

21 July 2021 DRAFT

Tom Georg
Manager Wholesale Markets
Electricity Authority
Wellington

By e-mail: WholesaleConsultation@ea.govt.nz

Dear Tom,

Wholesale market information disclosure reforms welcomed but should go further and address all the matters raised by the Rulings Panel

Electric Kiwi and Haast Energy Trading (Haast) welcome the urgent Code amendment made in March 2021 in response to the Rulings Panel's 28 January 2021 Haast Energy Trading Limited v Genesis Energy Limited decision, and that the Electricity Authority is now proposing to make permanent Code changes to the WMID requirements.¹ We also appreciated the opportunity to discuss this matter with Authority staff, which helped us better understand the Authority's thinking.

Electric Kiwi and Haast consider that the proposed "likely to" Code amendment is an improvement on the pre-existing "will have" provision, but the WMID reform should go further to meet the Authority's policy intent of improving market transparency and reducing information asymmetries.

We consider that the Authority can and should go further in addressing its concern about its "limited ... ability to require information of a standard that is needed to resolve any ambiguity regarding gas available for thermal generation"² by prescribing in the Code that (i) information such as the Pohokura outage is required to be disclosed by electricity generators and (ii) removing the confidentiality 'shield' where information does not have to be disclosed if one party is not a market participant.

Our submission reflects that we consider the Authority should address all the matters highlighted by the Rulings Panel decision. The remainder of the 9-month period before the urgent Code amendment expires provides ample time to complete a more fulsome review that goes beyond the "will have" versus "likely to" issue that is the main focus of the consultation paper.

Summary of Electric Kiwi and Haast's views

- **The purpose of information disclosure is to improve market transparency and reduce information asymmetries** e.g. the Authority's Annual Corporate Plan 2021/22 includes: "Improve availability of wholesale market information"³ and similarly in the most recent Statement of Corporate Intent a "key part" of building trust and confidence "taking a robust regulatory approach which enhances transparency".⁴ These purpose statements are consistent with the Guidelines for participants on wholesale market information disclosure obligations:⁵

In the Code, the WMI disclosure obligations provide a mechanism to ensure that the stakeholders in the New Zealand wholesale electricity market (interested parties) are informed of relevant information at all times. The WMI disclosure obligations are designed to reduce information asymmetry in the wholesale electricity market ...

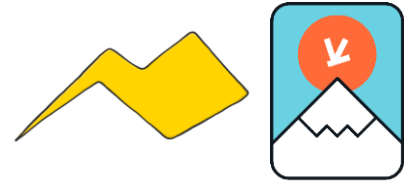
¹ Responses to the consultation questions are provided in the Appendix.

² Electricity Authority, MINISTERIAL BRIEFING Dry Year Risk Update: Spot market review and other related Authority initiatives, 14 June 2021.

³ Electricity Authority, Annual Corporate Plan 2021/22, undated.

⁴ Electricity Authority, STATEMENT OF INTENT, 1 JULY 2021 – 30 JUNE 2025.

⁵ Electricity Authority, Guidelines for participants on wholesale market information disclosure obligations, 23 March 2021, at: <https://www.ea.govt.nz/assets/dms-assets/27/Guidelines-for-participants-on-wholesale-market-information-disclosure-obligations-clean.pdf>.



- **The Authority has treated the policy intent and solution as one and the same:** The consultation paper has recast the policy intent from improved information, enhanced transparency and reduction in information asymmetries to “information should be treated as disclosure information where it is likely to have a material impact on prices”.
- The consultation paper’s statement of policy intent results in a circular and tautological outcome that the Code should require information to be disclosed “where it is likely to have a material impact on prices” because “The policy intent is that information should be treated as disclosure information where it is likely to have a material impact on prices”.
- **The Authority’s proposed Code amendment would not result in disclosure of the Pohokura outage information.** The WMID Code amendment should address all issues raised by the Rulings Panel. Replacement of “will have” with “likely to” is an improvement. However, if this change were in place from 1 November 2018, it would not have required Genesis to disclose information on the prolonged planned outages at the Pohokura gas field in February 2019. While Genesis is a “participant” as defined in the Act, OMV is not. Further, while “It was clear to the Panel that the information might have had an impact” it uncertain whether a “likely to have material impact” threshold would have been met.
- **A “likely to have material impact” threshold is still too high and risks continuing to limit disclosure of important market information.** The Authority should not just “assume” setting a threshold that “information is likely to have a material impact on prices, is set at the right level to achieve an efficient level of disclosure”.

