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29 November 2016

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TRUSTPOWER SUBMISSION: CODE REVIEW PROGRAMME 2016

1 Introduction and overview

1.1.1 Trustpower Limited (Trustpower) welcomes the opportunity to provide a submission to the Electricity Authority (the **Authority**) on its Code Review Programme 2016 consultation paper (the Consultation Paper).

1.1.2 We understand that the Code Review Programme proposes 15 amendments to the Electricity Industry Participant Code 2010 (the **Code**) to:

a) Clarify and simplify language and processes;

b) Make it easier for participants to understand their Code obligations; and

c) Promote operational efficiency within the electricity industry.

1.1.3 Trustpower recognises the Authority's intention to provide industry participants with clarity around their Code obligations and improve the overall operation of the electricity industry. However, we are concerned that several of the proposed Code amendments may have a more significant impact on the operation of the industry than considered by the Authority. They are therefore due further consultation, independent of the omnibus approach.

1.1.4 Our answers to the specific questions posed in the Consultation Paper, on each of the Authority's proposed Code amendments, are attached in Appendix A.

2 General comments on the omnibus Code review process

2.1.1 Trustpower supports the Authority's initiatives to improve Code compliance by improving the readability of the Code, and expects that the improved clarity and consistency of the Code will be able to deliver efficiency in several respects.

2.1.2 However, in a number of proposed Code amendments, we are concerned that the changes may result in a loss of the original meaning of the amended clause(s), and suggest that this is carefully examined within any further Code drafting.

2.1.3 We question in particular whether certain of the proposed amendments, such as removing requirements for the Authority to act reasonably, are in the best interest of the end consumer, as per Section 15 of the Electricity Industry Act 2010 (the **Act**). Further, in light of possible amendment implementation issues, we would welcome additional discussion around the merits of the status quo.

2.1.4 For any questions relating to the material in this submission, please contact me on 07 572 9888.

Regards,

SIMON DARMODY
WHOLESALE SUPPLY AND RECONCILIATION MANAGER

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Appendix A: Responses to consultation questions

Reference	2016 – 01 Clarifying the use of the term ‘rules’
Question 1: Do you agree with the Authority's problem definition? If not, why not?	
Yes. The use of the term ‘rules’ to mean something other than the Electricity Governance Rules 2003 (the **EGR**s) could potentially cause confusion within the context of the Code.	
Question 2: Do you agree with the Authority's proposed solution? If not, why not?	
Yes, provided the original meaning of the word ‘rules’ within the relevant clauses is preserved.	
Question 3: Do you have any comments on the Authority's proposed Code drafting?	
Trustpower’s preference for the amendment to clause 6.3(2)(d) is for the phrase ‘policies, rules, or conditions under’ to be replaced by ‘policies, procedures, or conditions under’, as replacement with ‘circumstances in’ limits the requirements of the clause. Similarly, our preference for clause 10.2(1)(a)(ii) is for ‘rules’ to be replaced by ‘principles’, to maintain consistency with other bodies of New Zealand legislation. We believe the remainder of replacements adequately preserve the original meaning of the clauses.	
Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?	
Yes.	
Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?	
Yes.	
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority’s statutory objective in section 15 of the Electricity Industry Act 2010.	
Yes, the option of this amendment is preferable to the status quo, provided the original meanings of the amended clauses are retained.	

Reference	2016 – 02 Removing Part 6 and Part 9 exceptions

Question 1: Do you agree with the Authority's problem definition? If not, why not?

No. The Code came into effect in 2010 and only now, some six years later, has the Authority decided to broaden the reporting requirements of market operations services providers. More concerning is the timing of the amendment and the areas, specifically Part 6. It would seem the Authority is trying to get as much information as possible presented to them to assist them in removal of Part 6 of the Code. For all intents and purposes, it would appear an 'information grab'.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

No. As the Authority has stated, they "could continue with the status quo arrangements".

Question 3: Do you have any comments on the Authority's proposed Code drafting?

Trustpower believes no change is required.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

There is sufficient disclosure in place currently; this minor change will increase reporting requirements on market operations service providers, which will like see a cost increase to participants with no net benefit other than the Authority receiving more data.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?

As no CBA has been presented, Trustpower cannot carry out an analysis as to whether the benefits of the proposed amendment outweigh the costs. Trustpower questions the need for amending this minor component of reporting.

Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.

No, as the Authority clearly states the status quo is good enough.

Reference	2016 – 03 Simplifying the requirements for certification and declaration
Question 1: Do you agree with the Authority's problem definition? If not, why not?	
Yes.	
Question 2: Do you agree with the Authority's proposed solution? If not, why not?	
Yes.	
Question 3: Do you have any comments on the Authority's proposed Code drafting?	
The proposed changes make sense and will improve clarity and consistency for certifications that participants need to make.	
Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?	
Yes, efficiency and simplicity will be improved.	
Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?	
Yes.	
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.	
Yes.	

Reference	2016 – 04 Removing the definition of ‘assumed value of coefficient’
Question 1: Do you agree with the Authority's problem definition? If not, why not?	
Yes.	
Question 2: Do you agree with the Authority's proposed solution? If not, why not?	
Yes.	
Question 3: Do you have any comments on the Authority's proposed Code drafting?	
No.	
Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?	
Yes.	
Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?	
Yes.	
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority’s statutory objective in section 15 of the Electricity Industry Act 2010.	
Yes.	

Reference	2016 – 05 Removing reference to the Authority acting reasonably

Question 1: Do you agree with the Authority's problem definition? If not, why not?

No. The Authority's problem definition only refers to the "inefficiencies" said to be associated with the imposition of the reasonableness standards on the Authority, but does not reference "reasonable/reasonably/reasonableness" in the Code in relation to the activities of other persons bound by the Code such as service providers or market participants.

We believe that the case for these Code changes is not particularly persuasive. It is difficult to see how these changes are needed to promote the efficient operation of the industry as claimed by the Authority.

Please refer to Appendix B for our fulsome comments.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

No. The express removal of the various references to reasonableness is likely to alter both how reasonableness is assessed and also whether a court will be prepared to intervene and make an assessment that a review remedy should be available in relation to a decision or action of the Authority. These changes are demonstrably not in the interests of market participants and consumers.

Please refer to Appendix B for our fulsome comments.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

Yes. We do not agree with the changes proposed in the draft Code amendment. Please refer to Appendix B for our comments on the Authority's proposed Code amendment.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

No. Please refer to Appendix B for our comments on the Authority's proposed Code amendment.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?

No. We do not consider that the removal of the reasonableness code changes will result in the equivalent standard of reasonableness being applied under administrative law as is currently provided for in the Code. We think the removal of these provisions is more likely to lower the

standard of reasonableness which applies to the discharge of the Authority's obligations under the Code, and therefore disagree. Please refer to Appendix B for our fulsome comments.
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.
No. Trustpower's preference is for the status quo.

Reference	2016 – 06 Correcting the requirement to enter removal date in the registry

Question 1: Do you agree with the Authority's problem definition? If not, why not?

No.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

No.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

The Authority's proposed code drafting has overlooked the benefits that the market is currently receiving from the existing arrangement.

In providing the removal date the MEP is also then required to provide a complete record of removed asset information. This can help confirm to the participants of that installation what the certified installed assets were – even for fully certified metering installation this process can identify discrepancies in removed assets.

Additionally, MEP's are often providing the optional 'event reading' for the removed assets (meters and data storage devices). With this practice, the Traders are able to use the structured registry files to complete a full meter change. If MEP's are not obligated to provide removed assets to the registry – which will be the case if they no longer are required to provide the removal date – then this will introduce inefficiencies for some Traders and MEP's.

We would encourage the Authority to keep the current arrangement, where all removed and installed assets are provided in the meter file as part of asset changes on site, and to consider making the event reading a compulsory field on removed assets (Meters and Data Storage Devices).

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

Yes, we agree with the objective of simplifying processes, however in this instance for Trustpower and potentially other Traders and MEP's, the process for removing and replacing assets will become more complicated as systems will need to be redeveloped to accommodate receiving asset removal information from a new source.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?

No. This change would not align the code with the industry practice because there is existing industry practice that makes use of the removal dates and removed asset records and this capability would require significant investment to replace.

The industry still has a large number of legacy assets installed, but which are being displaced. Traders will continue to require removal details from the legacy asset with this information gathered from the field by the MEP installing new equipment.
The most efficient way for that removal information to make its way back to the trader is often via the standardised registry file formats.

Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.

No – we believe it would be more beneficial to the industry if the requirement was for the removal reading to be made mandatory for removed assets (Meters and Data Storage devices) and for that information to flow via the registry to participants of the ICP.

Reference	2016 – 07 Reassigning market administrator functions

Question 1: Do you agree with the Authority's problem definition? If not, why not?

Yes, responsibilities for market administration Code obligations should be allocated specifically to the entities that currently undertake them; the 'market administrator' definition within the Code is unnecessary.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

Yes. However, it should be made clear which market administration Code obligations the Authority has determined as most appropriate for the regulator, if these are functions the Authority does not currently perform.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

Within the drafting schedule of Appendix C, the defined term 'annual consumption list' does not have its publisher specified as the Reconciliation Manager (as per the amendment of 'market administrator' in clause 13.188).

We propose that the additional defined term 'WITS manager' within Part 1 should include the phrase 'who is for the time being appointed', both to maintain consistency with other defined terms that refer to market operation service providers, and as NZX is contracted as WITS manager for the period defined in the WITS Manager Market Operation Service Provider Agreement dated 30 October 2015 (i.e. not open-ended).

Clause 10.51(6)(f) has not been properly amended to replace 'market administrator' with 'Authority'.

We also seek confirmation that under the proposed amendment of clause 13.188(3), the Reconciliation Manager is, or will be made aware of the responsibility to publish the annual consumption list, as, at present, it is published by the Authority on its Electricity Market Information (EMI) website.

Trustpower agrees with the remainder of the replacements proposed in the drafting schedule. We do however note that Part 17 (Transitional provisions) does not form a part of the drafting schedule in Appendix C and suggest that it also be amended for completeness.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

Yes. Clear definition of the market administrator responsibilities removes the need for the defined term, and we support its removal.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?
Yes. While the Reconciliation Manager does have an additional responsibility as noted in our response to Question 3, as it currently provides the list to the Authority, publishing the annual consumption list is not expected to be onerous. The administrative cost reduction to the Authority, and the clarity that the amendment provides, outweighs the potential costs of the proposed amendment.
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.
Yes. It would be more efficient for market operation service providers to undertake certain market administrator obligations; as noted by the Authority, tendering of the remainder of responsibilities would result in costs that outweigh the benefits of doing so.

Reference	2016 – 08 Relocating transition provisions
Question 1: Do you agree with the Authority's problem definition? If not, why not?	
Yes. Trustpower agrees that the structure of transitional provisions within the Code should be consistent.	
Question 2: Do you agree with the Authority's proposed solution? If not, why not?	
Yes.	
Question 3: Do you have any comments on the Authority's proposed Code drafting?	
No.	
Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?	
Yes.	
Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?	
Yes.	
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.	
Yes.	

Reference	2016 – 09 Changing how Transpower makes grid information available

Question 1: Do you agree with the Authority's problem definition? If not, why not?

Yes.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

No. Transpower could provide a live database of the grid configuration and asset rating etc., in an industry standard format rather than a format of their choosing. If the Authority felt the need to consult on the grid configuration, a snap shot could be taken as reference for consultation.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

Trustpower seeks clarification regarding how the Authority's objective of "efficient operation of the electricity industry" would be enhanced by this amendment.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

We agree in terms of improving information flow and timeliness of information, however, we do not agree with selected methodology.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?

Trustpower would want to see more information on cost break down before assessing whether the benefits of the proposal outweigh the costs, as the differences in costs between the proposal and status quo appear inconsistent in the absence of supporting information.

Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.

Improved and more efficient information flow is essential and anything that can be done to improve the situation would be a positive move and is welcomed. However, we are unsure that what the Authority has proposed delivers on either count.

Reference	2016 – 10 Simplifying references to time
Question 1: Do you agree with the Authority's problem definition? If not, why not?	
Yes.	
Question 2: Do you agree with the Authority's proposed solution? If not, why not?	
Yes.	
Question 3: Do you have any comments on the Authority's proposed Code drafting?	
No.	
Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?	
Trustpower agrees with the proposal's objective of simplifying the Code, to improve participant understanding of, and compliance with, the Code.	
Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?	
We agree that the majority of the potential costs of the amendment are not likely to be onerous upon participants nor the System Operator nor participant. The efficiency benefits associated with the proposed amendment will likely outweigh these costs.	
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.	
We agree that the proposed amendment is preferable to the status quo, as it will improve the readability of the Code.	

