



1 May 2013

Electricity Authority
By email: submissions@ea.govt.nz

Review of the Undesirable Trading Situation provisions in the Code

Meridian welcomes the opportunity to submit on the Electricity Authority's consultation paper 'Review of the Undesirable Trading Situation provisions in the Code'.

The Undesirable Trading Situation (UTS) provisions are critical to the proper functioning of the electricity market. As such, any modifications should be the result of measured consideration. To this end, Meridian submits that following receipt of submissions and further analysis by the Authority, the Authority should release and consult on a revised version of its proposed amendments to the UTS provisions.

Detailed responses to each of the Authority's consultation questions are attached as Appendix A.

We would also like to make the following high-level points:

Existing legal precedent is of significant value

The Authority's decision in relation to the 26 March 2011 UTS, and the subsequent appeal hearing in the High Court, were a clear test of the Authority's decision-making processes and of the UTS provisions themselves. In general, Meridian considers both the processes and the provisions held up to scrutiny.

The High Court's detailed judgement clarified a number of interpretation questions with respect to the UTS provisions, as well as identifying a number of areas where potential improvements could be made. While we agree with pursuing Code drafting improvements where appropriate, Meridian considers care should be taken not to lose the precedents which have now been set. This would only serve to undermine the greater certainty created by the High Court's confirmation of the Authority's decision. Meridian considers the proposal to reframe the UTS definition around "confidence in" and "integrity of" the market risks losing the valuable precedent set by the High Court. As such, we do not support this proposal.

Further thinking required on regulatory jurisdiction over the hedge market

The hedge market – encompassing both bilateral and exchange-traded contracts - is currently subject to a number of different regulatory or supervisory bodies. We have sought to identify these bodies, and the regulatory tools at their disposal, in the table attached as Appendix B.

Meridian considers the Authority's proposal to explicitly define the hedge market as part of the wholesale market, thereby making it directly subject to the UTS provisions, risks creating confusion with respect to regulatory jurisdiction over the hedge market. We think the Authority needs to give consideration to how its proposed powers would fit with the powers of existing regulatory bodies. Such consideration may extend to establishing Memorandums of Understanding (MoU) with other relevant regulatory bodies about the jurisdictional borders in this area, in the same way that the Authority has an MoU with the Commerce Commission. At least until such jurisdictional boundaries are clear, Meridian considers that the hedge market should not be explicitly covered by the UTS provisions.

Need to consider UTS provisions alongside potential market conduct standard

Meridian considers it important for the UTS provisions and any market conduct standard – as is currently being proposed by the Wholesale Advisory Group – to work effectively in tandem. It is clear that both sets of provisions may need to be employed in particular situations, notably where improper market conduct leads to market outcomes that need to be unwound. We suggest the Authority gives due thought to how the UTS provisions will work alongside any market conduct standard. It may be appropriate for the Authority's decisions on each matter to be considered and taken together.

Related to this matter, Meridian considers an issue is raised by subclause (b) of the UTS definition: "*that, in the reasonable opinion of the Authority, cannot satisfactorily be resolved by any other mechanism available under this Code*". In our view, it may be inappropriate to interpret this requirement as meaning an issue could only ever be addressed either under the UTS provisions *or* another Code mechanism. In some cases, it may be desirable to allow actions to be taken both under the UTS provisions and under general Code provisions.

We consider this issue will become particularly apparent if a market conduct standard is adopted. For instance, if a participant were alleged to have engaged in manipulative trading activity, it may be appropriate to address the immediate market impact of this behaviour using the UTS provisions, while also pursuing proceedings that would determine whether the participant was in breach of a market conduct standard. Meridian proposes that the Code is amended to make clear that "*cannot satisfactorily be resolved*" does not preclude use of both the UTS provisions and a separate Code provision (or provisions) if appropriate in the circumstances.

If you have any queries regarding this submission please contact me.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. Hall', written in a cursive style.

