



23 August 2016

Submissions
Wholesale Advisory Group
By email: wag@ea.govt.nz

Wholesale market information: Review of disclosure exclusions

Meridian welcomes the opportunity to provide feedback on the Wholesale Advisory Group's (WAG) discussion paper 'Wholesale market information: Review of disclosure exclusions'.

We support the addition of a reasonable person (condition) test

Meridian's preference is to amend the current disclosure regime by adding a reasonable person test which applies as a condition on the application of all existing exclusions. As formulated by WAG, this would see the current disclosure regime amended to read:

"... a participant is not required to make disclosure information readily available to the public if

(aa) a reasonable person would not expect the disclosure information to be made readily available; and

(ab) one or more of the following [existing list of exclusions] apply:

(a) the disclosure information is excluded Code information; or

(b) ..."

In Meridian's view, this approach will:

- Introduce an additional test on the application of all existing exclusions which is based on an appropriate threshold i.e. the threshold of reasonableness. This will enhance the effectiveness of the current disclosure regime, thereby achieving WAG's objective.
- Retain the existing exclusion relating to commercial disadvantage, which is an important exclusion to apply in some cases¹, while at the same time making that exclusion (and all other exclusions) subject to a reasonableness test.

¹ See our response to Question 2 in Appendix A for further details.

- Apply a consistent pre-condition to all current exclusions. If the reasonable person test was only applied to particular exclusions, it is possible that problems with overreliance on other exclusions would arise in the future, which when then require further changes to the disclosure regime. This will be prevented if the reasonable person test is applied as a pre-condition to all existing exclusions now.
- Enhance alignment with the NZX disclosure regime. This will simplify compliance for participants subject to both regimes, and will also allow any relevant learnings, case studies or guidance from the NZX disclosure regime to be applied to the wholesale market disclosure regime.

We note that WAG eliminated the reasonable person (condition) from further consideration in its discussion paper as it “would tighten the use of all exclusions, with arguably a significant potential for unintended consequences” and “adding this test as an exclusion (rather than as a condition on the use of any exclusion) seems to be a better means of achieving the objectives”. Meridian disagrees with these reasons for eliminating this approach.

We agree this approach would theoretically tighten the use of all exclusions. However, Meridian considers this is appropriate and consistent with WAG’s objective of devising a more effective information disclosure regime. We do not agree there will be a high risk of unintended consequences as there is an inherent reasonableness test in applying this condition. In fact, we consider “reasonableness” is the appropriate test to apply in this situation.

We also do not agree that a “reasonable person (exclusion)” is preferable to a “reasonable person (condition)”. Including an additional reasonable person exclusion will in fact broaden the range of exclusions available to participants. This will provide a further ground for withholding information which is directly contrary to WAG’s objective of improving wholesale market information disclosure outcomes.

As a reasonable person test would be a new concept under the Code, Meridian recommends that guidance is also provided on what a “reasonable person” would expect to be disclosed. This guidance could be set out as a footnote to the clause (as it is in the NZX disclosure regime) or included in the Electricity Authority’s “Guidelines for Participants on wholesale market information disclosure obligations”. This guidance should include clear direction to participants about the type of information that is reasonable to disclose (e.g. coal stockpiles or gas storage volumes) and what is not reasonable to disclose (e.g. contract book details). Greater clarity about what is “reasonable” will help WAG’s objective of improving availability and accessibility of information.

Subpart 5 of Part 13 deals with hedge disclosure requirements

Meridian notes that subpart 5 of Part 13 sets out obligations on participants with respect to the disclosure of particular details relating to hedge agreements. This subpart (and its 20 associated clauses) provide very specific guidance on the information that needs to be disclosed in these circumstances. Meridian’s view is that compliance with these specific obligations should be

considered to fulfil the more general disclosure obligations in clause 13.2A with respect to disclosing information relating to hedge contracts.

To make this clear, we consider that the Code should explicitly state: “Nothing in this clause 13.2A applies to the disclosure of information about **risk management contracts** (disclosure of information about **risk management contracts** is provided for in subpart 5 of Part 13 of the Code).”

No requirement to disclose contract book

Meridian would also like to be clear that in no situation do we consider it appropriate or acceptable to require the disclosure of a participant’s contract book under the general wholesale disclosure obligations in the Code. This information is highly commercially sensitive.

We consider the introduction of a reasonable person condition would be consistent with this principle, as we do not consider a reasonable person could expect the disclosure of contract book details. However, we consider that it should be explicitly stated in the Code: “Nothing in clause 13.2A requires a participant to disclose the details of its contract book that it reasonably considers to be confidential whether relating to individual contracts for the sale or purchase of electricity (or related derivatives or financial products) or relating to its aggregated position”. Also, to avoid doubt, we consider that it should be explicitly clarified in the wholesale market information disclosure guidelines that a participant’s contract book is excluded from the disclosure requirements.

Market facilitation measures will further enhance the wholesale disclosure regime

We agree with WAG that regardless of any changes to the Code there is benefit in undertaking a number of market facilitation measures to improve the functioning of the current wholesale disclosure regime. We agree with the market facilitation measures proposed by WAG, namely:

- Improving the wholesale market information disclosure guidelines;
- Raising participant awareness and understanding of the wholesale disclosure regime; and
- Encourage improvements in the use of POCP.

Further to this, Meridian considers a greater focus from the Authority on compliance and enforcement will be an important part of raising the performance of participants with respect to their disclosure obligations.

Meridian’s responses to WAG’s specific consultation questions are attached in Appendix A.