Reference	2016 – 11 Rationalising references to ‘registry’ and ‘registry manager’

Question 1: Do you agree with the Authority's problem definition? If not, why not?

Yes.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

Yes, Trustpower agrees with the Authority’s proposal.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

Trustpower agrees with the Authority’s proposed Code drafting. We propose also that clause 10.4(2) is amended from ‘published by the registry’ to ‘published in the registry’, to maintain consistency with the remainder of drafting.

We also note that Part 17 (Transitional provisions) does not form a part of the drafting schedule in Appendix C and suggest that it also be amended for completeness.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

Yes. Rationalisation of references to the ‘registry’ and ‘registry manager’ will serve to clarify the responsibilities of the registry manager.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?

Yes. This proposed amendment will improve the readability of the Code, and Trustpower does not expect the costs to be significant.

Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority’s statutory objective in section 15 of the Electricity Industry Act 2010.

Yes, we agree that the proposed amendment is preferable to the status quo.

Reference	2016 – 12 Simplifying terms about electricity supply

Question 1: Do you agree with the Authority's problem definition? If not, why not?

Yes.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

Predominantly 'Yes'.

The only area of clarification we would seek is in regards to the proposal to replace references to 'electrically isolated' with 'electrical conductors'. We presume the actual drafting that will come about will reference the 'removal of electrical conductors' as being equivalent to 'electrical isolation'.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

The only area of clarification we would seek is in regards to the proposal to replace references to 'electrically isolated' with 'electrical conductors'. We presume the actual drafting that will come about will reference the 'removal of electrical conductors' as being equivalent to 'electrical isolation'.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

Yes.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?

We think the benefits will be minor – not significant as claimed by the authority's benefit statement.

We agree with the opinion that this will provide safety related benefits – consistency of interpretation and understanding of terms relating to connection, disconnection, isolation etc. across our industry are important.

Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.

Yes.

Reference	2016 – 13 Amending the definition of 'information system'

Question 1: Do you agree with the Authority's problem definition? If not, why not?

Yes. Trustpower agrees that the Information Systems Document (ISD) available on the Authority's website can be administratively burdensome to keep up to date, but also that it should be made clear (by way of a 'live' Approved Systems Document (ASD), for example) the means through which consistent information is delivered to participants.

We do however note the importance of the consultation process on the ISD, in allowing participants the opportunity to signal their preferences for receiving and providing information, and expect that this would continue in some form for changes made on the ISD and/or ASD.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

Yes. We support the Authority's intention to update the Code to reflect the approved means by which information is conveyed.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

In our comments, we have assumed that the defined term 'WITS manager' used in the Appendix C drafting schedule for amendment 2016-07 will be the same for this amendment.

We propose that the amendment of 'information system' within Schedule 8.3, Technical Code C, clause 5(2) should read 'An **asset owner** shall request...', rather than 'An **asset owner** may request…', given that the proposed amendment results in no specified primary means of transmitting information.

We propose that clause 13.227(a) is amended from 'submits a **verification notice** to the information system' to 'submits a **verification notice** to the WITS manager'. Further, we believe that the proposed amendment to clause 13.229(1) should read 'from the WITS manager in accordance with clause 13.228(1)'.

We also note that Part 17 (Transitional provisions) does not form a part of the drafting schedule in Appendix C and suggest that it also be amended for completeness.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

Yes. The proposed amendment clarifies the sources for which information is to be provided to, and received by, participants.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?
Yes. We agree that the costs of the proposal will be negligible and will be outweighed by the benefits.
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.
Yes. The alternative Interface Control Document (ICD) would likely be more administratively burdensome to keep up to date. Trustpower would support the introduction of a more 'live', up to date, ASD.

Reference	2016 – 14 Amending the definition of ‘publish’
Question 1: Do you agree with the Authority's problem definition? If not, why not?	
Yes.	
Question 2: Do you agree with the Authority's proposed solution? If not, why not?	
Yes.	
Question 3: Do you have any comments on the Authority's proposed Code drafting?	
No.	
Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?	
Yes.	
Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?	
Yes.	
Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority’s statutory objective in section 15 of the Electricity Industry Act 2010.	
Yes.	

