

<p>1. 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>			
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1.1.	Contact Energy	<p>Other remedies available</p> <p>There should be other remedies available to parties to a hedge contract e.g. under hedge markets rules, contract or competition law. Therefore, the UTS provisions should not need to extend to the hedge market.</p>	The Authority acknowledges that there may be other remedies available in the hedge or ancillary service markets. This would be a matter the Authority would take into account in its decision making.
1.2.	Contact Energy Trustpower	<p>Not all hedge market participants are industry participants</p> <p>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.</p>	If a UTS was to arise in which the Authority contemplated taking steps in the hedge or ancillary services market, it would need to take jurisdictional issues into account. This would be a matter that the Authority would take into account in its decision making.
1.3.	Contact Energy Genesis Energy Trustpower	<p>Interfere with privately negotiated contracts</p> <p>Parties to bi-lateral contracts negotiate their own arrangements for addressing unanticipated events including by way of arbitration and termination clauses (and have incentives to negotiate). Parties can also seek recourse under relevant contract law.</p> <p>It is therefore not appropriate for the Authority to have retrospective oversight of, interfere with or impact on privately negotiated contractual arrangements</p>	<p>The Authority acknowledges these concerns.</p> <p>However, the Authority does not consider that it should be precluded from taking any action in relation to the hedge market (and some aspects) of the ancillary services market. In the Authority’s view this would be a step too far because it would remove any ability to take actions in these markets, even if that was the most effective course of action available. The Authority therefore considers that this would be inconsistent with its statutory responsibilities.</p>
1.4.	Contact Energy	<p>Drafting change</p> <p>In paragraph (a), change the word “process” to “processes”.</p>	The Authority agrees. This change has been incorporated into the final Code amendments.

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1.5.	Genesis Energy	<p>Confusion between markets considered and markets applied to</p> <p>The consultation paper confuses the market that is the appropriate target of the UTS provisions and broader markets that the Authority may need to have regard to when deciding whether a UTS exists.</p>	The Authority does not consider that the hedge market has previously been beyond the scope of the UTS provisions under the existing definition of wholesale market.
1.6.	Genesis Energy MEUG Nova Energy	<p>Criteria for application of UTS provisions</p> <p>The Authority should not apply UTS provisions to markets unless the following criteria are satisfied:</p> <ul style="list-style-type: none"> • It is a co-ordinated market where UTS provisions can appropriately be applied. There is a strong rationale for UTS provisions applying where there are co-ordinated markets but not where there are bilateral markets. • The Authority is the market provider with jurisdiction over the rules that govern that market. The very point of the UTS is to provide for circumstances that cannot be anticipated under the relevant market rules. Further, the Authority should have jurisdiction to oversee and apply the UTS rules in that market. It is not appropriate to impose UTS provisions on related markets where the Authority is not the market provider, for example, the ASX futures exchange. 	The Authority considers that it is appropriate to include the hedge and ancillary services markets within the scope of the UTS provisions because those markets are closely linked to the spot market, and the Electricity Industry Act 2010 (Act) confers on the Authority responsibilities and powers in relation to those markets.
1.7.	Genesis Energy Trustpower	<p>No precedent for including hedge market</p> <p>There is no precedent for such a wide interpretation of “wholesale market”.</p> <ul style="list-style-type: none"> • The NZEM Rules referred to threats in trading in the “NZEM”, where the NZEM was narrowly defined as covering the spot 	<p>The Authority does not consider that the hedge market has previously been beyond the scope of the UTS provisions under the existing definition of wholesale market.</p> <p>Further, see paragraphs 3.3.21 – 3.3.26 of the</p>

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		<p>market but not the hedge market. Other markets, including the hedge market, were then considered relevant to assessing whether a UTS in the NZEM had occurred. Hedge markets were taken into account under previous NZEM Rules, despite the fact the jurisdiction was treated as being limited to the spot market.</p> <ul style="list-style-type: none"> • The consultation paper states that its proposed definition of wholesale market is more consistent with a July 2001 Market Surveillance Committee (MSC) UTS decision. However, the discussion of the “wholesale market” referred to from this decision was not in relation to the UTS provisions and, accordingly, is of limited assistance. More relevantly, the MSC’s position in the July 2001 decision was that its jurisdiction was “limited to the spot market and the market participants in and service providers to that market”. It also stated that UTS rules were for “the protection of an efficient and competitive spot market”. The MSC went on to find that other markets, such as the hedge market could be taken into account. • The term “wholesale market” under the current Code is synonymous with the term “spot market” as evidenced by: <ul style="list-style-type: none"> ○ the drafting history of the UTS provisions (especially the fact that the rule previously referred to the NZEM); ○ the structure of the UTS sections, for example the nature of the activity described in the first limb: “trading on the market”, “orderly trading”, “proper settlement of trading”; and ○ the remedies available to the Authority on breach of the clause e.g. “suspending activity on the market”, “deferring 	<p>consultation paper regarding the NZEM provisions.</p>

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		completion of trades”, “directing that trades be closed out”, etc.	
1.8.	Genesis Energy Meridian Energy Trustpower Transpower	<p>Can already take hedge market into account</p> <p>In the High Court hearing in relation to the 26 March UTS, the Court noted that both the reference to “public interest” in paragraph (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 UTS. 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>The Authority can therefore be confident that if a significant event occurred in the ancillary services market and affected the spot market, the Authority would have jurisdiction to investigate and take appropriate action.</p> <p>The High Court judgement has provided participants with a greater understanding of how the UTS provisions operate, thus reducing any potential benefits of clarification.</p>	<p>The Authority agrees that this is the case, and therefore does not consider the changes to the wholesale market definition expand the Authority's powers.</p> <p>Furthermore, the Authority proposed changes to the remedy provisions under clause 5.1 of the Code that would remove reference to the “wholesale market”.</p> <p>Therefore, the changes to the wholesale market definition merely clarify the ability to take the hedge and ancillary services markets into account.</p>
1.9.	Genesis Energy Meridian Energy Powershop	<p>Jurisdictional issues</p> <p>The Authority’s role in the facilitation of the hedge market should not extend to jurisdiction over market rules to which the ASX applies.</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</p>	<p>The Act confers responsibilities and powers on the Authority in relation to the hedge market. The Authority notes that it has considered implementing Code amendments in the past to mandate market-making on the ASX. Ultimately this was not pursued, but it illustrates that the Authority has powers to act in relation to the</p>

