

28 November 2016

Submissions
Electricity Authority

Via email: submissions@ea.govt.nz

Code review programme 2016

Mercury welcomes the opportunity to provide a submission to the Authority regarding its proposed 2016 code changes.

Mercury is of the view that regular reviews of the code are valuable to clarify obligations where ambiguity could occur and agrees with most of the amendments proposed by the Authority and in our view would support the Authority's statutory objective to promote "*competition in, reliable supply by, and the efficient operation of, the New Zealand electricity industry for the long-term benefit of consumers* ("the Authority's objective")."

However Mercury is concerned at the Authority's proposed amendment to remove reference in the Code to the Authority acting "reasonably".

Mercury agrees that there is a requirement on the Authority to act reasonably under general administrative law principles which allow a party to apply for the judicial review of a public body's decision in accordance with the *Wednesbury* test.

However, Mercury is of the opinion that the references to reasonableness in the current Code go further than this on the following basis:

SPECIFIC OBLIGATIONS OF THE AUTHORITY

Mercury submits that where the Code expressly requires a particular action or decision of the Authority to be "reasonable", the use of that statutory language requires an objective determination of whether the act or decision of the Authority in fact meets that objective standard. In that situation, a Court reviewing the act or decision may be entitled to substitute its own judgement as to the reasonableness of that act or decision, rather than exercising the conventional deference to the view of the public actor required by *Wednesbury*.

For example, where the Code requires the Authority to make reasonable endeavours, or to do an act within a reasonable time, a Court on review should be entitled to make its own determination of whether that requirement was in fact met. In contrast to *Wednesbury* unreasonableness, a Court may make its own assessment rather than deferring to whether the Authority's decision was reasonable, in the Authority's view.

It follows that in Mercury's view the more specific reasonableness requirements currently imposed by the Code are not redundant and may permit (and be intended to permit) a greater intensity of review of the substance of the Authority's conduct in those specific respects. For that reason, they modify the general administrative law position and should remain as part of the Code.

In summary, Mercury's view is that:

1. express provision in the Code requiring the Authority to publish information within a reasonable time should not be removed; and
2. express provision in the Code requiring the Authority to use reasonable endeavours should not be removed.

Mercury is therefore of the opinion that it is inappropriate for the Authority to remove all references to reasonableness and reduce all obligations to a *Wednesbury* standard of scrutiny and therefore the proposed amendment should not proceed as presently drafted.

Mercury would also suggest there remains an opportunity to address some issues with Part 13 of the Electricity Code. We propose two changes to Part 13 which in our view changes would support the Authority's statutory objective to promote "*competition in, reliable supply by, and the efficient operation of, the New Zealand electricity industry for the long-term benefit of consumers*" ("the Authority's objective").

Part 13 clause 225(1)(a)

The current wording of this clause allows industry participants up to 5 business days to disclose any Contracts for Difference (CFDs) and Options to the market. In our view, this timeframe is too long. We believe that CFDs and Options should be disclosed within one business day to increase transparency, thereby ensuring more efficient operation of the market. CFDs and Options have the potential to impact significantly on spot market dynamics and give informational advantages to the parties who are contracting. By reducing the timeframe for disclosure, other market participants can make better decisions about managing energy market risks and potentially, lower the end cost to the consumer. This Code change would therefore support the Authority's objective.

Part 13 clause 219(1)

We have seen an increasing number of short-term Options going through the market. We are therefore concerned that what are really CFDs may be being disguised as Options to avoid the more sophisticated disclosure regime.

Currently, the only information that must be submitted to the information system for Options are:-

- (a) the trade date;
- (b) the effective date;
- (c) the end date; and
- (d) the quantity.

In our view this disclosure is too light and we do not see why there should be different disclosure requirements for CFDs and Options. In our view, more disclosure, particularly the strike price and location of the contract, would enable all market participants to make more informed decisions. It would allow traders to better manage risk. Having the same disclosure requirements for CFDs and Options would ensure more efficient operation of the industry in line with the Authority's objective.

Please contact me on 09 308 8276 with any questions on the above.

Yours Sincerely,





Andrew Robertson
Regulatory Adviser