Reference	2016 – 15 Simplifying the meaning of ‘notify’

Question 1: Do you agree with the Authority's problem definition? If not, why not?

Yes. Trustpower agrees that the defined term ‘notify’ can be unnecessarily restrictive upon a participant’s preferred communication method, and could confer an unintended meaning within the Code.

Question 2: Do you agree with the Authority's proposed solution? If not, why not?

Yes.

Question 3: Do you have any comments on the Authority's proposed Code drafting?

We note that Part 17 (Transitional provisions) does not form a part of the drafting schedule in Appendix C and suggest that it also be amended for completeness. We are otherwise happy with the proposed Code drafting.

Question 4: Do you agree with the objectives of the proposed amendment? If not, why not?

Yes. We agree that the proposed amendment will make it easier for participants to understand the extent of, and give effect to, their disclosure obligations.

Question 5: Do you agree the benefits of the proposed amendment outweigh its costs? If not, why not?

Yes.

Question 6: Do you agree the proposed amendment is preferable to the other options? If not, please explain your preferred option in terms consistent with the Authority’s statutory objective in section 15 of the Electricity Industry Act 2010.

Yes.

Appendix B: Response to the proposed removal of the Electricity Authority's specific Code obligations to act reasonably

1 Authority's proposal

1.1.1 The Authority proposes to amend the Electricity Industry Participation Code 2010 (**Code**) by removing all requirements for the Authority to act reasonably in relation to its opinions on market situations or audit results, requests or requirements of service providers and market participants, or to use reasonable endeavours to do a task allocated to it under the Code (**the reasonableness code changes**).

1.1.2 This set of Code changes is grouped under a generic heading "Simplifying code terms about the supply of electricity". In total, 36 reasonableness Code changes are proposed. In each case the standard of reasonableness applies to an obligation on the Authority.

1.1.3 There are approximately 480 other references to "reasonable/reasonably/reasonableness" in the Code in relation to the activities of persons bound by the Code, such as service providers or market participants. These provisions include similar standards to those in which the Authority is proposing to remove in relation to its own activities.

1.1.4 However, the Authority does not propose to amend these requirements for the other persons bound by the Code: its problem definition only refers to the "inefficiencies" said to be associated with the imposition of the reasonableness standards on the Authority.

1.1.5 This is because the Authority considers that the imposition of a reasonableness standard on its activities is inconsistent with the efficient operation of the industry as it is already required to act reasonably under general administrative law.

1.1.6 It says this means the reasonableness provisions in the Code are redundant. In other words there are 36 unnecessary references in the Code.

2 Analysis of legal issues

2.1.1 We agree that administrative law principles require a decision-maker to act in accordance with the law, fairly, and reasonably. However, we note that some of the service providers, such as the System Operator, who are making decisions under the Code with a public law effect, are also likely to be subject to the same principles. No changes are proposed in relation to their responsibilities - so the proposed Code change proposals appear to be unbalanced and inconsistent.

2.1.2 More importantly, we do not consider that the proposed Code changes to remove "reasonableness" will result in the equivalent standard of reasonableness being applied under administrative law, as is currently provided for in the Code. We think the removal of these provisions is more likely to lower the standard of reasonableness which applies to the discharge of the Authority's obligations under the Code.

2.1.3 This is because the express removal of the various references to reasonableness is likely to alter both how reasonableness is assessed and also whether a Court will be prepared to intervene and make an assessment that a review remedy should be available in relation to a decision or action of the Authority.

2.1.4 In our view, without an express obligation on the Authority to act reasonably, the action of recourse against a decision or action of the Authority would be by judicial review on the ground of unreasonableness.

2.1.5 Generally, in a judicial review action the Court applies some interpretation of the Wednesbury test for unreasonableness – which provides that a decision-maker acts unreasonably if its act or

decision is so absurd that no sensible person could ever dream that it lay within its powers, or so unreasonable that no reasonable authority could have come to it.

2.1.6 The Courts have adopted a variety of descriptions of the kinds of decision that will be unreasonable in different circumstances. For example, an unreasonable decision has variously been described as one:

- outside the limits of reason;
- that no sensible decision-maker acting with due appreciation of his or her responsibilities could have arrived at;
- that no reasonable body could have reached, that is, a decision which is irrational;
- so absurd that no one could ever dream that it lay within the powers of the authority; or
- requiring "something overwhelming".

