



3 October 2017

Submissions
Electricity Authority
Level 7, ASB Bank Tower
2 Hunter Street
Wellington

By email: submissions@ea.govt.nz

Consultation Paper – Review of disclosure regime

Meridian appreciates the opportunity to provide feedback on the Authority's consultation paper 'Review of disclosure regime' relating to the wholesale market information continuous disclosure regime. We are also grateful to the Authority for organising the recent workshop on this subject at which very helpful presentations were made by the Authority and the System Operator, and the Authority had various key staff and advisers for this project in attendance.

In relation to the questions in the consultation paper, our detailed comments are set out in the attachment using the Authority's requested format for submissions. However, at a high level:

- Meridian commends the Authority for:
 - seeking to clarify its expectations for information disclosure in certain areas, particularly relating to outages and hedge contract information; and
 - providing greater assistance to participants making disclosure decisions in those areas.
- Meridian agrees with the WAG and the Authority that the 'commercial disadvantage exclusion' should be removed and replaced with a 'reasonable person exclusion'.
- Meridian suggests the proposed 'reasonable person exclusion', although based on a similar NZX condition, is actually not the subject of any substantial precedent that is directly applicable in a wholesale electricity market context, and is not as clear as it might be.
- Meridian suggests the Authority should accordingly provide additional clarification of the proposed 'reasonable person exclusion'. This clarification should be contained in the Code itself. While the proposed Guidelines are useful, the Code ultimately needs to 'stand on its own two feet' and be capable of being applied to a range of situations without resort to guidelines.

Please contact me if you have any questions.

Yours faithfully

Jason Woolley
Regulatory Affairs Manager
Meridian Energy

FORMAT FOR SUBMISSIONS

Question	Comment
Q1. Do you agree with the issues the Authority has identified?	Yes
Q2. Do you think the example definition of a 'reasonable person' in section 6.9 should be the final definition adopted? If not, how would you define a 'reasonable person'?	<p>Meridian agrees the example definition should be the final definition adopted. Meridian suggests that the example definition should be included in the Code.</p> <p>While guidelines issued by the Authority may, in practice, constrain the Authority's application of the Code, they do not 'bind' the Authority in the same way as the Code itself.</p> <p>Further the Code can also be enforced by participants (as well as the Authority). Such participants are not bound to apply the Authority's guidelines in seeking to enforce the Code but have an obligation to report breaches of the Code and have the option of referring alleged Code breaches to the Rulings Panel. Similarly, the Rulings Panel, who must ultimately decide on the correct application of the Code (subject to appeals to the High Court on questions of law or jurisdiction), are not constrained in their interpretation of the Code by guidelines issued by the Authority.</p> <p>Therefore if the example definition of 'reasonable person' is appropriate, (and Meridian agrees that it is and that it should be the final definition adopted, subject to our proposed additions below), then the only way to give participants comfort and certainty that the example definition is the one that will ultimately be applied, is to include it in the Code. If the Authority is seeking to provide greater assistance to participants making disclosure decisions then Meridian submits this is the only appropriate way for the Authority to proceed rather than by using guidelines to clarify the definition.</p> <p>As well as providing clear direction on the definition that should be applied to 'reasonable person' Meridian submits that the Authority should provide additional guidance and clarification on the issue of how the 'reasonable person exclusion' is to be applied.</p> <p>Meridian considers that the Authority is not correct when it asserts, at para 6.7 of the consultation paper that "...interpretation of the reasonable person exclusion will be aided by a substantive body of legal precedent..." In particular we understand that there is little to no case law on the NZX 'reasonable person condition' and, even if there was, that it may be of only limited relevance because that test is a 'reasonable person condition' and not a 'reasonable person exclusion'. Further there is no other legal precedent or case law that we are aware of would be directly applicable.</p> <p>If the Authority disagrees and still considers that there is a substantive body of legal precedent that will assist in interpreting the reasonable person exclusion we request that the Authority refer to the relevant cases in the guidelines so that participants seeking to understand the new proposed rules are 'on the same page' as the Authority in terms of the precedents or authorities that the Authority believes are relevant.</p> <p>In the absence of clearly applicable and directly relevant precedent or authority it is incumbent on the Authority, in introducing the exclusion, to be as clear as it can be so that participants know what is, and what is not, covered by the exclusion. In particular Meridian</p>