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Appendix A: Meridian responses to consultation questions

	Question	Meridian Response
1.	<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?</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>Meridian disagrees with the proposal.</p> <p>As the Authority notes, the Code (encompassing the Policy Statement and Procurement Plan) does not govern the hedge market to the same extent it governs the spot and ancillary services markets. While the Authority could reasonably be seen as the primary regulator of both the spot and ancillary services markets, we consider that the hedge market is subject to a number of different regulatory or supervisory bodies. We have sought to identify these bodies in the table in Appendix B. Given these existing responsibilities, we consider adding hedge market to the definition of wholesale market will create confusion with respect to jurisdictional boundaries.</p> <p>Further, we do not consider it necessary for the hedge market to be specifically included in the definition of wholesale market for the purposes of the UTS process. In the High Court hearing in relation to the 26 March UTS, the Court noted that both the reference to “public interest” in clause (c)(v) and the reference to the “long term benefit of consumers” in section 15 of the Electricity Industry Act made it clear that the Authority is entitled to consider the impact on the public when determining a UTS¹. This decision confirms that the Authority is able to take into account a range of matters when determining a UTS, and is not restricted to only considering impacts on the spot market.</p> <p>Given these points, we are not convinced that it is appropriate to include the hedge market within the definition of wholesale market. We are happy with the other aspects of the Authority’s proposed changes, however.</p>

¹ High Court judgement, at [291 – 292]. Note: While the Court did acknowledge that the wholesale market “consists essentially of the spot market and hedge market”, this statement is made in the context of the opening description of the electricity industry – no detailed consideration was given by the Court to the issue of which markets fell within the “wholesale market for electricity”.

	Question	Meridian Response
		<p>Recommendation</p> <p>Meridian recommends the definition of wholesale market in Part 1 of the Code is amended as follows:</p> <p><i>wholesale market</i> means <i>the wholesale market for electricity</i>—</p> <p><i>(a) the spot market for electricity, including the process for setting—</i></p> <p><i>(i) real time prices;</i></p> <p><i>(ii) forecast prices and forecast reserve prices;</i></p> <p><i>(iii) provisional prices and provisional reserve prices;</i></p> <p><i>(iv) interim prices and interim reserve prices;</i></p> <p><i>(v) final prices and final reserve prices;</i></p> <p><i>(b) markets for ancillary services;</i></p> <p><i>(c) the market for FTRs</i></p>
2.	<p>Do you agree with the proposed changes to Part 1 of the Code to clarify the definition of a UTS?</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>Our comments on each aspect of the Authority's proposed changes to the UTS definition are set out below.</p> <p>Frame around maintenance of wholesale market confidence and integrity</p> <p>Meridian considers there are a number of benefits associated with the existing wording in subclause (a) of the UTS definition:</p> <ul style="list-style-type: none"> The existing definition now has the benefit of the High Court's interpretation from the 26 March UTS (confirming the Authority's initial decision), as well as the Authority's (and Electricity Commission's) earlier UTS rulings. The High Court decision acts as precedent and provides greater certainty for the future. We note that the High Court's decision made clear that

	Question	Meridian Response
		<p data-bbox="902 252 2007 320">maintenance of “orderly trading” extended beyond simply ensuring that organised trading was able to continue.²</p> <ul data-bbox="853 368 2040 1070" style="list-style-type: none"> <li data-bbox="853 368 2040 767">• The terminology “orderly trading” (or a similar concept of “orderly market”) is used in a number of foreign securities and commodities exchanges, including in relation to provisions that serve a similar function to the UTS provisions. These include the United States’ Commodities Exchange Act which empowers the regulator to “<i>take such action as...is necessary to maintain or restore orderly trading...of any futures contract</i>” whenever it believes that “<i>an emergency exists</i>”, and Australia’s Corporations Act which requires a market licensee to “<i>do all things necessary to ensure that the market is a fair, orderly and transparent market</i>”. We understand that the use of the term “orderly trading” in the original NZEM rules was a deliberate attempt to mirror equivalent provisions on established commodities and futures markets. The result of this is that the Authority, participants and the courts have the benefit of foreign jurisprudence in interpreting this aspect of the UTS definition. <li data-bbox="853 815 2040 1070">• As emphasised by Meridian in its submission to the High Court, “orderly trading” is an economic concept. Meridian argued that “orderly” implied a state of reliable market operations and an absence of unreasonable price variation, both features of a workably competitive and efficient market. This is consistent with the Electricity Industry Act and, in particular, the Authority’s statutory objective, which is stated in economic terms. The use of familiar economic concepts may improve certainty as it enables economic understandings to be brought to bear in determining whether a UTS exists. <p data-bbox="808 1118 1995 1182">In contrast, Meridian considers the Authority’s proposal to introduce the concepts of “confidence” and “integrity” may create uncertainty:</p> <ul data-bbox="853 1230 1995 1294" style="list-style-type: none"> <li data-bbox="853 1230 1995 1294">• As far as we are aware, these concepts are not commonly used for similar purposes in other jurisdictions. As such, there is no (or less) potential to draw on foreign jurisprudence.