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		<p>the Authority could reasonably be seen as the primary regulator of both the spot and ancillary services markets, the hedge market is subject to a number of different regulatory or supervisory bodies.</p> <p>Given these existing responsibilities, adding the hedge market to the definition of wholesale market will create confusion with respect to jurisdictional boundaries.</p>	<p>hedge market, although it will use other less intrusive mechanisms (e.g. market facilitation) where those are more effective.</p> <p>In summary, the Authority does not consider it appropriate to completely exclude the possibility of taking an action in the hedge market to remedy a UTS if it was the most efficient course of action. The jurisdiction of other agencies is an issue that the Authority would carefully take into account in determining its choice of remedy, including whether it applied any UTS remedy at all.</p>
1.10.	Genesis Energy	<p>Clarify paragraph (b) to include other laws etc</p> <p>If the wide definition of wholesale market is adopted, then (b) should necessarily be broadened to include mechanisms under any other rule, code, regulation or enactment. This is because, in relation to the wider markets, there are a range of remedies available that can be enforced by other agencies or by parties to a contract. It would unnecessarily broaden the scope of a UTS and increase uncertainty if a UTS could be found and acted on where other remedies were available.</p>	<p>The Authority acknowledges the general point, but considers that the default legal position will require it to take account of the impact of actions by other regulatory bodies where this is relevant. For this reason, it is unnecessary to state this in the Code.</p>
1.11.	Powershop	<p>Include reconciliation and settling in drafting</p> <p>The definition of the wholesale market may be too restrictive as it does not reference the settling of prices set by the spot market or</p>	<p>The Authority agrees that a reconciliation failure could give rise to a UTS, but considers that this possibility is covered in the proposed definition because it uses the term “includes”, and so is</p>

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		<p>reconciliation (which is arguably separate from the spot market).</p> <p>If for instance there was a large scale metering data loss, as an example already envisaged by the Authority, then unless it included Transpower’s GXP data there could be a situation where the spot market can still set prices but not necessarily settle or reconcile data, which could be a UTS if it undermined the wholesale market.</p> <p>The definition of wholesale market in Part 1 of the Code should therefore be amended as follows:</p> <p><i>wholesale market means <u>the wholesale market for electricity—</u></i> <i><u>(a) the spot market for electricity, including the process for setting, reconciling and settling¹—</u></i> <i><u>(i) real time prices:</u></i> <i><u>(ii) forecast prices and forecast reserve prices:</u></i> <i><u>(iii) provisional prices and provisional reserve prices:</u></i> <i><u>(iv) interim prices and interim reserve prices:</u></i> <i><u>(v) final prices and final reserve prices:</u></i> <i><u>(b) markets for ancillary services:</u></i> <i><u>(c) the market for FTRs²</u></i></p>	<p>not exhaustive.</p> <p>The Authority has considered the possibility of seeking to extend the definition, but ultimately decided that trying to exhaustively and accurately define the spot market would raise a number of difficult boundary issues, as the term is used in other areas of the Code. For this reason, the Authority prefers the current non-exhaustive wording.</p>
1.12.	Trustpower	Inadequate explanation in consultation paper	As stated in the consultation paper, UTS

¹ Words bolded to show additions- it is not suggested these would be bolded in the actual definition itself.

² Removal of the reference to the hedge market in accordance with Meridian Energy’s submission.

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		<p>The Consultation Paper does not contain any analysis of why including the proposed changes are necessary. Without further information about the problem(s) the Authority is trying to address in these markets, it is not possible to have confidence that the Authority has identified all practical solutions to any problems in these markets.</p> <p>For example, <i>ex ante</i> regulated terms may be preferable over an <i>ex post</i> regulatory intervention. However the case for neither has been made. The Authority needs to be more specific about the shortcomings of the current hedge market arrangements:</p> <ul style="list-style-type: none"> • Does the Authority consider the ASX contracts are inadequate? • How does the Authority see its jurisdiction over hedge contracts fitting with the jurisdiction of other organised markets such as the ASX? • Has the Authority evidence that bilateral hedge contracts are inefficient? If so, which ones? • Does the Authority consider physical and financial hedges are in the same or separate markets? 	<p>provisions are adopted by market providers because they cannot foresee all future eventualities and hence explicitly cater for all eventualities in the market’s rules. Also, some practices are particularly difficult to specify in the rules, and so are better covered by generic UTS-type provisions.</p> <p>The Authority does not consider that the UTS provisions are a replacement for effective <i>ex ante</i> regulation under the Code. The 10 business day time limit on investigating a UTS should provide confidence that the UTS provisions will not be used as a fix-all in place of Code amendments.</p> <p>See ref 1.9.</p>
1.13.	Trustpower	<p>Need to define hedge market</p> <p>The Authority needs to consider defining “<i>hedge market for electricity</i>”. Failure to define the term is a significant weakness of the Consultation Paper.</p> <p>In so doing, the Authority should be wary that defining the hedge market broadly (as in the MSC decision) would be extremely problematic. While the Act requires the Authority to facilitate an</p>	<p>The Authority has considered whether the hedge market should be explicitly defined. However, because the hedge market is very organic and dynamic, the Authority concluded that there is no workable and enduring way to define the hedge market.</p>

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		active hedge market, this in itself does not give the Authority the ability to regulate over all financial instruments which may settle against the electricity spot market. Nor does it suggest that the Authority should claim over-arching governance over all the other arrangements market participants enter to manage their exposure to spot prices.	
1.14.	Trustpower	<p>Change may put people off trading in the hedge market</p> <p>A long-term consequence of the Authority’s proposal might be to limit those who trade in energy to market participants, which would limit the ability of intermediaries to assist in trading the forward curve. This would clearly not be in the long-term interests of consumers.</p>	The reason for having UTS provisions is to bolster confidence in the market by ensuring that traders in the market are not subject to undesirable trading situations.
1.15.	Transpower	<p>Changes will have impacts on other clauses in the Code</p> <p>Under 9.14 (2) (a) the System Operator would now be responsible for considering whether the hedge and FTR markets will be unlikely to facilitate adjustment of supply and demand. This is unreasonable, as the System Operator would not have the necessary knowledge or information to make that consideration.</p> <p>We strongly suggest the proposed definition applies only to the UTS provisions, and not to clause 9.14 (2) (a).</p>	The Authority has made changes to address this issue. Specifically it has amended clause 9.14(2) so that it refers to the spot market rather than the wholesale market.
1.16.	Transpower	<p>Changes will have impacts on FTR service provision</p> <p>As a point of compliance, currently the Authority can only suspend an FTR auction in advance up to the point that the FTRs are awarded. This is part of the functional requirements of the FTR Manager, rather</p>	The service provider has already been in discussions with the Authority over this issue.

