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Permanent Change to Definition of Disclosure Information

Genesis Energy Limited (**Genesis**) welcomes the opportunity to provide feedback on the Electricity Authority's (**Authority**) consultation paper *Permanent change to definition of disclosure information* dated 22 June 2021.

We agree that a robust, well understood and effective information disclosure regime is an essential foundation for a well-functioning wholesale electricity market. Where change is proposed, the problem it seeks to address should be well defined and evidence-based.

Policy Intent of the Information Disclosure Regime

The Authority's principal stated reason for the permanent change is that the definition of "disclosure information" does not reflect the policy intent of the wholesale market information disclosure regime set out in clause 13.2A of the Code (the **Disclosure Regime**). Specifically, the Authority asserts that the policy intent requires the disclosure of information that is *likely* to, rather than *will*, have a material impact on prices in the wholesale electricity market.

Respectfully, we disagree.

The history of reviews and amendments to clause 13.2A and the definition of "disclosure information" clearly indicate that the definition, as it stood before the temporary change in April 2021, reflects the policy intent of the Disclosure Regime.

The predecessor to clause 13.2A of the Code which applied from 1996 to 2013 required the disclosure of information:

> ***which would, or is likely to,*** *materially affect the price of electricity or any contracts relating to electricity traded under the Code.* [emphasis added]

The current clause 13.2A and the threshold for disclosure was introduced after extensive review and consultation in 2012 and 2013.[1] This process included a detailed

[1] Wholesale Market Information Disclosure Obligations Consultation Paper, Electricity Authority, 9 November 2012.

independent review by the Wholesale Advisory Group (**WAG**) as part of its Wholesale Market Information Project. The WAG consulted with the industry before it made its recommendations to the Authority.

Following its review and consultation, the WAG identified specific areas where the drafting in clause 13.2 was unclear and could be improved. These included that: [2]

(a) the definition of information that needs to be disclosed was very wide, so a participant may be required to disclose information of little or no value to the electricity market; and

(b) the drafting of clause 13.2 was overly complex and outdated and did not meet the Authority's guidelines for Code drafting.

The WAG recommended several changes. They included that clause 13.2 be amended so that:[3]

> *… the disclosure obligations relate to all information a participant holds about itself that it expects, or ought reasonably to expect, if made publicly available,* ***will have a material impact*** *on the prices in:*
>
> *(i) the wholesale spot market for electricity; or*
>
> *(ii) the market for ancillary services; or*
>
> *(iii) the market for financial hedge contracts for electricity*. [emphasis added]

The Authority accepted the WAG's recommendations stating:[4]

> *3.1.2 In summary, the Authority proposes to amend clause 13.2 by deleting the current disclosure obligations and including new disclosure obligations in a new proposed clause 13.2A so that:*
>
> *…*
>
> *(b) only information that is expected to have a material impact on prices in specified markets (subject to some exclusions) is required to be made publicly available;*
>
> *3.1.3 These are explained in more detail as follows:*
>
> *…*
>
> *(b) the disclosure obligation – the specification of which information is required to be disclosed will no longer refer to the defined term*

[2] Wholesale Market Information Disclosure Obligations Consultation Paper, Electricity Authority, 9 November 2012.
[3] Wholesale Market Information Disclosure Obligations Consultation Paper, Electricity Authority, 9 November 2012.
[4] Wholesale Market Information Disclosure Obligations Consultation Paper, Electricity Authority, 9 November 2012, pages 7-8. We note for completeness the Authority did not accept one of the exclusions from disclosure which the WAG proposed.

> *"relevant information" but will require that a participant makes publicly available any information (subject to exclusions discussed below) that the participant holds about itself that it expects, or ought to reasonably expect, if made publicly available,* ***will have*** *a material impact on prices in any one (or more) of the relevant markets.* [emphasis added]

The Authority's consultation paper on the changes specifically addressed the proposed change. It asked:[5]

> *Q2. How do you think the test should be expressed for the information that relevant parties should be required to disclose under a revised clause 13.2A? (refer to paragraph 3.1.3(b)).*

Following the consultation, the Code was amended in 2013 so that "disclosure information" was defined as information that:

> *the participant expects, or ought reasonably to expect, if made available to the public,* ***will have*** *a material impact on prices in the wholesale market.*

The words used in the definition are clear and have been so for some time.

The definition is expressly set out in the Authority's *Guidelines for Participants on Wholesale Information Disclsoure Obligations* (prior to the amendments earlier this year to reflect the temporary change). The threshold test is also reflected in a number of sections, diagrams and flow charts in the guidelines.

The references include the following:

> *6.10 The Authority's focus is on information that is* ***likely to have*** *a material impact on prices in the relevant markets. The term "material impact" is not defined, nor are materiality metrics included in the Code or in these guidelines. Participants will need to exercise judgement whether information needs to be disclosed in the context of each particular circumstance. The Authority encourages participants to take a cautious approach when determining whether information* ***will have*** *a material impact on prices,* ***and to err on the side of disclosing the information****.*
>
> *…*
>
> *6.15 Factors that holders of information may find it useful to consider when applying the "material impact on prices" test include the following:*
>
> *(a) would a reasonable person expect that the information* ***would****, if it were generally available to the market,* ***have*** *a material effect on the day-to-day decision-making of interested parties (see the following sections for*

[5] Wholesale Market Information Disclosure Obligations Consultation Paper, Electricity Authority, 9 November 2012, page 9.