² High Court judgement, at [97].

	Question	Meridian Response
		<ul style="list-style-type: none"> • The concept of market “confidence” raises a number of further questions, including: <ul style="list-style-type: none"> ○ Whose confidence must be threatened? It is unclear, for example, whether the Authority must consider the confidence of market participants only, or whether it should take into account the confidence of retail consumers or the public generally. ○ What is it about the wholesale market that persons must have confidence in? <p>We note also the High Court’s decision (under the existing UTS definition) that “<i>the Authority was entitled to take confidence in the market into account in assessing whether a UTS had occurred</i>”.³ The Court went on to say that “confidence” was not itself determinative of a UTS, but was merely a relevant consideration. We consider that by instead making the issue of confidence determinative, the Authority’s proposal would depart from the High Court decision. We do not consider this to be desirable. As such, Meridian recommends the existing wording of subclause (a) of the UTS definition is retained.</p> <p>Removal of “would be likely to”</p> <p>We note that the effect of the Authority’s proposed change to the definition of a UTS is to alter the threshold for a UTS from something “likely” to preclude the maintenance of orderly trading or proper settlement of trades to something which “may” threaten confidence in or the integrity of the wholesale market.</p> <p>We consider the use of “may” significantly lowers the threshold for intervention under the UTS provisions. The High Court, in its judgement on the 26 March UTS, noted there was agreement from all parties that “would be likely to” was a higher standard than “may”, which is mostly identified as something that is possible.⁴ In particular, the combined use of “may threaten” and “confidence in...the market” creates a particularly low standard for intervention, meaning the Authority could declare a UTS if</p>

³ High Court judgement, at [294].

⁴ High Court judgement, at [145].

	Question	Meridian Response
		<p>it concluded that it is <i>possible</i> that a situation threatens confidence in the market. Given that appeals of a UTS decision can only be considered on points of law, we consider this change will narrow the scope for appeal beyond what is reasonable or desirable. As noted by the Authority, appeal rights act as a check on the Authority’s powers – as such, it is important that reasonable grounds for appeal are retained.</p> <p>As we note above, our overall preference is that the existing wording of subclause (a) of the UTS definition is retained. However, in the event the Authority elects to adopt an alternative test relating to confidence and integrity, the threshold should be “likely to” rather than “may” threaten.</p> <p>Use of “situation” rather than “contingency or event”</p> <p>In the 26 March High Court proceedings, Meridian argued that the meaning of “contingency or event” was broader than what is meant by “situation”. The former includes both:</p> <ul style="list-style-type: none"> • Any “event”, being “<i>something that happens or is thought of as happening; an occurrence, an incident...</i>” • Any “contingency”, being “<i>an event conceived of or contemplated as of possible occurrence in the future</i>” <p>We consider the inclusion of the word “contingency” makes it clear that a UTS could arise as a result of possible future occurrences. While there may be other indications in the Code that suggest future events can be considered – in particular clause 5.1(1) which enables the Authority to investigate if it “<i>anticipates the development or possible development</i>” of a UTS – we consider the proposed change exposes the Authority to a greater risk of challenge if it declares a UTS on the basis of events that have not yet occurred. Therefore, Meridian recommends that the existing reference to “contingency or event” is retained.</p>