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		<p>than of the Code. In consequence, the FTR Manager’s Nexant i-HEDGE product and processes do not allow retrospective re-assessment of FTR awards (price and quantity). Extending the definition of UTS to include the FTR market would allow such retrospective re-assessment, and the FTR Manager would presumably be obliged to provide that capability.</p> <p>This capability change could add significant costs to service provision that would need to be funded by the Authority and factored into its cost-benefit analysis of the proposal.</p>	

<p>2. 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>			
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2.1.	Contact Energy Genesis Energy Nova Energy Trustpower Vector Transpower	<p>The proposed changes are too broad and imprecise</p> <p>The term “confidence in, and the integrity” in the market is imprecise and capable of wide and different interpretation by market participants and the regulator. Applying this definition, a UTS could potentially cover anything that the Authority judges to be “a threat to confidence in the wholesale market” irrespective of whether it concerns threats to trading or orderly trading, or are within the control and influence of market participants and the Authority.</p> <p>The concept of market “confidence” raises a number of further questions, including:</p> <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>Thus the proposed changes are a recipe for significant regulatory uncertainty, not regulatory clarity.</p> <p>If UTS provisions are too broad and fail to give participants clear signals on what conduct is restricted, they can reduce confidence in the market, with adverse impacts on dynamic efficiency. In addition, participants need to have a reasonable expectation that they can trade in accordance with the rules without sanction or</p>	<p>The Authority proposed to replace references to “orderly trading” in the UTS definition with “confidence and integrity” so as to frame the UTS definition around the core concern from a policy perspective (maintenance of wholesale market confidence and integrity), rather than intermediate processes (trading and settlement).</p> <p>The overall impact on the likelihood of finding a UTS depends on the interaction of the different elements in the UTS definition. While the Authority does not consider that the proposed amendments would materially alter the overall likelihood (but would improve clarity), it acknowledges that this is a matter of judgement and some submitters have a different view on the issue. In this context, the Authority also notes that it has retained or enhanced other important procedural checks on the ability to find a UTS. In particular, the Authority has not proposed any changes to paragraph (b) of the definition, and proposed that a time limit apply to the ability to initiate a UTS investigation.</p> <p>To assist participants in interpreting the revised definition and understanding how the Authority will apply it in practice, the Authority will update and expand its UTS guidelines that are</p>

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		regulatory interference.	published on its website.
2.2.	Genesis Energy	<p>UTS provisions used to address a range of complaints</p> <p>Participants will have an incentive to invoke the UTS provisions as a means of addressing a range of complaints (which could have a significant destabilising impact on the operation of the market).</p>	The Authority's view is that the definition will maintain a high threshold for finding a UTS.
2.3.	Meridian Energy	<p>Removes link with known concepts</p> <p>"orderly trading" is an economic concept. "orderly" implies 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>	<p>The Authority considers that such terms place an undue focus on underlying physical market processes, rather than the core concern of the UTS provisions, which is to maintain wholesale market confidence and integrity.</p> <p>Furthermore, the focus on trading could prevent the Authority from acting in response to a UTS that affects other market processes, such as settlement, reconciliation or clearing, unless those processes were also included.</p>
2.4.	Vector	<p>Removes causal link</p> <p>The proposed amended definition will remove the <i>causal</i> link between an undesirable activity and a UTS, thereby widening the scope of situations that could be deemed a UTS.</p>	The Authority does not agree with this submission. Such a ' <i>causal</i> link' has not been removed.
2.5.	Contact Energy	<p>Not enough rationale provided for expanded scope</p> <p>The scope of the following provisions has been expanded without significant support or rationale:</p>	The Authority proposed to replace references to "orderly trading" in the UTS definition with "confidence and integrity" so as to frame the UTS definition around the core concern from a policy perspective (maintenance of wholesale

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			market confidence and integrity), rather than intermediate processes (trading and settlement).
2.6.	Contact Energy Genesis Energy Meridian Energy Powershop	<p>The removal of “would be likely to” in favour of “may” provides a lower standard for finding a UTS</p> <p>There is no good reason for removing the “likely” threshold. It is the appropriate standard for a UTS which is expected to arise only in exceptional circumstances.</p> <p>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 it concluded that it is <i>possible</i> that a situation threatens confidence in the market</p>	<p>It is not correct that the Authority’s proposed changes would lower the standard from “is likely” to “may” per se. The existing Code includes references to both standards, but for different aspects of the UTS definition. The Authority’s proposed change would apply the single standard of “may”, but within a revised UTS definition.</p> <p>The overall impact on the likelihood of finding a UTS depends on the interaction of the different elements in the UTS definition. While the Authority does not consider that the proposed amendments would materially alter the overall likelihood (but would improve clarity), it acknowledges that this is a matter of judgement and some submitters have a different view on the issue. In this context, the Authority also notes that it has retained or enhanced other important procedural checks on the ability to find a UTS. In particular, the Authority has not proposed any changes to paragraph (b) of the definition, and proposed that a time limit apply on the ability to initiate a UTS investigation.</p>

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2.7.	Contact Energy	Drafting amendment Add the word "that" at the end of the opening line and delete the word "that" from the beginning of paragraphs (a) and (b).	This Authority has not adopted this suggested change as it considers the current wording to be clear.
2.8.	Contact Energy	Drafting amendment “(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.	The Authority has not adopted this suggested change as it considers the current wording to be clear.
2.9.	Genesis Energy	Significant departure from previous drafting The proposed change represents a significant change in the drafting of UTS provisions in the Code. Since 1996, a UTS has been consistently defined by reference to threats to trading and/or orderly trading. This is because the role of a UTS is to manage unanticipated situations and undesirable conduct that impacts on trading in the relevant market (where market rules do not cover all contingencies).	The Authority refers to paragraphs 3.3.21 – 3.3.26 of the consultation paper regarding the comparison with the relevant NZEM provisions.
2.10.	Meridian Energy	Benefit from foreign jurisprudence lost 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	The Authority reviewed the UTS-type provisions in a number of international jurisdictions and other markets (NZEM, NZX). That review identified a range of different approaches which have been considered by the Authority. See also ref 2.3.