We are concerned the requirements of “likely to”, “material impact” and the required link between the availability of the information and wholesale electricity prices, will still set too high a threshold for disclosure, and reduce the potential benefits of the proposed Code amendments. Part of the problem is the extent to which a market participant can have certainty (be it “will have” or “likely to”) about the causative relationship between the information they hold and the impact on prices in the wholesale market.

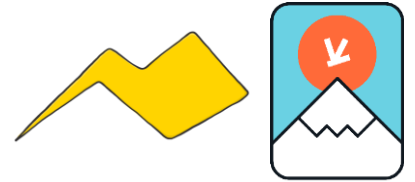
It would be better to rephrase the requirement to something like “the participant expects, or ought reasonably to expect, [may][is likely to] inform views or expectations about prices in the wholesale market”.

- **Electric Kiwi and Haast agree with the Rulings Panel that mandatory disclosure should apply “with respect to areas where disclosure is fundamental to the operation of the wholesale market”.** The Guidelines include an appropriate “bright-line test” that belongs in the Code, and demonstrates it is not necessary to rely solely on principles-based standards. Information like the Pohokura forecasts, and other circumstances where there has been “A significant change in fuel supply situation”,⁶ are fundamental to the operation of the wholesale market and should explicitly be required to be disclosed.

The consultation paper notes this issue was considered while reviewing the WMID Guidelines. Since then the Rulings Panel has added its commentary to the debate and, by way directly relevant precedent, the Authority has directed Transpower that structural and fundamental elements of the TPM should be included in the Code and not in discretionary guidelines or manuals.

- **The Authority should consider the Rulings Panel comments about the inter-relation between clauses 13.2A(2)(ba) and 13.2A(2):** The Rulings Panel stated “Clause 13.2A(2)(ba) of the Code does not, in the Panel’s opinion, sit well within clause 13.2A(2). Rather the Panel believes it is a matter that should be considered as part of the considerations as to whether information is disclosure information under clause 13.2A(1) and the definition of the term “disclosure information” in clause 1.1 of the Code.”

⁶ Electricity Authority, Guidelines for participants on wholesale market information disclosure obligations, 23 March 2021, clause 6.30(b) at: <https://www.ea.govt.nz/assets/dms-assets/27/Guidelines-for-participants-on-wholesale-market-information-disclosure-obligations-clean.pdf>.



- **The Authority should amend the Code to require disclosure where only one party is a “participant” as defined in the Act.** This would avoid the Genesis-OMV situation where “The GSA was entered into between OMV and Genesis. Genesis is a participant. OMV is not.” The Rulings Panel found: “The Panel further finds that even if the information was “disclosure information” it was subject to a confidentiality agreement and that clause 13.2A(2)(c) of the Code applied” and that “confidentiality exclusion to the disclosure requirement in clause 13.2A(1) would apply had there been an obligation to disclose”.

The Authority is right to “[remain] concerned about the confidentiality exclusion” and to be “concerned about some other exclusions”. The Authority has sufficient evidence to make a decision to resolve these issues now, rather than further delay and “use the data received under the new reporting regime to monitor reliance on all the exclusions and will conduct a specific review in future if required”.⁷

The Authority’s proposed Code amendment would not result in disclosure of the Pohokura outage information

Electric Kiwi and Haast consider that WMID should require disclosure of information by market participants such as the Pohokura outage information Genesis choose not to disclose.

We share the Electricity Price Review (EPR) Panel’s concerns about the issues which arose due to disruption to gas supplies from outages at the Pohokura field and that “no generator-retailer shared any specific information that gas fuel shortages were coming”.⁸ In our submission to the EPR, we supported toughening rules on disclosing wholesale market information:⁹

The information disclosure issues highlighted in the recent UTS decision expose the failure of the current regime starkly. We believe the behaviour of Genesis detailed in section 9 of the UTS decision is deeply undesirable. The trader aggressively purchased contracts while in possession of detailed non-public information on the Pohokura gas outage ...

We also agree with Genesis about the need for “increased transparency of the wholesale market” and that “it is important to address any actual or perceived information asymmetry to build greater trust and confidence in the market”.¹⁰

We agree ... market participants and consumers would benefit from increased transparency of the wholesale market. Reflecting on the electricity and gas market stress experienced during spring 2018, it is important to address any actual or perceived information asymmetry to build greater trust and confidence in the market. An improved disclosure regime is needed that facilitates the disclosure of gas production outages and greater disclosures of the performance of generator-retailers ...

The Authority should satisfy itself whether the proposed “likely to have material impact” threshold is consistent with the purpose of WMID “to ensure that the stakeholders in the New Zealand wholesale electricity market (interested parties) are informed of relevant information at all times” and “reduce information asymmetry in the wholesale electricity market ...”¹¹

The Rulings Panel was clear the Pohokura outage information would have meet a “may have” or “might have” threshold “but that it could not determine that it would have met the required higher threshold”.