	<p>has 2 suggestions that it believes would assist in making the proposed new rules clearer:</p> <ol style="list-style-type: none"> 1. The 'unreasonably prejudice' test which is suggested in the draft guidelines as one of three factors to consider in applying the 'reasonable person exclusion' should be lifted out of the guidelines and put in the Code itself. Meridian suggests that unlike the other factors in the guidelines this one is sufficiently substantive that it should form part of the Code. Meridian notes that the NZX 'reasonable person condition' in the NZX Main Board Listing Rules (the NZX rules) contains by way of footnotes the following: <p><i>"...a "reasonable person" would not expect the information to be disclosed if the release of the information would:</i></p> <p><i>(a) unreasonably prejudice the Issuer; or</i></p> <p><i>(b) provide no benefit to a person who commonly invests in securities."</i></p> <p>The NZX rules are clear on how these footnotes are to be applied. They say:</p> <p><i>"1.6.5 The footnotes to the Rules are intended as a guide for users and an aid in interpretation and, only to that extent, form part of the Rules."</i></p> <p>Meridian submits that in the absence of a similar provision in the proposed Code wording the best approach is simply to incorporate the 'unreasonable prejudice' test directly into the Code wording as indicated in our suggested wording at the end of this submission.</p> 2. No reasonable person would expect a participant to disclose its aggregate hedge position or FTR position at a nodal, regional, island-wide or national level. We suggest that this is a sufficiently important principle that it should be included in the Code itself. As the Authority's notes of the workshop it held say at page 2, "...there was general agreement that a participant's hedge book ought not to be captured by the WMI disclosure obligations and a suggestion that this be made clearer." <p>Meridian also notes that in their Guidance Note on Continuous Disclosure, NZX state at page 16 that "NZXR considers that this [reasonable person condition] has only a narrow application in practice because..." essentially the work of the "reasonable person condition" in the NZX rules is largely already done by other provisions in the NZX rules. This reasoning would not seem to be apply to the 'reasonable person exclusion' that the Authority proposes to introduce but Meridian submits that it would be useful if the Authority were to confirm this in its own guidelines.</p>
<p>Q3. Do you agree the Authority should update the guidelines in the way it is proposing?</p>	<p>Generally speaking yes although Meridian considers parts of the proposed Guidelines should instead be included in the proposed Code amendment. See our comments above in response to Question 2 and our suggestions below in response to Question 10.</p> <p>In addition, Meridian considers that the following provisions could be made clearer in terms of their intent and effect:</p> <ul style="list-style-type: none"> - Clause 6.23: It is clear from the definition of wholesale

	<p>market that the issue of ‘material impact on prices’ is not to be tested by reference to the retail market. The wording of this part of the guidelines however confuses the issue by suggesting that the retail market may be relevant ‘to the extent there is an overlap’ with the wholesale market. What this means isn’t clear. Meridian suggests clause 6.23 should be deleted or expanded. At the moment it is confusing.</p> <ul style="list-style-type: none"> - Clause 6.28(a): Some indication of what the Authority considers to be ‘major’ new generation or transmission assets would be very useful and potentially vital to achieving a settled and consistent approach by participants. Without such an indication there is scope for disagreement on what amounts to ‘major’ – one person’s ‘major’ may not be another’s. - Clause 6.28(b): Some indication of what the Authority considers to be ‘significant’ in terms of the measures listed (e.g. a ‘significant’ quantity of coal) would be very useful and, again, potentially vital to achieving a settled and consistent approach by participants. - Clause 6.28(c): Again, some measurable indication of what the Authority considers to be a ‘significant’ reduction in generation capability or ‘significant’ change in this context would be very useful and potentially vital. - The same comments re the word ‘significant’ apply to clauses 6.28(d), (e) and (f). - Clause 7.7: It would be useful if the Authority could include additional explanation in the guidelines with respect to what is meant by paragraph (a) of the definition of ‘excluded Code information’ “...relates to bids, offers, reserve offers...etc” and how far this extends i.e. what, in the Authority’s view is information that “relates to bids, offers, reserve offers....” - Clause 7.18: Where two parties sign a contract containing a confidentiality provision the purpose of that confidentiality provision will be to preserve the confidentiality of the agreement in a wide variety of scenarios and as against a wide variety of potential third parties or ‘potential audiences’ of that information i.e. it will have multiple purposes. Meridian submits that the wording of the guidance in this clause and the wording of clause 13.2A(7) of the Code should be clarified to make it clear that it is only those situations where a confidentiality agreement has been entered into for the <i>sole</i> purpose of avoiding making disclosure information readily to the public that the prohibition applies. Otherwise the provision and clause 13.2A(2)(c) of the proposed Code are unworkable as any time a participant signs an agreement containing a confidentiality clause that participant will potentially be in breach of clause 13.2A(7) of the Code if the information would otherwise be disclosure information. - Clause 7.33: It would be useful if the Authority could give examples of the types of things it considers might be ‘trade
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	<p>secrets' in a wholesale electricity market context.</p> <ul style="list-style-type: none"> - At 10.4(b) in relation to the requirement that disclosure information be readily available to the public the guidelines say that '...an interested party should be able to locate the information using a straightforward internet search with suitable search engine...and appropriate keywords.'" Meridian requests that the Authority provide some guidance on whether the POCP website currently meets this requirement.
<p>Q4. Can you suggest one or more case studies the Authority could consider using in the guidelines where parties have either disclosed, or not disclosed, information relating to wholesale markets in an effective way?</p>	<p>Meridian suggests that the Authority should develop case studies for the guidelines that are based on the scenarios that parties say they have observed and which are referenced at clause 5.4 of the consultation paper, namely:</p> <ul style="list-style-type: none"> (a) participants announcing plant outages after OM Financial Limited and NZX Limited release their daily reports, to avoid distributing outage information before the trading window (b) plant dispatched in a manner inconsistent with outage declarations made in the planned outage co-ordination process (POCP) database (c) plant running when it is declared unavailable in POCP (d) permanently retired plant returning to service without notice (e) hedge trading activity in advance of major market announcements, suggesting some parties may have been aware of the impending announcement.
<p>Q5. Do you agree with the objectives of the proposed Code amendment? If not, why not?</p>	<p>Yes.</p>
<p>Q6. Do you agree the costs of the proposed Code amendment to the exclusions will be minimal? If not, why not?</p>	<p>Provided sufficient clarity can be given to the proposed Code amendment by the use of the additional wording suggested below, Meridian agrees the costs of the proposed Code amendment will be minimal. If not Meridian considers that the costs of the proposed amendment may be significant as parties seek to understand and comply with their Code obligations.</p>
<p>Q7. Do you agree the benefits of the proposed Code amendment outweigh its costs?</p>	<p>Yes, subject to the proposed amendment being clarified in the way we suggest below.</p>
<p>Q8. Do you agree the proposed Code amendment is preferable to the other options? If you disagree, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Act.</p>	<p>Yes, subject to the proposed amendment being clarified in the way we suggest below.</p>
<p>Q9. Do you agree the proposed Code amendment complies with section 32(1) of the Act?</p>	<p>Yes, subject to the proposed amendment being clarified in the way we suggest below.</p>
<p>Q10. Do you have any comments on the drafting of the proposed Code amendment?</p>	<p>Meridian has no comments on the proposed drafting of clause 13.2 and Meridian supports that drafting in full.</p> <p>In relation to clause 13.2A Meridian considers that it is critical that</p>

