

Market Development Advisory Group
By email: MDAG@ea.govt.nz

5 November 2020

MDAG supplementary consultation on trading conduct provisions

Mercury welcomes the opportunity to provide a submission to the Market Development Advisory Group (MDAG) on its supplementary consultation on improving the high standard of trading conduct provisions.

We respond to the consultation questions in Appendix A and make other observations below which should be read as core aspects of our submission.

Recap of Mercury's submission and cross-submission

Mercury's submission and cross-submission on MDAG's earlier 2020 consultation did not support the proposal for a number of reasons which are summarised below:

- a) there was a lack of evidence or problem definition on how six local pivotal situations led to material consumer detriment or the need to reform trading conduct provisions. The scope of the proposal was therefore too wide as it would apply to all offers in all periods (rather than only pivotal periods);
- b) MDAG's proposal would impose a form of cost-based regulation, which had been previously discounted by the Electricity Authority;
- c) the legal implementation and development of case law assumptions were particularly problematic for traders having to operate in real time;
- d) there would be issues interpreting what were economically efficient offers and the scheme would be open to lobbying and/or vexatious claims;
- e) there was a need for the Electricity Authority to carry out a robust cost benefit analysis.

Good progress made through panels, but more work required

The advisory panels convened by MDAG have added value to the policy process and we commend MDAG for listening to submitter concerns and responding by putting the panels together. The panels have clarified that the existing HSOTC provisions are problematic, yet we also note they did not reach a unanimous conclusion for each of the case studies under the proposed rule.

Several of the issues raised in Mercury's submissions (and those by other submitters) remain unresolved. A core concern we have, which remains despite the insights from the panel process, is clarity on day to day rules for those actively trading in the market in real time. A compliance process with the benefit of hindsight absent any time pressure is the opposite environment traders will face, particularly in the initial period of the proposal being implemented. Mercury recommends MDAG (or the Electricity Authority) considers publishing guidelines to assist traders in this initial phase should the Code change be implemented.

As with all Code changes the Electricity Authority would be expected to carry out a robust cost-benefit analysis following on from a problem definition and options analysis. We look forward to additional consultation by the

Electricity Authority on this workstream and would welcome the opportunity to provide input to those processes or respond by way of submissions at that time. With respect to a problem definition, we remain concerned with the potential for these trading provisions to be used as a roundabout way of implementing an inadequately analysed “solution” for transmission outages.

Recommend application fee or cost reimbursement

Should MDAG proceed with recommending its proposal to the Electricity Authority we would recommend an amendment which would effectively deal with one of our (and other submitter’s) main concerns. From the earlier consultation period we highlighted our concern that the proposal could result in unfettered scope for vexatious claims to be made about any and all offers made in the generation market. A simple way of guarding against this would be to impose an application fee, or perhaps a reimbursement of costs should a claim be deemed vexatious. A major benefit to having an application fee payable on application would be to reduce any scope for disagreement later, plus the fee could be reimbursed should the claim proceed to a ruling that the claim had merit.

If you have any questions on this submission please direct them to John Bright, Regulatory Strategist at john.bright@mercury.co.nz.

Yours sincerely,



John Bright
Regulatory Strategist



Appendix A. Responses to consultation questions

#	Question	Mercury's response
1	Do you agree that the proposed 'rule' [clause 2] is better than the existing provision requirement for "conduct in relation to offers and reserve offers is consistent with a high standard of trading conduct"?	Mercury agrees MDAG's supplementary proposal is an improvement on the original however, as per our cover letter, this should not be construed as Mercury's support for the overall code change as there are several issues not yet resolved in our view.
2	Do you agree that the economic efficiency framework underpinning the proposed 'rule' is better than the existing HSOTC framework?	As per our response to question 1.
3	Do you agree that new preamble [clause 1] is effective in conveying succinctly the intended framework and purpose of the 'rule' [clause 2]?	As per our response to question 1.
4	Do you agree with clause 3(a), which states when market power becomes significant?	No comment.
5	Overall, do you support the revised proposed code change in preference to the existing HSOTC provisions?	As per our response to question 1.