Part of the problem is the extent to which a market participant can have certainty about the causative relationship between the information they hold and the impact on prices in the wholesale market.

We also consider information on outages of a major electricity generation fuel source is fundamental to the operation of the wholesale electricity market and something which should be explicitly prescribed as a disclosure requirement.

⁷ Electricity Authority, Review of thermal fuel informaton [sic] disclosure Decision, 26 January 2021.

⁸ Expert Advisory Panel, Electricity Price Review, OPTIONS PAPER for discussion, 18 February 2019, page 18.

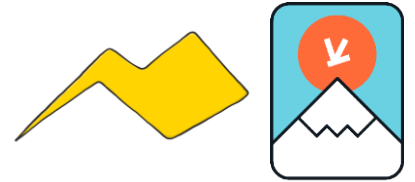
⁹ Haast Energy and Electric Kiwi, Electricity Price Review – Options Paper, 22 March 2019.

¹⁰ Genesis, Genesis Energy’s submission on the electricity price review options paper, undated, at:

<https://www.mbie.govt.nz/dmsdocument/4859-genesis-energy-submission-electricity-price-review-options-paper-pdf>

¹¹ Electricity Authority, Guidelines for participants on wholesale market information disclosure obligations, 23 March 2021, at:

<https://www.ea.govt.nz/assets/dms-assets/27/Guidelines-for-participants-on-wholesale-market-information-disclosure-obligations-clean.pdf>.



Even if the Authority implemented both of these recommendations, Genesis would not have had to disclose the information (even if it would have a material impact on prices) because while Genesis is a market participant, OMV is not. We share the Authority’s “specific concerns about the confidentiality exclusion” and that “it may unjustifiably prevent relevant disclosures”.¹² This loophole needs to be remedied with urgency.

Care should be taken to avoid foreclosing policy options

We do not consider the consultation paper’s recasting of the Authority policy intent (“that information should be treated as disclosure information where it is likely to have a material impact on prices”) sits well with the policy intent in the Annual Corporate Plan 2021/22 to “Improve availability of wholesale market information”¹³ and similarly in its most recent Statement of Corporate Intent a “key part” of building trust and confidence “taking a robust regulatory approach which enhances transparency”.¹⁴

The Authority’s Guidelines for participants on wholesale market information disclosure obligations are also clear about the purpose of the WMID requirements:¹⁵

4 Overview of the WMI disclosure obligations

- 4.1 In the Code, the WMI disclosure obligations provide a mechanism to ensure that the stakeholders in the New Zealand wholesale electricity market (interested parties) are informed of relevant information at all times. The WMI disclosure obligations are designed to reduce information asymmetry in the wholesale electricity market so that an interested party:
 - (a) is not materially disadvantaged against another
 - (b) can make informed decisions.
- 4.2 The WMI disclosure regime was designed to establish a “continuous disclosure” obligation for information relevant to the wholesale market. The regime is modelled on comparable provisions for companies listed and traded on the New Zealand Stock Exchange (NZX), but modified for the electricity market context.

The consultation paper statements that: (i) “The policy intent is that information should be treated as disclosure information where it is likely to have a material impact on prices”, (ii) “This paper assumes the policy intent, that information should be treated as disclosure information where it is likely to have a material impact on prices, is set at the right level to achieve an efficient level of disclosure”, and (iii) “Reviewing the intent of the policy is not within scope of this paper” are too restrictive.

Care is needed to avoid confusing ‘means’ with ‘ends’.

Treating the policy intent and solution as the same thing results in a circular and tautological outcome that the Code should require information to be disclosed “where it is likely to have a material impact on prices” because “The policy intent is that information should be treated as disclosure information where it is likely to have a material impact on prices”.

This effectively rules out consideration of issues raised by the Rulings Panel such as whether the thresholds for disclosure should be lowered, for example, by using “may” or “might” or amending “material impact on prices”, regardless of whether to do so would result in improved market information and reduce information asymmetries and would be to the long-term benefit of consumers.

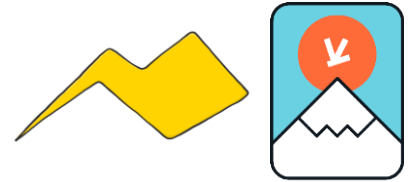
By way of analogy, the approach to policy intent in the consultation paper is equivalent to the Ministry of Education stating its policy intent is to increase the ratio of teachers to students. The solution to this is to

¹² Electricity Authority, Review of thermal fuel information disclosure Decision 26 January 2021, at: <https://www.ea.govt.nz/assets/dms-assets/27/Wholesale-market-information-disclosure-Review-of-thermal-fuels-decision-paper.pdf>.