2.1.7 These descriptions, along with the initial Wednesbury formulation, all set a higher threshold than that currently incorporated in the Code.

2.1.8 This is because the current standard in the Code is, in contrast to the judicial review standard, an objective and impersonal test. It refers to what an ordinary competent person, or a prudent and a reasonable person, might do in the same circumstances. This standard is commonly used in commercial contracts, including complex multilateral contracts, and also in the common law.

2.1.9 We think a strong case would need to be made to remove this standard, particularly because of the adverse inferences that might be drawn from having had the standard in the Code in the first place and then removing it. This would indicate a shift away from an objective standard of reasonableness towards one provided by the Wednesbury test.

3 Analysis of specific Code change proposals

3.1.1 In this section we discuss the specific provisions in the Code the Authority seeks to amend.

3.2 Reasonable opinion

3.2.1 The Code currently provides in the definitions in clause 1(1) that an undesirable trading situation means any situation that impacts on the integrity or confidence in the wholesale market that "**in the reasonable opinion**" of the Authority cannot satisfactorily be resolved.

3.2.2 The Code also provides in clause 13.255 that the Authority may direct the FTR manager to suspend the allocation of FTRs if there is any situation that "**in the reasonable opinion**" of the Authority cannot satisfactorily be resolved by any other mechanism available under the Code.

3.2.3 In these contexts, the term "reasonable" provides an objective standard by which the Authority's decision-making can be reviewed.

3.2.4 In clauses 1(1) and 13.255, the inclusion of the reasonable opinion criterion means that if the Authority had no objectively reasonable basis for a view that a market situation could not be satisfactorily resolved, then it would be unlawful for an undesirable trading situation to be declared or for FTR allocations to be suspended.

3.2.5 The Wednesbury requirement of unreasonableness or irrationality would not need to be met. Nor would there be a need to invoke the Court's discretion to intervene by way of judicial review.

3.2.6 In our opinion this is an appropriate threshold for market intervention, and thus maintaining the current clauses would be more consistent with the Authority's statutory objective than the removal of them would be.

3.2.7 We also note that the term "reasonable opinion" is used eight other times [1] in the Code in relation to industry participants (i.e. not the Authority) , for example, in rule 8.25 where it is used in relation to the system operator's quasi-regulatory requirement for the design and configuration of assets of grid owners.

3.3 Reasonable satisfaction

3.3.1 The reasonableness Code changes also contain eight references to the need for participants to pay costs if an audit establishes outcomes which would justify this to the Authority's "**reasonable satisfaction"** (clauses 9.33 (1) and (3) and clauses 10(1) and (2) of Schedule 10.2, 13.232(1) and (2) and 13.236I (1) and (3)).

3.3.2 The inclusion of this standard protects participants from an arbitrary cost allocation decision and means that the Wednesbury requirement of unreasonableness or irrationality would not need to be met in a challenge to the Authority's decision making. We are not sure why the Authority regards this as inefficient.

3.4 Reasonably considers

3.4.1 The reasonableness Code provisions include three references to the Authority "reasonably considering" a matter and one reference to use of its own "reasonable expectations" of future activities at a GXP when making a decision where the usual data is not available:

- Clause 3.14 provides that market operation service providers must include in their reports details of any other matters that the Authority in its "**reasonable discretion considers appropriate**";
- Clause 12.54 permits the Authority to withhold publication of confidential aspects of the information provided by a participant to the Authority if the Authority "**reasonably considers** there is good reason for withholding it";
- Clause 12(1) of schedule 15.1 permits the Authority to audit a participant if it "**reasonably considers** that a participant has not complied with a clause in this Part or Part 11:
- Clause 4(2)(b) of schedule 13.7 provides for the Authority to make a determination using a combination of all available data and "**using its own reasonable expectations of the future activities at the GXP**".

3.4.2 Our searches indicate the phrase "reasonably considers" is used 15 times[2] in other parts of the Code in reference to industry participants. For example, in clause 13(1) of schedule 6.2 it is used in relation to a distributor's obligation to advise a distributed generator of concerns it has about adverse effects arising from the operation of that generator's plant.