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		<p>a market licensee to “do all things necessary to ensure that the market is a fair, orderly and transparent market”.</p> <p>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.</p>	
2.11.	<p>Genesis Energy</p> <p>Meridian Energy</p> <p>Powershop</p> <p>Trustpower</p> <p>Transpower</p>	<p>Precedent lost</p> <p>Removing references to trading and settlement removes:</p> <ul style="list-style-type: none"> the benefit of previous decisions and practice which have incrementally improved certainty over many years; and clarity provided by the High Court judgment analysis of trading and orderly trading. <p>The High Court decision acts as precedent and provides greater certainty for the future. The High Court’s decision made clear that maintenance of “orderly trading” extended beyond simply ensuring that organised trading was able to continue.</p> <p>Essentially, the next time a UTS is upheld by the Authority, it is likely that the UTS provisions would be challenged in the High Court again, at large cost to the industry. This inefficiency and the uncertainty associated with it does not fit with the Authority’s statutory objectives of the efficient operation of, the electricity industry for the long-term benefit of consumers.</p>	<p>The Authority acknowledges that the change will result in some loss of precedent value in relation to the High Court decision on the 26 March 2011 UTS. However, the Authority considers that the degree of change may be overstated as the concepts of market confidence and integrity were key aspects of the Authority's decision in relation to the 26 March 2011 UTS.</p>

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2.12.	Genesis Energy Meridian Energy Nova Energy Trustpower	<p>Reduces scope for appeal</p> <p>Broadening the scope of the UTS definition reduces the likely effectiveness of any question of law appeal or judicial review (where appeal rights operate as the key check and balance on the Authority).</p> <p>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>This change hence increases uncertainty around the operation of the UTS rules as participants will have less confidence that poor decisions will be corrected.</p>	<p>The Authority’s findings regarding the 26 March 2011 UTS were informed by the assessed impact of the events on confidence in the market.</p> <p>The Authority does not consider that the scope for appeal rights will change materially with the proposed Code changes.</p>
2.13.	Genesis Energy Meridian Energy	<p>At odds with High Court judgment in relation to confidence</p> <p>The High Court judgment held that, while confidence in the market was a relevant factor when determining a UTS, it was not a determinative factor. Specifically it stated:</p> <p><i>“In assessing threats to trading and the likelihood of orderly trading being effected, confidence in the market is relevant. Confidence, or the lack of it, would not by itself be determinative of these questions. Confidence is an integral part of the operation of such a market.”</i></p>	<p>The Authority considers that maintenance of confidence in the wholesale market is a core policy concern, and therefore a situation that threatens, or may threaten, confidence in the wholesale market should be sufficient to meet the first limb of the UTS definition.</p>
2.14.	Meridian Energy Trustpower	<p>Situation not as inclusive as contingency or event</p> <p>The meaning of “contingency or event” is 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</i> 	<p>The Authority considers that the term “situation” could be interpreted broadly (for example, so that the 'situation' is the possible future occurrence), which would allow for</p>

2. 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.			
Ref	Submitter	Comment	Electricity Authority response
		<p><i>of as happening; an occurrence, an incident..."</i></p> <ul style="list-style-type: none"> Any "contingency", being "<i>an event conceived of or contemplated as of possible occurrence in the future</i>" <p>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</p> <p>A UTS may relate to a circumstance which has already occurred but for some reason cannot reoccur. The aggrieved party, however, needs to have the UTS agreed to enable restitution. This is a core part of the current arrangements which may not be covered if "situation" is used in place of "contingency or event".</p>	future events to be adequately considered.
2.15.	Meridian Energy	<p>Combined use of UTS and WAG conduct standards</p> <p>It may be inappropriate to interpret the requirement "cannot satisfactorily be resolved" by any other mechanism available under this Code 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,</p>	The Authority agrees that it will be important to consider the interplay of the two mechanisms, which it will do if it proposes any Code changes to adopt conduct standards (based on the advice from the Wholesale Advisory Group (WAG)).

<p>2. 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>			
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		<p>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>	
2.16.	Mighty River Power	<p>Clarity around definition required</p> <p>The change to a definition of a UTS to apply to actions that may undermine “integrity and confidence” could benefit from further clarity being provided by the Authority as to how this may be interpreted in practice.</p> <p>In particular, clarity would be useful around what weight the Authority would be likely to give to various parties (e.g. non-participants) claims as to lack of confidence creating grounds for a UTS.</p>	<p>Authority staff will prepare an update of the “Guidelines for participants on Undesirable Trading Situations” document that is published on the Authority website, in order to assist participants in interpreting the revised Code provisions and understanding how the Authority will apply them in practice.</p>
2.17.	Transpower Trustpower Genesis Energy	<p>Changes are more than a “clarification”</p> <p>We understand from the Authority’s review of the provisions that ‘fundamental change’ was not required and is not the Authority’s intent. Since we consider the changes to the terms in the definition result in an expanded scope for a UTS, we conclude this is a fundamental change. Therefore we cannot agree with proposed changes since they do not meet the Authority’s objective for clarification only.</p>	<p>The Authority does not consider the changes to be a significant departure from the existing provisions.</p> <p>The Authority considers that the revised definition better aligns with the policy rationale for UTS provisions, and will reduce the likelihood of UTS provisions being misapplied (either by being triggered inappropriately, or by</p>

<p>2. 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>			
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			<p>being inoperative when required).</p> <p>The overall impact on the likelihood of finding a UTS depends on the interaction of the different elements in the UTS definition. While the Authority does not consider that the proposed amendments would materially alter the overall likelihood (but would improve clarity), it acknowledges that this is a matter of judgement and some submitters have a different view on the issue.</p>

	<p>3. 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>		
Ref	Submitter	Comment	Electricity Authority response
3.1.	Vector	<p>Issues regarding scope arise because of paragraph (c)</p> <p>Paragraph (c) is too wide because it contains the qualification “without limitation” and “(v) any exceptional or unforeseen circumstance that is at variance with, or that threatens or may threaten, generally accepted principles of trading or the public interest.”</p> <p>However, a UTS should only be declared when it has been determined that the party has acted undesirably. The amendment would frustrate the ability to deter trading practices that harm the market and create uncertainty around what may be deemed a UTS.</p> <p>It is not enough to merely include paragraph (c) as “examples” in Part 5 of the Code. The Authority should amend rather than delete paragraph (c) of the definition of a UTS along the following lines:</p> <p>(c) that is caused by misleading, deceptive or undesirable conduct or activity which includes, without limitation:</p> <p><i>(i) manipulative or attempted manipulative trading activity; and</i></p> <p><i>(ii) conduct in relation to trading that is misleading or deceptive, or likely to mislead or deceive; and</i></p> <p><i>(iii) unwarranted speculation or an undesirable practice; and</i></p> <p><i>(iv) material breach of any law</i></p>	<p>The Authority disagrees. The Wholesale Advisory Group is currently considering whether to recommend the possible introduction of market conduct standards that could more directly pertain to the sorts of issues described by Vector.</p> <p>UTS provisions are, by design, more generic, as market providers cannot foresee all future eventualities, and some practices are particularly difficult to specify in the market rules.</p> <p>The Authority does not consider that UTS provisions should be confined to addressing situations where a “party has acted undesirably”. For example, a situation might arise due to an Act of God.</p>
3.2.	Genesis Energy	<p>Unnecessary because of High Court decision</p> <p>Given the High Court has clarified the hierarchy between (a) and (b) and (c), moving (c) to 5.1 is not required.</p>	<p>The Authority disagrees. Relying solely on the High Court decision to provide interpretive guidance is not ideal. Providing clarity within the Code provisions themselves is preferable. Moving paragraph (c) clarifies the interpretation of the</p>