	Question	Meridian Response
		<p>Clarifying “cannot satisfactorily be resolved”</p> <p>While the Authority does not discuss this in the consultation paper, Meridian considers that an issue is raised by subclause (b) of the UTS definition, in particular the phrase “cannot satisfactorily be resolved” by any other mechanism available under this Code. In our view, it may be inappropriate to interpret this requirement as meaning an issue could only be addressed either under the UTS provisions <i>or</i> another Code mechanism. In some cases, it may be desirable to allow actions to be taken both under the UTS provisions and under general Code provisions.</p> <p>This issue may become particularly apparent if a general market conduct standard – as is currently being proposed by the Wholesale Advisory Group – is adopted in the Code. For instance, if a participant were alleged to have engaged in manipulative trading activity, it may be appropriate to address the immediate market impact of this behaviour using the UTS provisions, while separately pursuing proceedings to determine whether the participant had breached the market conduct standard (and thus, triggering Code breach provisions). Such an example also illustrates the importance of the Authority considering whether the UTS provisions and any market conduct standard will complement each other or overlap.</p> <p>Meridian submits that additional clarification of the meaning of “cannot satisfactorily be resolved” should be added to the definition of a UTS.</p> <p>Recommendation</p> <p>Taking the views set out above into account, Meridian recommends the definition of a UTS in Part 1 of the Code is amended as follows:</p> <p style="text-align: center;"><i>undesirable trading situation</i> means any contingency or event—</p> <p style="text-align: center;"><i>(a) that threatens, or may threaten, trading on the wholesale market for electricity and that would, or would be likely to, preclude the maintenance of orderly trading or proper settlement of</i></p>

	Question	Meridian Response
		<p><i>trades; and</i></p> <p><i>(b) that, in the reasonable opinion of the Authority, cannot satisfactorily be resolved by any other mechanism available under this Code; and</i></p> <p><i><u>(c) for the avoidance of doubt, for the purposes of paragraph (b), a contingency or event may not be able to be satisfactorily resolved by any other mechanism available under this Code notwithstanding that the contingency or event may include conduct that is in breach of one or more provisions of this Code, if the Authority considers that objectives of the Authority would be best met by restoring the normal operation of the wholesale market as soon as possible by taking steps under Part 5 of this Code.</u></i></p>
3.	<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?</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>In light of the High Court's decision that the matters listed in subclause (c) should be treated only as examples of a potential UTS (rather than deterministic of a UTS), we consider it is sensible to remove these matters from the UTS definition and include them in Part 5 of the Code.</p> <p>Meridian supports the Authority's proposed modification of (c)(v): "any exceptional or unforeseen circumstance that is contrary to the public interest".</p> <p>Meridian does not support inclusion of the proposed clause 5.1(2)(e): "a situation that threatens orderly trading or proper settlement". As above, our preference is for the existing reference to "orderly trading" to be retained in the Part 1 UTS definition, making an additional reference in 5.1(2) unnecessary and confusing.</p> <p>Recommendation</p> <p>Meridian recommends that the existing subclause (c) is removed from the Part 1 UTS definition, and the following provisions be added to clause 5.1 of the Code:</p> <p><i><u>(2) The following are examples of what the Authority may consider to constitute an undesirable trading situation:</u></i></p> <p><i><u>(a) manipulative or attempted manipulative trading activity;</u></i></p>

	Question	Meridian Response
		<p><i>(b) conduct in relation to trading that is misleading or deceptive, or is likely to mislead or deceive;</i> <i>(c) unwarranted speculation or an undesirable practice;</i> <i>(d) material breach of any law;</i> <i>(e) any exceptional or unforeseen circumstance that is contrary to the public interest.</i></p> <p><i>(3) To avoid doubt—</i> <i>(a) the list of examples in subclause (2) is not an exhaustive list, and does not prevent the Authority from finding that an undesirable trading situation is developing or has developed in other circumstances; and</i> <i>(b) an example listed in subclause (2) does not constitute an undesirable trading situation unless the example comes within the definition of that term in Part 1.</i></p>
4.	<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?</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>Refer to Meridian’s recommendation under Question 2 in relation to amending the definition of a UTS. If the Authority does not adopt Meridian’s recommendation, we agree it is sensible to amend clause 13.255 to ensure it remains consistent with the new definition.</p>
5.	<p>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?</p> <p>If you agree/disagree, please explain why, including why in your view the proposal is consistent/inconsistent with achieving the</p>	<p>Meridian agrees with establishing a time limit on the initiation of a UTS investigation. However, we consider that any time limit should be subject to a “reasonable discoverability” exemption. This is particularly relevant when contemplating use of the UTS provisions to address issues of fraud. It is also common practice to adopt such an exemption within New Zealand legislation, including:</p> <ul style="list-style-type: none"> • The Commerce Act, which states in section 82(2): “An action under subsection (1) may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. However no action under subsection (1) may be

