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C/O:  
Electricity Authority  
PO Box 10041  
WELLINGTON 6143

By email: [MDAG@ea.govt.nz](mailto:MDAG@ea.govt.nz)

Dear Tony,

**Re: High standard of trading conduct provisions – cross submission**

Thank you for the opportunity to provide a cross submission on the Market Development Advisory Group's *High standard of trading conduct provisions – Discussion paper*. Having reviewed other participants' submissions, our principal views on the proposed HSOTC provisions remain unchanged.

Our position is set out in our [previous submission](#). In summary:

- a) the electricity generation market is generally workably competitive, but there are occasions where generators have the ability to exercise unfettered market power;
- b) the discussion paper correctly identifies the problem to be addressed – that generators should not be able to exercise unfettered market power when making offers;
- c) therefore, the solution must be focused on clarifying the standard that a generator must meet in submitting offers when it is pivotal – and it should not be a blanket standard that applies to all offer conduct; but
- d) the proposed solution is not appropriately targeted at the problem, and follows a legal and economic approach that has been developed for monopolies, and is not applicable to workably competitive markets;
- e) while the *Wellington Airport* case contains a useful discussion of workable competition, it does not provide guidance on how to resolve transient market power issues.

This cross submission focuses on three specific issues that have arisen during the consultation process:

1. A change of the magnitude proposed by MDAG should be subject to a full cost benefit analysis, and the normal Electricity Authority consultation process.
2. MDAG's proposal amounts to the imposition of a price control standard, albeit seemingly unintentionally. The HSOTC provisions should have a narrower scope.
3. Retention of a 'catch all' standard as proposed by some submitters is unnecessary, and would make the rules unworkable and risky.

These issues are addressed briefly below.

### Process

Genesis agrees with the other generators who submitted on the paper that a robust and quantitative cost benefit analysis is warranted given the significance of what is being proposed.

We acknowledge MDAG's position that a full quantitative cost benefit analysis would be difficult to produce, given the subjective judgements that would be required to conduct the analysis. However, Genesis does not agree that this is sufficient justification for not undertaking such analysis.

Genesis agrees with Mercury that the costs of the proposal would not be negligible. We do not agree with Haast Energy Trading/Electric Kiwi's assertion that substantial benefit would arise from the proposal through "reduction in wealth transfers from consumers". There is no evidence to support this claim, and MDAG's own analysis concludes that situations in which generators are able to exercise unfettered market power are rare.

We reiterate that we believe the costs of the proposal have been understated. The costs to the Authority and participants of lengthy investigations would be considerable if the Code is changed as proposed. In particular, the proposal provides too much scope for participants to raise complaints whenever they believe prices are too high, regardless of whether these prices are justifiable and subject to competitive discipline.

The costs the Authority and other participants have sustained through investigation of the three most recent Undesirable Trading Conduct claims, which related to allegations of inflated pricing and market power, are substantial and provide an indication of the potential impact of the proposed rules. It is also worth noting that the two closed UTS proceedings did not find a UTS existed.

### Price control standard

Genesis does not believe that the HSOTC provisions are intended to operate as a price control standard. However, as we set out in our submission, in seeking to replicate perfect competition at all locations and at all times MDAG's proposal effectively applies a standard akin to monopoly regulation under Part 4 of the Commerce Act. This is unnecessary and goes well beyond the problem the HSOTC provisions are intended to solve.

Whilst it is understandable that purchasers may want the ability to set prices at a level that they believe is fair, this is not desirable in a competitive market designed to incentivise efficient investment, and the entry and exit of participants. The wholesale market has delivered these outcomes well, and the risk of distortions as a result of conduct standards that amount to price controls far outweighs any potential benefit.

For avoidance of doubt, Genesis is not proposing that suppliers should not always offer as though they were disciplined by competition. Rather we are seeking to avoid a situation in which generators are required to prove that they were acting in this way whenever a participant harbours a suspicion or desires price discovery outside of the usual competitive process.

Genesis has no issue with the suggestion that generators should *be able* to provide an objective justification of why offers are made at a certain level. However, we do not agree that it is desirable for rules to enable participants to demand and challenge these justifications at all locations and at all times. This is unnecessary in a market that is subject to competitive pressure. Therefore, the first test the regulator should apply in determining whether the HSOTC rules have been broken is whether a generator had the opportunity to do so, that is, whether the generator was pivotal and able to exercise unfettered market power in the period in question.

#### **‘Catch all’ trading conduct standard**

Some submitters have called for the retention of references to a ‘high standard of trading conduct’, as a ‘catch all’ designed to enable the Authority to take action on behaviours such as market manipulation and/or insider trading. Genesis agrees that these behaviours are undesirable, but we do not agree that it is appropriate to address these issues through the Code.

The HSOTC provisions provide for redress in situations where the market fails to deliver efficient prices. Additional powers are available to the Authority through the Undesirable Trading Conduct provisions, which enable the regulator to intervene in situations where conditions arise that may threaten confidence in the wholesale market and cannot be addressed by specific elements of the Code.

Code clause 13.5 demands that bids and offers by purchasers, generators, or ancillary service agents must be lawful. Undesirable or anti-competitive conduct of the type raised by some submitters is already addressed in primary legislation and financial market regulations. In particular:

- The Commerce Act 1986
- The Financial Markets Conduct Act 2013
- ASX Operating Rules
- Corporations Act 2001 (Australia)
- ASIC Market Integrity Rules

It is unclear why the Code requires a ‘catch all’ standard, when trader behaviour is already comprehensively regulated, and the UTS provisions exist. If there is a specific pattern of unaddressed undesirable behaviour that is of concern then it should be defined and proscribed, and prohibitions and regulation should be sited within the appropriate legislative or regulatory instruments.

The ambiguous nature of the current HSOTC provisions is one of the principal issues this reform process is seeking to address, so it would be counterproductive to allow this ambiguity to persist by retention of the current language.

### Conclusion

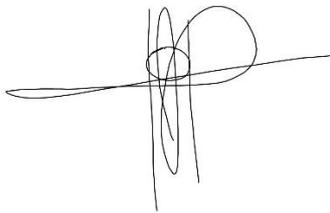
MDAG is to be commended for its good work on wholesale market trading conduct rules. Genesis appreciates the consultative approach to date and the opportunity to provide a cross submission.

We accept that the process of redesigning the rules has been underway for more than two years, and there is a desire to complete the workstream. However, Genesis believes that it is critical to ensure any change is practicable and enduring.

To that end, we urge the MDAG to refine the rules so they more appropriately target the problem, and recommend to the Authority that a full cost benefit analysis and Code change process be undertaken.

Should you wish to discuss any aspect of our submission further, please contact me by email: [matt.ritchie@genesisenergy.co.nz](mailto:matt.ritchie@genesisenergy.co.nz) or by phone: 027 204 3864.

Yours sincerely

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the left.

Matt Ritchie  
**Senior Advisor, Regulatory Affairs and Government Relations**