

1 May 2013

Submissions
Electricity Authority
PO Box 10041
WELLINGTON

email: submissions@ea.govt.nz

Dear Authority,

Re: Consultation paper: Review of the Undesirable Trading Situation provisions in the Code

Thank you for the opportunity to provide feedback on the proposed changes.

Please find our table of responses attached.

In summary, Contact considers the proposal in its current form to be over-reaching, and extending well beyond the limits necessary to resolve issues that may exist in relation to the current Undesirable Trading Situation (UTS) provisions, following the High Court decision.

We do not believe that the proposed changes will make the position regarding a UTS any clearer; in fact we believe that there is an increased risk that the changes may create more uncertainty.

The new approach would be wider in scope and significantly less precise than the current UTS provisions. It would also provide more discretion to the Electricity Authority (**Authority**) in terms of the remedies that can be granted in relation to a UTS.

Accordingly, any changes arising from the decision should be the **minimum** required to achieve the Authority's objective of 'operationally efficient and competitive markets for the long term benefit of consumers'. We wish to stress that certainty of regulation should be seen as a key pillar in ensuring market efficiency and that any changes should meet this objective.

Please contact us should you wish to discuss the contents of this submission.

Yours sincerely



Catherine Thompson
Regulatory Affairs Manager

Q1	<p>Do you agree with the proposal that the current definition of “wholesale market” should be clarified as including the spot market for electricity, the ancillary services markets and the hedge market, and that clause 9.14(2)(a) of the Code should be amended accordingly? 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>
A	<p>We agree that the hedge market is part of the wholesale market. We are therefore comfortable with the Authority’s proposal to clarify the definition of “wholesale market” to include the spot market for electricity, the ancillary services markets and the hedge market. However, Contact does not think that a situation in the hedge market should be able to (of itself) give rise to a UTS; it should only be a factor that is considered in assessing what should be done if a UTS arises. In our view, there should not be undue intrusion into the hedge markets via the use of UTS provisions, especially as there should be other remedies available to parties to a hedge contract e.g. under hedge markets rules, contract or competition law. Further, because non-industry participants may not be subject to Authority or Code sanctions, there is a risk that, in relation to the hedge market, any UTS remedy would apply only to some and not all “affected” parties, and/or could interfere with or impact on privately negotiated contractual arrangements.</p> <p>We also recommend that the drafting is slightly amended as follows:</p> <p>Definition of wholesale market:</p> <p>In paragraph (a), change the word “process” to “processes”.</p>
Q2	<p>Do you agree with the proposed changes to Part 1 of the Code to clarify the definition of a UTS? 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>
A	<p>In Contact’s view, the proposed changes are too broad and imprecise.</p> <p>In particular, we are very concerned that the scope of the following provisions has been expanded without significant support or rationale:</p> <ul style="list-style-type: none"> - the replacement of the word ‘trading’ with the less precise concept of ‘confidence and integrity’. - the removal of ‘would be likely to’ in favour of ‘may’, which provides a lower standard for finding a UTS. <p>The proposed amendments should be modified to reflect the above concerns; to reduce the potential uncertainty and breadth that the wording</p>

	<p>would otherwise create. Our responses are premised on the assumption that the scope of the UTS provisions will not be unduly expanded and the terms used will be made clearer.</p> <p>We agree an industry participant should not face the risk of breaching the Code if it is acting under a direction given by the Authority.</p> <p>In our view, however, a direction that is inconsistent with the Code should, if permitted at all, be a solution of last resort.</p> <p>We would prefer to see the Authority grant an urgent exemption to a rule at the same time as directing the participant, and then consulting on the exemption. This would give participants the ability to determine whether it was a suitable requirement or not.</p> <p>If the UTS provisions get amended to allow remedies that are inconsistent with the Code, then in our view Clause 5.2(4) should be amended to read as follows:</p> <p>Clause 5.2(4)</p> <p>“(4) A participant is not liable to any other participant, the Authority or any other person, under the Code or otherwise, in relation to ...”</p> <p>From a drafting perspective we also suggest the following amendments</p> <p>Definition of undesirable trading situation:</p> <p>Add the word “that” at the end of the opening line and delete the word “that” from the beginning of paragraphs (a) and (b).</p> <p>Clause 5.2(1)(b) be amended to read</p> <p>“(b) relates to an aspect of the electricity industry that is covered by section 32 of the Act”. In our view this wording is less clumsy and is not coloured by the concept of the Authority’s ability to regulate.</p>
Q3	<p>Do you agree that the examples in paragraph (c) of the current definition of a UTS should be retained in the Code, and moved to Part 5? 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>
A	<p>Yes. We have no issue with paragraph (c) being moved.</p>
Q4	<p>Do you agree with the proposed changes to clause 13.255 of the Code to align it with the suggested changes to UTS provisions? 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>