	Question	Meridian Response
	<p>Authority's statutory objective in section 15 of the Act.</p>	<p><i>commenced 10 years or more after the matter giving rise to the contravention."</i></p> <ul style="list-style-type: none"> The Fair Trading Act, which states in section 43(5): "<i>An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.</i>" <p>Recommendation</p> <p>Meridian recommends the following wording is added to Part 5 of the Code:</p> <p><u>5.1A Time limit for investigating undesirable trading situation</u></p> <p><i><u>Despite clause 5.1, the Authority must not commence an investigation if 10 business days or more have passed since the situation, which the Authority suspects or anticipates may be an undesirable trading situation, occurred or ought reasonably to have been discovered.</u></i></p>
6.	<p>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 alleged UTS and the date the Authority initiates an investigation?</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>Meridian agrees a 10 business day time limit is appropriate, subject to the addition of a "reasonable discoverability" exemption, as described above.</p>
7.	<p>Do you agree with the proposal that there should be no time limit on republication of final prices per se?</p>	<p>Meridian agrees there should be no time limit on publication of final prices. Imposing such a time limit would severely restrict the Authority's ability to determine and implement an appropriate remedy in the event of a UTS.</p>

	Question	Meridian Response
	<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>	
8.	<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?</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>Our comments on each aspect of the Authority's proposed changes to clause 5.2 are set out below.</p> <p>Parts of the electricity industry in which UTS remedies may be applied</p> <p>The Authority has proposed that the existing reference to "in relation to the wholesale market" in clause 5.2(1) is removed. The impact of this change, and of the subsequent addition of the proposed clause 5.2(1)(b) ("<i>relates to an aspect of the electricity industry that the Authority could regulate in this Code under section 32 of the Act</i>") is to empower the Authority to impose a remedy on a participant in relation to virtually any aspect of the electricity industry. Meridian considers such broad remedial powers are inappropriate, and are likely to reduce certainty in the electricity market.</p> <p>In particular, we are not convinced that the Authority should be empowered to enforce remedies in the hedge market. As noted in our response to Question 1, and as illustrated by the table in Appendix B, there is already substantial regulatory oversight of hedge markets. We think the Authority needs to give consideration to how its proposed powers would fit with the powers of existing regulatory bodies. Such consideration may extend to establishing Memorandums of Understanding (MoU) with other relevant regulatory bodies about the jurisdictional borders in this area, in the same way that the Authority has an MoU with the Commerce Commission. At least until such jurisdictional boundaries are clear, Meridian considers the Authority's ability to enforce remedies should be restricted to steps "in relation to the wholesale market" (with wholesale market defined in accordance with our response to Question 1). Meridian therefore recommends that the existing wording in clause 5.2(1) is retained. Moreover, Meridian suggests the Authority should also consider how such remedies might apply to non-market participants.</p>