	<p>3. 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>		
Ref	Submitter	Comment	Electricity Authority response
			definition in the Code, consistent with the High Court decision.
3.3.	Genesis Energy Meridian Energy Trustpower	<p>Keep orderly trading in definition</p> <p>References to orderly trading in (a) should be retained, with any duplication being removed from (c)(v). In particular:</p> <ul style="list-style-type: none"> • this approach is consistent with the High Court judgment which held that (a) was the prevailing clause and that the examples in (c) were all illustrative of situations that may be beyond orderly trading in (a). • the reference to trading and orderly trading in (a) is central to the definition of a UTS and has been for many years. <p>Retaining reference to “orderly trading” in the Part 1 UTS definition makes an additional reference in 5.1(2) unnecessary and confusing.</p>	<p>The Authority considers that maintaining reference to orderly trading places an unnecessary focus on underlying physical market processes, rather than the core concern of the UTS provisions.</p> <p>By framing the UTS definition around the core policy concern, issues arising with the underlying market processes can suitably be included as examples of what might constitute a UTS.</p>
3.4.	Mighty River Power	<p>Consider interaction with conduct standards</p> <p>The Authority's Wholesale Advisory Group (WAG) is currently considering recommending revisions to the Code to reinstate market manipulation and “in good faith” trading provisions. It is unclear how such provisions relate to UTS paragraph (c) which also references manipulative trading and whether consideration has been given to any potential uncertainties this creates.</p> <p>The WAG analysis shows that actually proving market manipulation has occurred is a high bar given the need to demonstrate intent. If market manipulation is tested under the proposed new market conduct provisions, but market manipulation is unable to be proven, participants may not have recourse to then call a UTS, particularly given the proposed</p>	<p>The Authority agrees that it will be important to consider the interplay of the two mechanisms, which it will do if it proposes any Code changes to adopt conduct standards (based on the advice from WAG).</p>

<p>3. 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>			
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		<p>10 day limitation.</p> <p>As a result we consider it likely that participants would seek to call a UTS as well as seek remedy under the Code to preserve optionality which would likely not be efficient.</p> <p>A further issue is whether the Authority would consider a UTS could still be called given clause B of the UTS provisions indicates that a UTS can only be called when, in its reasonable opinion, the issue cannot be resolved by any other mechanism available in the Code.</p> <p>March 26 is illustrative here as while it was not able to be found that deliberate market manipulation had been engaged in, a UTS was still able to be called and prices reset.</p> <p>Providing clarity around how the various provisions might work in tandem will be important as is ensuring that the market conduct provisions being considered by the WAG are broad enough to capture and deal with market manipulation without needing recourse to a UTS.</p>	

<p>4. 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>			
Ref	Submitter	Comment	Electricity Authority response
4.1	Genesis Energy Meridian Energy Trustpower	<p>Objections due to preference to maintain definition</p> <p>Disagree with the changes to paragraph (a) of the UTS definition and, accordingly, do not agree that the proposed consequential changes to clause 13.255 are necessary.</p>	<p>The Authority remains of the view that is appropriate to amend the UTS definition as initially proposed and, as such, the Authority considers that it is also appropriate to amend clause 13.255.</p>

	<p>5. 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 Authority’s statutory objective in section 15 of the Act.</p>		
Ref	Submitter	Comment	Electricity Authority response
5.1.	Genesis Energy	<p>Also include time limit on making a decision</p> <p>If a time limit for lodging a proposal is introduced, the Code should also include a time limit for the making of the UTS decision by the Authority (which is arguably the more critical event in terms of finality).</p>	<p>The Authority does not perceive any significant benefits in restricting the time it can take to investigate a UTS. UTSs are likely to be of varying nature and complexity, and restricting the length of an investigation would likely only result in the potential for a less thorough investigation process in some instances. The Authority considers that it is preferable to ensure decisions are made on a solid foundation by allowing time for full and proper information gathering and analysis.</p>
5.2.	Meridian Energy Powershop	<p>Reasonable discovery exemption</p> <p>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): <i>“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 commenced 10 years or more after the matter giving rise to the contravention.”</i> • 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,</i> 	<p>The Authority has considered including a reasonable discovery exemption. However, it considers that the time limit is a key part of its overall Code change package, as it would provide the industry with greater certainty with regard to final prices, application of the UTS provisions, and that the Authority will opt for Code changes rather than use the UTS provisions as a catch-all. Ultimately, the Authority concludes that such an exemption would be contrary to this intent.</p> <p>While the Authority acknowledges that other legislation includes reasonable discovery provisions, the Authority considers that the real-time nature of electricity is such that the need for them is less fundamental when compared to the Commerce Act and Fair Trading Act, which addresses issues associated with a wide array of physical and long-life</p>

<p>5. 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 Authority's statutory objective in section 15 of the Act.</p>			
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		<i>or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered."</i>	products.
5.3.	Powershop	<p>Unlikely to go unnoticed hence unnecessary to restrict</p> <p>Any situation which meets the test of being a UTS is extremely unlikely to go unnoticed for any extended period. This self-evidently means that the more time that expires, the less likely it is that a UTS could be claimed, which therefore makes a time limit unnecessary.</p>	The Authority agrees that a UTS is extremely unlikely to go unnoticed. However, it disagrees that this is a reason to exclude a time limit, as not having a time limit would provide ongoing uncertainty to participants.
5.4.	Powershop	<p>Buried data or reconciliation issue will not be captured</p> <p>It is possible that say, a buried data or reconciliation issue does not come to light for some period of time after it has occurred, and may only be discovered after the 24 month period to submit revisions to reconciliation information.</p> <p>Not allowing remedies to participants for what amounts to an undesirable trading situation does not fit with the Authority's statutory objective to the efficient operation of, the electricity industry for the long-term benefit of consumers. Maintaining the integrity of the market outweighs any concerns over finality of market outcomes, particularly given the relative (un)likelihood of a UTS being found to have taken place some significant time after it occurred.</p>	The Authority disagrees that maintaining the ability to remedy a situation that is agreed to be an extremely unlikely occurrence is preferable to achieving greater certainty of market outcomes.
5.5.	Powershop	<p>Time limit tied to settlement date for smaller retailers benefit</p> <p>The Authority should consider the resources of smaller retailers in</p>	The Authority acknowledges concerns around the timing of data availability and has considered suggestions that the time limit be linked to the next

