **ancillary service agent** uses its reasonable endeavours to overcome the inability to perform the obligation and to remove or mitigate the effect of the **force majeure event**; and
  - (c) the **ancillary service agent**, as soon as practicable, advises the **system operator** and the **Authority** in writing of the full details of the **force majeure event**.
- (3) To avoid doubt, the relief in subclause (1) applies only if an **ancillary service agent** is acting in its capacity as an **ancillary service agent** under an **ancillary service arrangement**.

Compare: SR 2003/374 r 53B

#### 4.2 Effect of relief

If an **ancillary service agent** is relieved of an obligation under clause 4.1,—

- (a) the **ancillary service agent** is not liable for a breach of this Code (except Parts 6 and 9) or Part 2 or Subpart 1 of Part 4 of the **Act** in respect of that obligation during the period for which the relief applies under that clause; and
- (b) any costs arising from the relief from the obligation lie where they fall, except that the **system operator** and the **ancillary service agent** may agree to adjust the remuneration of the **ancillary service agent**.

Compare: SR 2003/374 r 53C

## Appendix F Sections 29, 58 and 60 of the Act

### **29 Registration and requirement to update information**

- (1) An industry participant is registered as soon as its information is recorded, or deemed to be recorded, on the register.
- (2) A registered industry participant must supply updated information, as soon as practicable, if its name, contact details, or business details change.  
Compare: SR 2003/374 rr 8, 11

### **58 Suspension and termination for breach of certain Rulings Panel orders**

The Rulings Panel may make a suspension order or a termination order against an industry participant if—

- (a) the industry participant has failed to comply with an order of the Rulings Panel, and the failure has seriously prejudiced the operational or financial security of the wholesale market or transmission system for electricity; or
- (b) the Authority has suspended trading in a generator or purchaser under section 49 and applies to the Rulings Panel for a termination order.

Compare: SR 2003/374 r 138

### **60 Offences relating to suspension and termination orders**

An industry participant commits an offence, and is liable on summary conviction to a fine not exceeding \$20,000, if it fails to comply with—

- (a) a suspension order or a termination order; or
- (b) any direction or arrangement made by the Rulings Panel under the regulations in relation to a suspension order or a termination order.

Compare: SR 2003/374 r 139