3.4.3 Similarly, we note that the term "act reasonably" is used five times[3] in relation to industry participants. For example, clause 12.137 provides that Transpower when planning or implementing outages must act reasonably, taking into account information reasonably known or that can be reasonably forecast.

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[1] Clauses 1(1) "grid emergency", 8.15(3), 8.25(1), 8.30, 9(1) of Schedule 8.3 (Technical Code C), 4 of Schedule 8.3 (Technical Code D), 13.82(2) and 5(3) of Schedule 14.3.

[2] Clauses 1(1) "system security situation", 12 of Schedule 6.1, 13(1) of Schedule 6.2, 8.25(5) and (6), 8.35(1), 8.47(1), 8.53(1), 5(1) of Schedule 8.1, 1(3) of Schedule 8.2, 2 of Schedule 8.3 (Technical Code B), 2 of Schedule 8.3 (Technical Code C), 3(2) of Schedule 10.2, 3(1) of Schedule 13.8 and 12(2) of Schedule 15.1,

[3] Clauses 10.34(3), 12.135(1), 12.137(1) and (2) and 13.2(1A).

3.4.4 The reasonableness qualifier enables an objective assessment to be made of the relevant decision-making.

3.5 Reasonably require/reasonably request of others

3.5.1 The reasonableness Code provisions also include nine references to the Authority setting reasonable requirements for:

- information included in market operation service provider reports (clauses 3.14 (2)(c) and 7.3);
- information in a system operator's self-review (clause 7.11 (2));
- scope of audits in clause 4 of schedule 10.2 and clause 13 of 13.8;
- providing information under clause 12.54(1) in relation to grid reliability and industry information;
- providing additional information under clause 5 of schedule 13.4 in relation to applications to be approved as a type A or type B industrial co-generating station;
- information requested under clause 1(2)(b) of schedule 10.3 in relation to applications to be approved as an ATH;
- information requested under clause 45(3)(b) of schedule 10.7 in relation to metering installation inspections; and
- providing other information under clause 4(2) of schedule 15.1 in relation to a reconciliation participant obtaining certification.

3.5.2 Reporting obligations are clearly not costless, and thus we think that having a yardstick of "reasonableness" is sensible. The current clauses provide a basis for service providers to push back on excessive reporting requirements which we think is consistent with the efficient operation of the industry. We do not think it is in the interests of consumers if the only basis for challenge for this code requirement is the higher Wednesbury standard of unreasonableness.

3.5.3 Our searches also indicate the term reasonably "requires/d" is used 19 times[4] in reference to industry participants in other parts of the Code. For example, clause 2 of schedule 8.3 permits the system operator to request additional information reasonably required from asset owners to enable it to assess compliance of particular assets with the requirements of the asset owner performance obligations in the Code at certain designated times.

3.6 Reasonable notice/time for compliance for others

3.6.1 Currently there are a number of clauses in the Code which qualify service providers and market participants' obligations to provide information requested by the Authority by providing that a **reasonable notice or a reasonable timeframe for compliance** must be given.

3.6.2 These clauses all provide protection for service providers and market participants as they give a basis for a conversation with the Authority about the reasonableness of its requests.

3.6.3 For example:

- Clause 10.16(1) provides an obligation on market operation service providers to provide metering data within **reasonable time frames notified by the Authority;**

[4] Clauses 2(2), 11(3) and 18 of Schedule 6.1, 8.18, 8.24(1) and (2), 8.25(3) and (4), 2(2), 2(5), 3(1), 3(2) and 3(3) of Schedule 8.3 (Technical Code A), 7B(1) of Schedule 8.3 (Technical Code B), 12.135(1), 13.6(4), 13.173 and 15.18.

- Clause 10.16(2) provide that **the Authority must provide reasonable notice** of any changes to notified formats;
- Clause 41 of schedule 10.7 provides that a ATH attaching a metering installation certification sticker must include **other information notified by the Authority giving reasonable notice;**
- Clause 13.7B refers to the system operator's obligation to report on accuracy of certain forecasts **by a reasonable date specified by the Authority;** and
- Clause 13.27D refers to the system operator's obligation to provide advice **within reasonable time specified by the Authority**.