	Question	Meridian Response
		<p>Remedies that are inconsistent with the Code</p> <p>We note that the Authority provided exemptions to a number of service providers in the course of its response to the 26 March UTS. We understand the statutory processes from which service providers were exempted primarily related to “<i>deferring completion of trades for a specified period</i>” and “<i>directing that any trades be closed out or settled at a specified price</i>”, as described by clause 5.2(b) and (c). Neither of these subclauses are subject to the requirement to “<i>not [be] inconsistent with this Code, the Act or any other law</i>”. Accordingly, it is unclear whether any of the examples given by the Authority actually involved circumstances where the participant could have been in doubt about the Authority’s power to make the orders concerned.</p> <p>Nevertheless, we accept that the Authority’s proposal to remove reference to “<i>not be inconsistent with this Code, the Act or any other law</i>” from clause 5.2(2)(d) and to insert the new proposed clause 5.2(2A) may provide further clarity in relation to its ability to carry out remedies, and avoid the need for specific exemptions to be granted. As such, we support the proposal.</p> <p>Recommendation</p> <p>Meridian recommends the following wording is added to Part 5 of the Code:</p> <p>(1) <i>If the Authority finds that an undesirable trading situation is developing or has developed, it may take any of the steps listed in subclause (2) in relation to the wholesale market that the Authority considers are necessary to correct the undesirable trading situation.</i></p> <p>(2) <i>The actions steps that the Authority may take <u>under subclause (1)</u> include any 1 or more of the following:</i></p> <p>(a) <i>directing that suspending, or limiting or curtailing, an activity on the wholesale market, <u>be suspended, limited or stopped</u>, either generally or for a specified period:</i></p> <p>(b) <i>directing that deferring completion of trades <u>be deferred</u> for a specified period:</i></p>

	Question	Meridian Response
		<p><i>(c) directing that any trades be closed out or settled at a specified price:</i></p> <p><i>(d) giving directions to directing a participant to take any actions act in a manner (not inconsistent with this Code, the Act, or any other law) that will, in the Authority's opinion, correct or assist in overcoming the undesirable trading situation.</i></p> <p><i><u>(2A) A direction given to a participant under subclause (2)(d)—</u></i></p> <p><i><u>(a) may be inconsistent with this Code; but</u></i></p> <p><i><u>(b) must not be inconsistent with the Act, or any other law.</u></i></p> <p><i>(3) The participant must comply promptly with a direction given to it in writing.</i></p> <p><i>(4) Neither a participant nor the Authority is <u>not</u> liable to any other participant in relation to the taking of an action, or an omission, that is reasonably necessary for compliance with an Authority direction under this clause.</i></p> <p><i><u>(5) A participant does not breach this Code if it acts in accordance with a direction given under subclause (2)(d).</u></i></p>
9.	<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?</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>We agree that industry participants should not be at risk of breaching the Code when complying with a direction given by the Authority under the UTS provisions.</p>

Appendix B: Wholesale Electricity Hedging Contracts Regulatory Framework

	Regulator	Over the counter products (OTCs)	Exchange traded products
SECURITIES MARKETS ACT (SMA)	FMA	<p>OTCs are “futures contracts” regulated under the SMA.</p> <p>An electricity market participant that is an authorised futures dealer (Electricity Market Participant)⁵ is authorised to “deal in” OTCs under a class authorisation as long as the OTCs relate to wholesale electricity prices and are between an Electricity Market Participant and other listed electricity market participants or habitual investors.</p> <p>An Electricity Market Participant is potentially:</p> <ul style="list-style-type: none"> • criminally liable for any dealings in OTCs in breach of its authorisation; and/or • civilly liable for any misleading or deceptive conduct in relation to dealings in OTCs (and could be subject to other orders by the FMA). 	<p>The contracts for difference (CFDs) currently traded on ASX 24 are “futures contracts” regulated under the SMA.</p> <p>An Electricity Market Participant is authorised to “deal in” CFDs as long as the CFDs relate to wholesale electricity prices and the exchange is an “authorised futures exchange” (which includes ASX 24, the current trading platform).</p> <p>An Electricity Market Participant is potentially:</p> <ul style="list-style-type: none"> • criminally liable for any dealings in CFDs in breach of its authorisation; • civilly and criminally liable for insider trading and market manipulation in relation to dealings in CFDs; and • civilly liable for any misleading or deceptive conduct in New Zealand in relation to dealings in CFDs (and could be subject to other orders by the FMA).
SECURITIES ACT (SA)	FMA	<p>OTCs are also “securities” under the SA.</p> <p>Recognising the regulation under the SMA, comprehensive (class) exemptions apply to an Electricity Market Participant, which dis-apply most of the SA for dealings in OTCs which comply with the Electricity Market Participant’s authorisation.</p> <p>However, if an Electricity Market Participant was to deal in an OTC in breach of its authorisation, and is the issuer of the OTC, the Electricity Market Participant (and, in certain circumstances, its directors and senior officers) would be</p>	Position the same as that applying to OTCs.