Please contact me if you have any questions regarding this submission.

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 response to consultation questions

	Question	Comment
1	<p>What comment do you have on the WAG conclusion that the existing WMI disclosure regime could be enhanced if concerns with exclusions (b) and (g) could be addressed in a cost effective way?</p>	<p>Meridian partly agrees with WAG's conclusion. In particular, we agree that further consideration of exclusion (b) (commercial disadvantage) is warranted.</p> <p>Meridian is less convinced that exclusion (g) (information insufficiently definite) is a problem. We note that the wording of exclusion (g) – through use of the term “insufficiently” – has its own implicit trade-off i.e. the exclusion only applies so long as the relevant information is insufficiently definite. Once the information becomes sufficiently definite, the exclusion no longer applies. Meridian considers this is a sensible approach. The release of insufficiently definite information is likely to lead to misinformation which subsequently needs to be corrected. This would detract from rather than enhance the effectiveness of the information disclosure regime. We also note that this exclusion is consistent with the NZX disclosure regime. Meridian considers, where possible, it is sensible and desirable to align these two information disclosure regimes.</p>
2	<p>What comments do you have on the WAG's assessment of these Code amendment options?</p>	<p>Meridian has the following comments:</p> <ul style="list-style-type: none"> • We do not support the use of a “good conduct” provision. We consider the expectation of good conduct is implied by the information disclosure obligation i.e. a participant must comply with its obligations under the Code, otherwise it is not practicing “good conduct”. There is no reason for a good conduct provision to apply to the wholesale market information disclosure regime but not to other parts of the Code. • We do not support the use of a “purpose statement” in the Code. A purpose statement is already included in the disclosure guidelines. It will provide no additional guidance to include such a statement within the Code. Again, it is not clear why a purpose statement should be used for the wholesale market information disclosure regime but not for other parts of the Code. • We do not agree that the “reasonable person (condition)” option should be eliminated from further consideration. We agree this would theoretically tighten the use of all exclusions. However, Meridian considers this is appropriate and consistent with WAG's objective of devising a more effective information disclosure regime. We do not agree there will be a high risk of unintended consequences as there is an inherent reasonableness test in applying this condition. In

	Question	Comment
		<p>fact, we consider “reasonableness” is the appropriate test to apply in this situation. We note also that use of a reasonable person condition is consistent with the approach adopted under the NZX disclosure regime.</p> <ul style="list-style-type: none"> • We do not agree that a “reasonable person (exclusion)” is preferable to a “reasonable person (condition)”. Including an additional reasonable person exclusion will in fact broaden the range of exclusions available to participants. This will provide a further ground for withholding information which is directly contrary to WAG’s objective of improving wholesale market information disclosure outcomes. • We do not agree with removing or replacing the “commercial disadvantage” exclusion. In some scenarios, material commercial disadvantage is a valid and fair reason for withholding information. For instance, wholesale market participants should not be required to disclose the details of their contract books – while such information could be argued to be “disclosure information” in some circumstances, release of such information would have a significant commercial impact on a participant which will greatly outweigh any potential benefit from its release. It is appropriate to retain reference to “commercial disadvantage” within the listed exclusions to ensure these impacts are taken into account. Rather, the objective should be to ensure this and other exclusions are applied in an appropriate way. As above, Meridian considers the correct way to do this is through the application of a reasonable person condition. • We agree a “no trading on undisclosed information” provision would involve significant policy considerations and is outside the scope of the current review. • We do not support a requirement to “notify” when applying an exclusion. We agree this will create a significant additional burden for participants and the Authority.
3	What comments do you have on the potential benefits, risks and costs of each option?	See response to Question 2.
4	What is your preferred option, and why?	Meridian’s preferred option is to add a reasonable person condition applying to all exclusions. As described above, this approach will:

	Question	Comment
		<ul style="list-style-type: none"> • Impose an additional test on the application of any existing exclusion which is based on an appropriate threshold i.e. the threshold of reasonableness. This will enhance the effectiveness of the current disclosure regime, thereby achieving WAG's objective. • Retain the existing exclusion relating to commercial disadvantage, which is an important exclusion to apply in some cases, while at the same time making that exclusion (and all other exclusions) subject to a reasonableness test. • Apply a consistent pre-condition to all current exclusions. If the reasonable person test was only applied to particular exclusions, it is possible that problems with overreliance on other exclusions would arise in the future, which when then require further changes to the disclosure regime. This will be prevented if the reasonable person test is applied as a pre-condition to all existing exclusions now. • Enhance alignment with the NZX disclosure regime. This will simplify compliance for participants subject to both regimes, and will also allow any relevant learnings, case studies or guidance from the NZX disclosure regime to be applied to the wholesale market disclosure regime.
5	<p>What comments do you have on the possible market facilitation measures the WAG has identified?</p>	<p>Meridian strongly supports the market facilitation measures proposed by WAG, namely:</p> <ul style="list-style-type: none"> • Improving the wholesale market information disclosure guidelines; • Raising participant awareness and understanding of the wholesale disclosure regime; and • Encourage improvements in the use of POCP. <p>We agree with WAG that these measures should be pursued regardless of any decision to amend the Code.</p>
6	<p>Are there other market facilitation measures that should be considered?</p>	<p>Further to the list above, Meridian considers a greater focus from the Authority on compliance and enforcement will be an important part of raising the performance of participants with respect to their disclosure obligations.</p> <p>WAG and the Authority may also want to give consideration to developing a central disclosure platform to assist with monitoring and compliance.</p>