A	Yes. We agree that the FTR suspension provisions should align with the proposed UTS amendments. We think the solution proposed is more satisfactory than the option of deleting clause 13.255.
Q5	Do you agree with the proposal that there should be a restriction on the Authority initiating a UTS investigation for situations earlier than a defined time limit in the past? 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.
A	In the interests of certainty for market participants Contact agrees there should be a time limit on UTS investigation being initiated.
Q6	Do you agree with the proposal that the time limit should be no more than 10 business days, and apply between the commencement of the Consultation Paper March 2013 alleged UTS and the date the Authority initiates an investigation? 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.
A	<p>While we agree that there should be a time limit, we are concerned a period of 10 working days would confine the UTS provisions to only short, sharp events. In our view this does not seem optimal. Therefore we recommend amending Clause 5.1(A) to reflect that there may be a time lag between the UTS event, and a party becoming aware of it:</p> <p>“... passed since the situation, which it is suspected or anticipated may be an undesirable trading situation, occurred or any affected person (acting reasonably) ought to have known it had occurred (whichever is later) ...”</p> <p>One example of where this sort of situation may occur is ancillary services where information is not available until day 14 of the following month. Accordingly there is a significant time lag between day one of a month and invoices being issued and scrutinised.</p> <p>Contact considers that any person should be able to identify a UTS and not just the Authority (as the wording is originally drafted) – our proposed revisions cover off this point.</p>
Q7.	Do you agree with the proposal that there should be no time limit on republication of final prices per se? 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.

A	<p>No, in order for market participants to have certainty and for the market to be orderly and efficient there must be a time limit on the republication of final prices.</p> <p>We think that, as a default position, this time limit could be relatively short (e.g. six months); however, to avoid any unintended consequences of setting a drop-dead date for final price republication (and regardless of how long the period is), we also recommend providing for this period to be extended where appropriate, with prior approval of the Authority’s Board or, possibly, the Minister – e.g. if a UTS investigation has been initiated but is not complete as at the applicable date.</p> <p>There is no defined period within which investigation of an alleged UTS must be completed, so the duration of the period for determining that is uncertain. Regardless of whether a UTS investigation has to be initiated quickly after a situation has arisen, there is a risk a final price republication time limit could occur before an investigation can be completed or, conceptually, the situation is even identified (i.e. if our proposal under Q6 is adopted, it is possible no person ought reasonably to have known of the situation by that date). This may also have the effect of limiting the range of remedies available to the Authority should a UTS actually be shown to have arisen after that time limit has passed.</p> <p>The Consultation Paper seems to suggest (e.g. paragraphs 3.1.33 – 3.1.43, especially 3.1.36 and 37)) there is a connection between the time limit for initiating a UTS investigation and the need (or otherwise) for putting a time limit on republishing final prices. We don’t think there is a direct correlation (except to the extent that, arguably, the sooner an investigation is started the sooner it is likely to be completed and pricing can be confirmed or reset). Accordingly, on balance, for the reasons given above, we favour a time limit being placed on the republication of final prices, but with a qualification that the relevant period can be extended where that is appropriate and in making this submission we acknowledge there is a residual, albeit in our view low, risk that any such time period could expire before a UTS has been identified where the “ought to have known” formulation we have proposed is used or before an investigation can be properly completed and that may impact on the range of actions the Authority can take to resolve the situation.</p>
Q8.	<p>Do you agree with the proposal that the Authority should be able to take any action to remedy a UTS, provided the action relates to an aspect of the electricity industry that the Authority could regulate in the Code under section 32 of the Act? 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>
A	<p>No. The proposed change gives the Authority much broader powers than are required. In our view, as indicated above, this wording should be qualified by requiring the Authority to use remedies that are consistent with the Code.</p> <p>Accordingly, we recommend the Authority either deletes sub-paragraph (a)</p>

	<p>(which is our preference) or, at a minimum, amends it to read:</p> <p>Clause 5.2(2A)(a)</p> <p>“(a) may be inconsistent ... Code (but any such inconsistency shall be only to the extent strictly necessary to enable correction of, or to assist in overcoming, the specific undesirable trading situation to which it relates, and such inconsistency shall be removed or rectified as soon as reasonably practicable (including, where applicable, by way of an exemption or urgent Code change); but ...”</p>
Q9.	<p>Do you agree with the proposal that industry participants following directions from the Authority do not face the risk of breaching the Code as a consequence of doing so? 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>
A	<p>Yes. We agree that an industry participant should not face the risk of breaching the Code. However, we would rather see the Authority grant an urgent exemption to a rule at the same time as directing the participant, and then consulting on the exemption. This would better allow participants to determine whether it was a suitable requirement or not.</p>