⁵ The relevant class authorisation is the Authorised Futures Dealers Notice 1997 (No 3).

	Regulator	Over the counter products (OTCs)	Exchange traded products
		potentially criminally and civilly liable under the SA.	
FAIR TRADING ACT (FTA)	Commerce Commission	<p>The FTA prohibits:</p> <ul style="list-style-type: none"> • conduct in trade that is misleading or deceptive or is likely to mislead or deceive; and • making false or misleading representations in trade. <p>These prohibitions would extend to an Electricity Market Participant's conduct in relation to OTCs.</p> <p>The consequences for breaches of the FTA can be extensive and include (both for an Electricity Market Participant and, potentially, its officers and employees):</p> <ul style="list-style-type: none"> • fines; and/or • orders requiring the return of money and requiring payment of compensation equivalent to the amount of loss or damage suffered. 	Position the same as that applying to OTCs.
FINANCIAL MARKETS CONDUCT BILL (FMCB)	FMA	<p>When fully effective, the FMCB will overhaul securities laws and replace the SMA and SA. Broadly:</p> <ul style="list-style-type: none"> • any offer of an OTC to retail investors will be a "regulated offer" requiring disclosure to investors; • any derivatives issuer in respect of an OTC (which would include an Electricity Market Participant) which involves a "regulated offer" will require a market services licence; and • even if the derivatives issuer does not require a market services licence, regulations can still be made 	<p>Position the same as that applying to OTCs.</p> <p>In addition:</p> <ul style="list-style-type: none"> • civil and criminal liability for insider trading and market manipulation in relation to dealings in OTCs will continue; and • civil liability will continue for any misleading or deceptive conduct in New Zealand in relation to dealings in OTCs, but will also be broadened in scope to include false or misleading, or unsubstantiated,

Regulator		Over the counter products (OTCs)	Exchange traded products
		<p>which govern the handling of investor money and property. The existing authorised futures dealing regime will be discontinued (after a transition period).</p> <p>Accordingly, if an Electricity Market Participant continued to offer OTCs solely to wholesale investors then it should not require a market services licence as a “derivatives issuer”. It may, however, be subject to regulations governing the handling of investor money and property.</p> <p>In addition, proceedings by the Commerce Commission in relation to financial products (which would include OTCs) can still be brought under the FTA, but will require FMA consent.</p>	<p>representations.</p>
ASX RULES / AUSTRALIAN CORPORATIONS LAW	ASX	N/A	<p>Where an Electricity Market Participant trades CFDs through the ASX 24 it will be bound by the relevant ASX rules and provisions of the Australian Corporations Act which apply to it as a trader on that market.⁶</p> <p>In addition, an Electricity Market Participant must comply with:</p> <ul style="list-style-type: none"> • the conditions of any Australian Financial Services Licence it holds under section 913B of the Corporations Act 2001 (e.g. in relation to market making activities for CFDs traded on ASX 24); and • any specific terms and conditions applying to the Electricity Market Participant under the ASX 24 Rules as a result of any particular function or status it holds (e.g. as a liquidity provider).
CRIMES ACT	FMA	Criminal liability may be imposed under the Crimes Act if any person (which could include an Electricity Market Participant)	Position the same as that applying to OTCs.

⁶ While we have not reviewed Australian law in depth for the purposes of this table, at a high level, under Australian law, insider trading and market manipulation prohibitions, and rules against misleading and deceptive conduct, will apply to any trading in CFDs on ASX 24. Enforcement would be undertaken by the Australian Securities & Investments Commission (ASIC).

Regulator	Over the counter products (<i>OTCs</i>)	Exchange traded products
	<p>makes, or concurs in making, a false statement with intent:</p> <ul style="list-style-type: none"> • to induce any person, whether ascertained or not, to subscribe for any security; • to deceive or cause loss to any person, whether ascertained or not; or • to induce any person, whether ascertained or not, to entrust or advance any property to any other person. <p>This provision could apply to an Electricity Market Participant's dealings in OTCs.</p> <p>The relevant penalty is imprisonment for up to ten years (although a fine would be imposed if an Electricity Market Participant were found liable).</p>	