<p>5. 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 Authority's statutory objective in section 15 of the Act.</p>			
Ref	Submitter	Comment	Electricity Authority response
		<p>setting a realistic timeframe. Ten business days is far too short. Smaller retailers do not have trading teams monitoring prices constantly, and although some small retailers would be alerted to any undesirable trading situation by their parent companies, some smaller independent retailers would not have this luxury. Absent being alerted by their parent company, they may not be aware of any events, situations or contingencies until after the relevant Clearing Manager's invoice is received. Even after becoming aware, staff would need to investigate and this would take some time.</p> <p>It is therefore suggested that an appropriate time limit, if the Authority persists with one, would be until the settlement date after the relevant invoice has been issued (i.e., the 20th calendar day of the month following the billing period in respect of which the invoice was issued).</p>	<p>settlement date. However, the Authority considers that any situation worthy of a UTS claim would become apparent very quickly, and that there are other mechanisms under the Code that would deal with data and technical issues with the pricing process that are most likely to be apparent in invoices (rather than issues of the type included in the examples under the new clause 5.1(2)).</p>

<p>6. 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>			
Ref	Submitter	Comment	Electricity Authority response
6.1.	Contact Energy MEUG Meridian Energy Powershop	<p>Reasonable discovery exemption</p> <p>A period of 10 working days would confine the UTS provisions to only short, sharp events. This does not seem optimal. Therefore it is recommended that Clause 5.1(A) is amended to reflect that there may be a time lag between the UTS event, and a party becoming aware of it, e.g.</p> <p><i>“... 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) ...”</i></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>	See ref 5.2.
6.2.	Contact Energy	<p>Any person to identify a UTS</p> <p>Any person should be able to identify a UTS and not just the Authority (as the wording is originally drafted)</p>	The Authority considers that this is already clear in the Code. While any person can allege a UTS, the time limit only applies to the Authority acting on any such allegation by initiating an investigation.
6.3.	Trustpower	<p>Time limit applies to allegation</p> <p>It may be more appropriate for the ten-day time limit to apply to the period between the end of the alleged UTS and the time at which a participant or the Authority makes an allegation of a UTS.</p>	The Authority does not consider there is a significant distinction between these two events.
6.4.	Trustpower	<p>Settlement date</p>	The Authority acknowledges concerns around the

<p>6. 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>			
Ref	Submitter	Comment	Electricity Authority response
		<p>It would be preferable if time limit were to be associated with the settlement dates following a UTS.</p> <p>Under current market processes, settlement date is the 20th of the month following, and some participants may not be aware they have been disadvantaged by an undesirable event or circumstance until they receive their invoice. This could be much later than ten business days after the event.</p> <p>It may therefore be appropriate to extend the time period in question so that it ends <i>"five days after receipt of the first invoice using the affected final prices"</i> (or words to that effect). The final date for alleging a UTS would then be five or so business days before the 20th of the month (or the first date on which settlement has occurred in relation to those final prices).</p>	<p>timing of data availability and has considered suggestions that the time limit be linked to the next settlement date.</p> <p>However, the Authority considers that any situation worthy of a UTS claim would be readily apparent, and that there are other mechanisms under the Code that would deal with data and technical issues with the pricing process that are most likely to be apparent in invoices³ (rather than issues of the type included in the examples under the new clause 5.1(2)).</p>
6.5.	Trustpower	<p>Authority to notify prices subject to UTS claim</p> <p>If a UTS is alleged, the Authority should be required to notify the market within one day of receipt of the UTS allegation of the prices that may be subject to change, so that each participant can ensure that their own settlements (including hedges, etc.) reflect the uncertainty of the final prices.</p>	<p>The Authority agrees that it is appropriate for it to notify the market if prices are subject to a UTS claim. However, it does not believe it is necessary to include such a requirement in the Code.</p>

³ For example, recent UTS claims by Norske Skog Tasman and Mighty River Power were withdrawn and the issues instead dealt with under the interim pricing provisions under the Code.

	<p>7. Do you agree with the proposal that there should be no time limit on republication of final prices per se?</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>		
	Submitter	Comment	Electricity Authority response
7.1.	Contact Energy	<p>Needed for certainty</p> <p>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>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), there could be a provision 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>While the Authority accepts that it is not desirable for prices that are subject to a UTS claim to remain uncertain for long periods, there is an inherent need for flexibility around this issue. As such, the Authority does not support a fixed limit on the time to investigate a UTS.</p>
7.2.	Contact Energy	<p>Connection between republication and time limit</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. There is a no 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 re-set).</p> <p>Accordingly, a time limit should be placed on the republication of final prices, but with a qualification that the relevant period can be extended where that is appropriate.</p> <p>It is acknowledging that there is a residual, albeit in our view low, risk that any such time period could expire before a UTS has been identified if a “ought to have known” formulation were used or before an investigation could be properly completed, and that may impact on the range of actions the Authority can take</p>	<p>The proposed 10 business day time limit on the initiation of an investigation into a UTS is highly relevant because the only circumstance in which final prices can be republished under the Code is to remedy a UTS.</p> <p>The time limit on initiating a UTS investigation is therefore expected to mean that 10 business days after final prices are published, they cannot be republished unless they were already subject to a UTS claim.</p>

	<p>7. Do you agree with the proposal that there should be no time limit on republication of final prices per se?</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>		
	Submitter	Comment	Electricity Authority response
7.3.	Trustpower	Prices that are uncontested need to be final when payment for the first invoice using them is made. The only prices that could be changed would be <i>contested final prices</i>	The time limit provides a significant degree of certainty in this regard. 10 business days after publication, final prices will not be able to be republished unless they were already subject to a UTS investigation by the Authority.
7.4.	Trustpower	<p>The Authority should be mindful of the history of final price-setting when making its decision. Until the Penrose/Mt Roskill metering event of 1998-2000 occurred⁴, there was no time limit on participants’ ability to review final prices. As a result of that event it was determined that prices needed to be made final within a few days of the trading day itself.</p> <p>However, the market and/or Electricity Commission had the ability to delay the issuing of final prices. This gave a very short period for participants to ensure they were happy with the resulting prices. UTSs were called as a mechanism to ensure prices did not go final. Subsequently, the Authority decided to give itself the power to change final prices, but with a lack of clarity over the term of this ability.</p> <p>TrustPower does not believe the industry would want to have an underlying “Penrose” event reoccur simply because the industry has forgotten why it collectively decided to ensure prices went final within a few business days of trading day.</p>	The Authority considers that the 10 business day time limit addresses this concern.
7.5.	Transpower	There should be a best endeavours timeframe set, so that the situations, and calculation of a final price, have some degree of confidence. This	The Authority does not see merit in a best endeavours obligation to investigate a UTS within a defined time frame, given that the

⁴ This event occurred after Transpower discovered a metering error on the Penrose and Mt Roskill GXPs – the meters had been under-recording for an extended period spanning several years. When the error was corrected, and the corrected volumes were entered into SPD, it was found that the wholesale market prices lifted materially. At that time, prices were not final (as they are today), so several years of wholesale market prices were recalculated and rebilled, leading to a material increase in costs to loads.