3.6.4 In our searches we established that that:

- "reasonable time" is used almost 40 times overall in the Code (see for example in clause 7(1) of schedule 6.1 where a distributed generator must test and inspect its plant within a reasonable timeframe specified by the distributor); and
- "reasonable notice" is used six times[5] in relation to other industry participants (see for example clause 8.51 which requires an asset owner to give reasonable notice of its desire to cancel an alternative ancillary services arrangement).

3.6.5 It is a common practice for decision-makers to give parties bound by rules a reasonable time to achieve compliance with any new requirements and thus we do not consider the Authority has made a sound case for removing these requirements.

3.7 Reasonable time/endeavours for the Authority to undertake tasks

3.7.1 The reasonableness Code changes also include obligations on the Authority to do certain tasks within a reasonable timeframe or at reasonable times and/or use reasonable endeavours to undertake a task.

3.7.2 These are:

- publish reports from the system operator within reasonable time of their receipt (clause 7.3(6) and clause 8.47);
- publish Rulings Panel decisions as soon as reasonably practicable (clause 8.63(4));
- deciding whether to proceed with a request for determining conforming and non-conforming GXPs within a reasonable time of receiving the request (clause 13.27B(4));
- making available registers of approvals for public inspection (clauses 9 of schedule 13.4 and clause 12 of schedule 13.8); and
- using reasonable endeavours to make a determination in accordance with the methodology in schedule 13.7, using the data available to it if the data specified in the Schedule is not available (clause 4 schedule 13.7).

3.7.3 The term "reasonably practicable" is used over 30 times in the Code. The purpose of the Authority's changes in the Consultation paper seems to be to remove or reduce its own accountability.

[5] Clauses 6(1) and 13(2) of Schedule 6.2, 8.35(2), 8.49(1), 8.51 and 8.52(2).

3.7.4 For example, in clause 8.63 of the Code, the term "reasonably practicable" is used twice; once in relation to the Rulings Panel (as shaded below) and once in relation to the Authority. The Authority only proposes to remove the reference in clause 8.63(4) below, and not that in 8.63(3).

> **8.63 Decision of the Rulings Panel**
> (1) The **Rulings Panel** may—
> (a) confirm the determination; or
> (b) amend the determination; or
> (c) substitute its own determination; or
> (d) refer the determination back to the **Authority** with directions as to the particular matters that require reconsideration or amendment.
> (2) The **Authority's** determination has effect as confirmed, amended, or substituted by the **Rulings Panel** from the date of the **Rulings Panel's** decision.
> (3) The **Rulings Panel** must give a copy of its decision to the **Authority** as soon as reasonably practicable.
> (4) The **Authority** must **publish** the **Rulings Panel's** decision as soon as reasonably practicable.

3.7.5 The Authority appears to have particular concern about the obligation in clause 4 of schedule 13.7 to use reasonable endeavours to make a determination because it says in its Consultation paper that this is a commercial term which "*imposes an obligation to act unless doing so would not be in the relevant person's commercial interest.*" The term is therefore said to be "*not appropriate for a statutory obligation on a Crown entity like the Authority*".

3.7.6 However, we do not think that in the legislative context in which it appears that it would be interpreted in the same way as in a commercial contract. Therefore, we think the Authority's concern is misplaced. We agree that the clause provides that the Authority has an obligation to Act. That is its purpose. We note that removing the reference to reasonable endeavours could strengthen the obligation to act, by removing any qualification to its obligation to make a determination. It might also reduce the standard which applies to the Authority's determination. Therefore, it would be better to err on the side of caution and retain the current wording.

4 Conclusion

4.1.1 In conclusion, we think that the case for the proposed reasonableness Code changes is not particularly persuasive. It is difficult to see how these changes are needed to promote the efficient operation of the industry as claimed by the Authority.

4.1.2 If we are wrong in our interpretation of any of these changes, then the Authority will have to meet the same standard in the Code as required by administrative law. This does not seem to create any inefficiencies.

4.1.3 If, however, we are correct in our view that the express removal of the various references to reasonableness is likely to alter both how reasonableness is assessed and also whether a Court will be prepared to intervene and make an assessment that a review remedy should be available, then these changes are demonstrably not in the interests of market participants and consumers.

4.1.4 Given the matters raised in this memorandum we are also concerned that the Authority "*is satisfied that the nature of the proposed amendment is technical and non-controversial in accordance with section 39(3)(a) of the Act*".