	<p>the drafting of the proposed Code amendment is clarified. Meridian’s suggested clarification is set out immediately below this table. In addition to the points of clarification already discussed we suggest the definition of ‘disclosure information’ should be clarified to make it clear that a model or application developed by a participant is not information ‘about’ that participant and therefore need not be disclosed. As the Authority points out at para 4.5(c) of the consultation paper if this wasn’t the case then the disclosure rules could have the adverse impact of reducing incentives to invest in such models or applications. We suggest that the Code wording should be amended to make clear that such a result is not intended.</p>
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MERIDIAN SUGGESTED AMENDMENTS TO DRAFTING OF PROPOSED CODE AMENDMENT AND TO OTHER CODE PROVISIONS

13.2A Participant must make disclosure information readily available

(1) Each **participant** must make all **disclosure information** in relation to the **participant** readily available to the public, free of charge, as soon as reasonably practicable after the **participant** becomes aware of the information.

(2) Despite subclause (1), a **participant** is not required to make **disclosure information** readily available to the public if—

- (a) the **disclosure information** is **excluded Code information**; or
- (ba) a reasonable person would not expect the **disclosure information** to be made readily available; or
- (c) the **participant** is bound by a legal obligation to keep the **disclosure information** confidential; or
- (d) doing so will be a breach of law; or
- (e) the **disclosure information** is already readily available to the public; or
- (f) the **disclosure information** concerns an incomplete proposal or negotiation; or
- (g) the **disclosure information** comprises matters of supposition or is insufficiently definite to warrant being made readily available to the public; or
- (h) the **participant** claims legal professional privilege or privilege against self incrimination in respect of the **disclosure information**; or
- (i) the **disclosure information** is a trade secret.

(3) In subclause (2)(ba) a ‘reasonable person’

(a) is not ‘the person on the street’

(b) is a sophisticated participant in the wholesale market familiar with the purpose and scope of clause 13.2A, the market and regulatory framework within which it operates, and publicly known circumstances;

(c) would not expect a participant to make disclosure information readily available if doing so would unreasonably prejudice that participant’s position and activities in the wholesale market or in their commercial operations more generally; and

(d) would not expect a participant to disclose its aggregate electricity hedge market position or FTR position, whether at a nodal, regional, island-wide or national level.

(4) A **participant** that relies on subclause (2) must, as soon as reasonably practicable, make the **disclosure information** readily available to the public, free of charge, if subclause (2) ceases to apply to the **disclosure information**.

(5) If information ceases to be **disclosure information**, a **participant** is no longer required to make the information readily available to the public.

(6) A **participant** that does not make information readily available to the public under this clause must, if required to do so by the **Authority**,—

- (a) satisfy the **Authority** that subclause (2) applies to the **disclosure information**, if the **participant** relies on subclause (2); or
- (b) satisfy the Authority that the information is not **disclosure information**.

(Z) A **participant** must not enter into a confidentiality agreement with another person for the sole purpose of avoiding making **disclosure information** readily available to the public under this clause.

disclosure information, in relation to a **participant**, means information that—

- (a) is about the **participant** (for example, a model or application developed by the participant is not information about the participant); and
- (b) is held by the **participant**; and
- (c) the **participant** expects, or ought reasonably to expect, if made publicly available, will have a material impact on the prices in the **wholesale market**.