	<p>7. Do you agree with the proposal that there should be no time limit on republication of final prices per se?</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>		
	Submitter	Comment	Electricity Authority response
		would be set on a case by case basis specific to the incident.	Authority is subject to the requirements of the Act and administrative law in the discharge of its duties.

	<p>8. 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>		
Ref	Submitter	Comment	Electricity Authority response
8.1	Contact Energy Genesis Energy Meridian Energy Trustpower Vector	<p>Broader powers than required</p> <p>The proposed changes significantly broaden the Authority's powers and the potential range of remedies available. These powers are much broader than the Authority would require.</p> <p>The proposed wording should be qualified by requiring the Authority to use remedies that are consistent with the Code.</p>	<p>The Authority considers that limiting remedies to actions that are not inconsistent with the Code would be unworkable. In particular, the Authority notes that a situation cannot be a UTS if it can be resolved by any other means under the Code.</p> <p>By implication, the normal application of the Code will not resolve the situation and actions not specifically provided for in the Code would be required. Whether such actions are inconsistent with the Code (or merely not provided for) would depend on what they were. However, there is a strong likelihood that, in some cases, actions will need to be inconsistent with at least some aspects of the Code. Indeed, the UTS may have arisen because the Code itself is leading to some major unintended problem.</p> <p>If the Authority was limited to remedies not inconsistent with the Code, it could be constrained to applying less effective remedies at times, and may in some instances be unable to apply any remedy at all.</p>
8.2	Contact Energy	<p>Preference for exemptions</p> <p>A direction that is inconsistent with the Code should, if permitted at all, be a solution of last resort.</p> <p>It would be preferable to see the Authority grant an urgent exemption</p>	<p>The Authority remains concerned that relying on the use of exemptions is not ideal for the following reasons:</p> <ul style="list-style-type: none"> it may give an unwilling participant a possible legal avenue for refusing to comply with an

<p>8. 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>			
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		<p>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>Authority direction to remedy a UTS</p> <ul style="list-style-type: none"> • exemptions would impose costs and delays in remedying a UTS. A UTS is an extreme situation that can unfold rapidly, and it is therefore prudent to address any identified issues with the Code in advance, rather than in the midst of the situation • situations such as the 26 March 2011 UTS, whereby the Authority was technically unable to implement a remedy provided for in the Code without the parties involved breaching other aspects of the Code, highlighted a technical inconsistency with the Code that should be addressed • by definition, a UTS cannot satisfactorily be resolved by any other mechanisms available under the Code. By implication, the normal application of the Code will not resolve the situation and actions not specifically provided for in the Code would be required.
8.3	Contact Energy Transpower	<p>Minimum required deviation from Code</p> <p>The Code should be modified to:</p> <ul style="list-style-type: none"> • first: identify the Code provision that needs to be departed from, and • second: limit the departure only to the extent necessary to affect the remedy. i.e. 	<p>The Authority can only provide for remedies that are necessary to correct a UTS. It therefore does not consider that this added clarification is required.</p>

<p>8. 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>			
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		<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>	
8.4	Genesis Energy Meridian Energy	<p>Reduces certainty</p> <p>The ability to give directions that are inconsistent with the Code is contrary to certainty, where, from a participant's perspective, the Code provides a clear framework as to what can, or cannot, be done.</p>	<p>The Authority considers that limiting remedies to actions that are not inconsistent with the Code is unworkable. In particular, it notes that a situation cannot be a UTS if it can be resolved by any other mechanism available under the Code.</p> <p>Furthermore, the Authority can only provide for remedies that are necessary to correct a UTS, is required to consult on its proposed course of action, and its decisions are subject to review under administrative law.</p>
8.5	Genesis Energy	<p>Weakens potential for appeal</p> <p>The broadening of the powers and discretion has the effect of weakening the potential effectiveness of a question of law appeal.</p>	<p>The Authority considers that the mechanisms in place for scrutinising its decisions are sufficient.</p> <p>In the first instance, the Authority is required to consult on its proposed course of action in response to a UTS (unless it is impractical to do so).</p> <p>Furthermore, the Authority is subject to the</p>

<p>8. 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>			
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			<p>requirements of the Act in the discharge of its duties, and must only act in a manner that furthers its statutory objective.</p> <p>Finally, principles of administrative law ensure, at a minimum, that:</p> <ul style="list-style-type: none"> • the decision relating to the exercise of the discretion must be reasonable; • the Authority must consider all relevant issues; and • no irrelevant factors will be allowed improperly to influence the decision.
8.6	Genesis Energy	<p>Current provisions fine</p> <p>The consultation paper does not make a strong enough case for changing the status quo. There is no clear evidence to suggest the current provisions have been inadequate. In particular:</p> <ul style="list-style-type: none"> • The current remedy provisions are clear, where the available actions are listed in subclause (2). The actions are also sufficiently wide for the Authority to be able to address a UTS. • The reference to “the wholesale market” does not add ambiguity in this context as the Authority suggests, particularly where it is proposed that this phrase now be defined. • The metering example provided as a reason for extending the UTS provisions (where there is a widespread loss of data), does not 	<p>The Authority disagrees that the current remedy provisions are sufficiently clear and wide enough for the Authority to address a UTS.</p> <p>As noted, it is unclear as to whether “in relation to the wholesale market” means steps that affect the wholesale market, or are within the wholesale market. The Authority’s changes address this issue.</p> <p>Further, the Authority’s experience with the 26 March 2011 UTS was that exemptions are not sufficient to appropriately address the issue of directions (see ref 8.2 for more detail).</p>