> *discussion of "interested parties" and "day-to-day decision-making")?* [emphasis added]

We note that while the first sentence in paragraph 6.10 above refers to the words "likely to have", these should be read in context. That is, that a cautious approach was recommended. It was not a statement of the threshold, which is clearly described in the guidelines and other commentary.

In summary, the history of clause 13.2A and the decisions made in relation to it show that the Authority and the industry specifically turned their minds to the definition of "disclosure information" and amended it to reflect the policy intent of the Disclosure Regime.

As the Rulings Panel in the *Haast* v *Genesis Energy* decision stated:[6]

> *The Panel also notes that in making an assessment that Genesis was required to consider whether the information "will have" a "material impact". The use of the wording "will have" creates a higher threshold for disclosure. If the Code had used the term "may have" then the threshold would have been lower, and a wider range of disclosure information would have been captured. Similarly, the use of the term "material impact" also operates to limit the amount of information that may otherwise be disclosed. It too imposes a higher threshold.* ***Given the terms used the drafters of the Code must have intended that the overall threshold for disclosure be high and, looked at from a market perspective, it may be appropriate for the amount of information that must be disclosed to be limited to that which will have a material impact rather than the market being flooded with and potentially distracted by information that may have an impact****.*

For completeness we note that the Panel found that: [7]

> *Turning to the question of whether the information would have had a material impact from the reasonable market participant perspective the Panel does not consider that the information was, at the time it was obtained by Genesis, disclosure information.* ***The Panel finds that it has not been established that, if disclosed, the information would have had a material impact on prices in the wholesale market.*** *It was clear to the Panel that* ***the information might have had an impact but that it could not determine that it would have*** *met the required higher threshold.* [emphasis added]

Change not supported by evidence

The definition of "disclosure information" is a fundamental pillar of the Disclosure Regime. Changes to the definition should therefore be carefully considered, and supported by evidence.

The definition has been in place for almost a decade and the Disclosure Regime was the subject of reviews and consultations in 2016, 2017, 2018 and 2020. These provided

[6] At paragraph 24.
[7] At paragraph 24.

opportunities for the Authority and the industry to raise concerns with the policy intent or the threshold definition, or to table evidence that the threshold posed a material risk to the effective functioning of the wholesale electricity market. However, no such concerns were raised or supporting evidence presented.

Similarly, no information has been presented by the Authority in this consultation (or in support of the urgent amendment in April 2021) which suggests that the existing threshold has led to an ineffective Disclosure Regime. For example, while the urgent amendment was made to address the risk of ineffective disclosure leading to inefficient prices and lower confidence in the market, no information was provided at the time to support this risk assessment, and no information has been provided as part of this consultation, to show that the temporary change prevented these outcomes from occurring.

We ask that before the Authority seeks to make such a significant change, it consider for example, the experience of the comparatively deeper and larger New Zealand capital market where a higher threshold has been preferred, and in place, for some time. Similarly, given the nature of the proposed change and policy development history relating to the disclosure regime, we suggest that the Market Development Advisory Group be asked to investigate the need for change.

Proposed change creates uncertainty

The wholesale market information disclosure regime was modelled on the NZX continuous disclosure rules, and tailored for the wholesale electricity market. While there are some differences between the two frameworks, the “will have” threshold in the definition of “disclosure information” is equivalent to the “would have” threshold in the NZX disclosure rules.[8] These thresholds are understood and familiar to companies that are subject to disclosure obligations in both the electricity and capital markets.

What is proposed will create additional compliance costs and introduce uncertainty for those seeking to apply the two sets of rules. It is unclear, for example, what “likely to” means under the proposed change. This uncertainty would add to the challenge which market participants already face in assessing whether information is “material” for the purposes of the Code. In the absence of compelling evidence for change, the introduction of further uncertainty should be resisted.

Summary

The definition of “disclosure information” was the subject of extensive consultation and review and has been unchanged for almost a decade. The policy development history

[8]These thresholds also equivalent to the disclosure thresholds for listed entities in the ASX Listing Rules and the Australian Corporations Act 2001. ASX Listing Rule 3.1 states that "once an entity is or becomes aware of any information concerning it that a reasonable person **would expect to have a material effect** on the price or value of the entity’s securities, the entity must immediately tell ASX that information." Section 674 of the Corporations Act 2001 provides that listed entities have an obligation to disclose to the market operator (in accordance with ASX listing rules) "information that a reasonable person **would expect, if it were generally available, to have a material effect** on the price or value of ED securities of the entity."

clearly shows that the definition reflects the policy intent of the wholesale information disclosure regime.

The temporary amendment to the disclosure information definition in April 2021 was made urgently to support market disclosure given the Authority's expectation of continuing supply constraints in dry year conditions. It was not clear then that the change was required. No evidence has been provided to verify the materiality of the risk that the temporary change was intended to address, the effectiveness (or otherwise) of the change or that a permanent change is merited. Further, it is unclear what "likely" is intended to mean. This introduces considerable uncertainty for participants seeking to interpret the disclosure obligations under clause 13.2A of the Code. Accordingly, we are unable to support the proposed change.

Please don't hesitate to contact me should you wish to discuss any of the matters raised in our response.

Yours sincerely

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