<p>8. 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>			
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		<p>provide a persuasive basis for such a fundamental change of the Code.</p> <ul style="list-style-type: none"> The problems that arose in the 26 March 2011 UTS do not justify the introduction of a power to provide directions that are inconsistent with the Code. The issue that the Authority refers to was appropriately addressed by way of the grant of exemptions. 	
8.7	Genesis Energy	<p>No precedent for wider powers</p> <p>While the previous NZEM Rules provided that the MSC could take “whatever steps it considers appropriate to correct the situation”, this was in a context where its jurisdiction was limited to the spot market. Further, the NZEM Rules limited who the MSC could give directions to.</p> <p>The consultation paper also places considerable emphasis on appeal rights, which it says provide a check on the Authority's powers, and states that this is an additional protection as compared to the NZEM Rules.</p> <p>However contrary to what the consultation paper suggests:</p> <ul style="list-style-type: none"> the NZEM Rules provided for appeal rights from a MSC decision to an independent appeal board (not limited to questions of law); and question of law appeals and judicial review are relatively weak accountability mechanisms for reviewing the decisions of an expert decision maker. 	<p>Addressing the first issue, the NZEM Rules limited who the MSC could give directions to – i.e.</p> <p><i>Rule 2.37 provided that the Market Surveillance Committee could “take whatever steps it considers appropriate to correct the situation and may give directions to the Market Administrator or any Market Participant or service provider accordingly, who shall comply with those directions forthwith.”</i></p> <p>This is comparable to the Authority's powers under the Act, which limits it to regulating industry participants. The key difference is the scope of activities under the jurisdiction of the MSC (set by the NZEM) and the Authority (set by the Act).</p> <p>The Authority does not agree that appeals and judicial review are relatively weak accountability mechanisms.</p>

<p>8. 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>			
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8.8	Meridian Energy Trustpower	<p>Jurisdictional issues</p> <p>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.</p>	See ref 1.9
8.9	Meridian Energy Trustpower	<p>Non-participant issues</p> <p>The Authority should consider how such remedies might apply to non-market participants.</p> <p>The Authority's proposal involves a number of risks for market participants. For example, there is a major risk that two identical contracts could have different consequences depending on the identity of the counterparty (in other words whether or not that party is subject to the Code).</p>	See ref 1.2
8.10	Meridian Energy	<p>Examples were not contrary to Code</p> <p>The statutory processes from which service providers were exempted primarily related to "deferring completion of trades for a specified period" and "directing that any trades be closed out or settled at a specified price", as described by clause 5.2(b) and (c).</p> <p>Neither of these subclauses are subject to the requirement to "not [be] inconsistent with this Code, the Act or any other law". Accordingly, it is unclear whether any of the examples given by the Authority actually involved circumstances where the participant could have been in doubt</p>	The clearing manager sought the exemptions concerned so the Authority's 26 March 2011 UTS decision could be implemented without the clearing manager breaching the Code. The full details are set out in Electricity Industry (Exemption No. 132 (Clearing Manager)) Exemption Notice 2011.

<p>8. 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>			
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		about the Authority's power to make the orders concerned.	
8.11	Trustpower	<p>Preference for ex ante regulation</p> <p>The consultation paper does not explain why it is necessary to intervene in the hedge market ex post rather than regulate ex ante for a particular outcome, for example by regulating a requirement for a specific force majeure clause.</p>	See ref 1.12
8.12	Vector	<p>Directions subject to scrutiny</p> <p>Directions that breach the Code should be subject to some form of scrutiny.</p> <p>If the Authority adopts this proposal, its directions under clause 5.2 should include provision for appeal to the Rulings Panel against such directions</p>	Under clause 5.4 the Authority is required to consult with participants before taking any remedial action in response to a UTS (unless it is impractical to do so). Furthermore, the Authority's decisions are subject to review under administrative law.

<p>9. 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>			
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9.1	Contact Energy	<p>Drafting change regarding liability</p> <p>If the UTS provisions get amended to allow remedies that are inconsistent with the Code, then 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>The Authority does not consider that this suggested change is necessary because these issues are addressed by clause 5.2(4) and 5.2(5).</p>

General Comments			
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0.1.	Genesis Energy Nova Energy	Refer to the WAG The Authority should refer the proposed changes to the Wholesale Advisory Group for further consideration, particularly given the close correlation with the net pivotal provider work stream.	The Authority considers that the changes to the UTS provisions are not a significant departure from the existing provisions, and as such are not sufficient to warrant specific reference to the WAG.
0.2.	Genesis Energy Meridian Energy	Undertake further consultation We suggest that the Authority undertake further consultation.	While the Authority acknowledges a degree of opposition to its proposals by a number of submitters, it does not consider that new information has been provided that substantively alters its previous views. Accordingly, subject to the technical amendments noted elsewhere, the Authority intends to make the proposed Code changes.
0.3.	MEUG	NZEM UTS provisions as a comparator There is some value using the NZEM UTS provisions as a comparator but there are important factors that undermine that value. For example the NZEM was a voluntary agreement that no large end users' participated in and UTS decisions were not subject to judicial review. The paper mentions the latter difference but not the former.	The Authority notes this distinction.
0.4.	Trustpower Transpower	Changes represent a policy change The proposals in the Authority's Consultation Paper go beyond what is necessary to address the ambiguity highlighted in the BOPE appeal, and instead involve a significant change of policy. The Authority has not adequately explained the reasons for the proposed expansion of its UTS jurisdiction, nor examined alternative options to the proposed amendments (which could include, for example, regulated terms for ancillary service or	The Authority does not consider its changes to be a change of policy. Specifically: <ul style="list-style-type: none"> As suggested by the High Court decision, the hedge market can already be considered to be part of the wholesale market, and hence the Authority considers that the hedge market can already be considered to be subject to the UTS provisions. The changes to the UTS definition do not represent a change in policy, but instead frame the definition

General Comments			
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		<p>hedge contracts). This raises questions about whether the Authority has properly complied with its Code amendment obligations.</p>	<p>around the actual concern from a policy perspective rather than intermediate processes. This concern was also reflected in the Authority's decision in relation to the 26 March 2011 UTS.</p> <ul style="list-style-type: none"> The changes to the UTS remedy provisions allow the Authority to choose the remedy most consistent with its statutory objectives, and removes ambiguity around the interpretation of the relevant clauses. <p>The Authority did not identify any alternative options that addressed the range of identified shortcomings of the existing UTS provisions.</p>
0.5.	Trustpower	<p>Changes would not pass cost-benefit analysis</p> <p>The changes would be unlikely to pass the required cost benefit analysis compared with either the status quo or a more limited set of Code changes, as outlined in our accompanying submission.</p>	<p>The Authority refers to its cost benefit analysis in section 3.3 of the consultation paper.</p>
0.6.	Transpower	<p>Requirement to articulate against the statutory objective</p> <p>The new requirement to articulate a submitter's alternative proposal against the Authority's statutory objective may better discipline a submitter's response, but its efficient consideration should be at the whole policy level rather than each element. This is because the overall policy outcome reflects both the sum and interaction of its parts.</p> <p>Assessing each response in isolation from the whole is unwarranted and unnecessarily time consuming.</p>	<p>It assists the Authority to see an assessment against the statutory objective for specific elements, but it will also note comments made at a more general level.</p>