¹³ Electricity Authority, Annual Corporate Plan 2021/22, undated.

¹⁴ Electricity Authority, STATEMENT OF INTENT, 1 JULY 2021 – 30 JUNE 2025.

¹⁵ Electricity Authority, Guidelines for participants on wholesale market information disclosure obligations, 23 March 2021, at: <https://www.ea.govt.nz/assets/dms-assets/27/Guidelines-for-participants-on-wholesale-market-information-disclosure-obligations-clean.pdf>.



increase the number of teachers but would fail to address that the appropriate policy intent should be better educational outcomes for students. Once the policy intent is properly defined it is clear increasing the number of teachers is just one potential option for addressing the policy intent.

Replacement of “will have” with “likely to” won’t sufficiently “Improve availability of wholesale market information”

If the proposed Code amendment were in place from 1 November 2018, it would not have required Genesis to disclose information on the prolonged planned outages at the Pohokura gas field in February 2019. While Genesis is a “participant” as defined in the Act, OMV is not. Further, while “It was clear to the Panel that the information might have had an impact” there is nothing in the Rulings Panel decision to suggest a “likely to have material impact” threshold would have been met.

When the Rulings Panel considered the “will have” threshold it considered it against an alternative “might have” threshold.

It could be useful to consider what information may or may not be disclosed with “will have”, “likely to”, and “may have” criteria and which would result in outcomes most consistent with a transparent and well-functioning market.

The consultation paper asserts a “may” threshold “could create too low a threshold, and could result in the disclosure of a significantly larger amount of information that is not very material, causing market confusion and unnecessary compliance costs for participants” and also that “requiring parties to disclose information may reduce innovation, facilitate collusion and increase compliance costs”. The suggestion disclosure could cause confusion, reduce innovation and facilitate collusion is not substantiated or explained. Even with a “may” threshold the “material impact” and requirement for there to be a link between the information and wholesale electricity prices means that the disclosure threshold would remain high.

The Authority has stated “The key outcome for an effective wholesale market is confidence in efficient prices, and currently there is a widespread view that prices are not as efficient as they could be” and “some useful and important thermal fuel information is absent from the market”.¹⁶ We consider that the WMID reforms should go further to achieve these outcomes.

The “material impact” threshold should also be reviewed

The interpretation of the Code and Guidelines hinges on interpretation and judgements about materiality.

The Rulings Panel noted “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.” The Authority’s consultation paper doesn’t discuss this threshold at all. The consultation paper simply assumes the threshold is efficient.

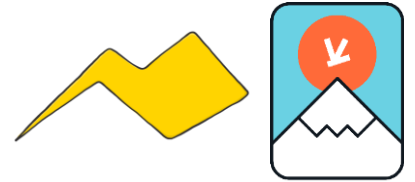
As noted previously: “Our experience is that the threshold for “material impact on prices” is used inappropriately, and the circumstances under which there are or could be material impacts on prices are misinterpreted or misunderstood. For example, we are aware of claims information about pending disruptions to gas supply may be subject to change has been used as a reason not to disclose.”¹⁷

We note and agree with the issues raised by Meridian on this point:

Whilst the misinterpretation of disclosure obligations has been identified by the Authority as a factor that may lead to non-disclosure, we wish to highlight the potential for different interpretations between parties as to whether information will have a material impact on prices. In particular, while the guidelines do contain some examples of information that ought to be disclosed by reference to “major investment and dis-investment decisions” and “significant changes” in, for example, coal supply and generation capability, the lack of indication of what the Authority considers to be “major” and “significant” may result in an inconsistent approach by participants. Without such an indication there may be differing views of what amounts to “major” or “significant” as one party’s “major” / “significant” may not be the same as another party (for example, we would consider that

¹⁶ <https://www.ea.govt.nz/development/work-programme/risk-management/wholesale-market-information-disclosure/consultation/>

¹⁷ <https://www.ea.govt.nz/assets/dms-assets/27/27353Electric-Kiwi-and-Haast-WMID-submission.pdf>



Trustpower's generation data, which generally relates to small generation stations, is significant given the size of the regions they operate in).

Accordingly, we consider it is useful to review the regime at this time to provide greater clarification to market participants as to what disclosure behaviour is expected.

Part of the problem is the extent to which a market participant can have certainty about the causative relationship between the information they hold and the impact on prices in the wholesale market. It would be better to rephrase the requirement to something like "the participant expects, or ought reasonably to expect, [may][is likely to] inform views or expectations about prices in the wholesale market".

Information fundamental to the efficient operation of the market should be prescribed in the Code where practicable

The Ruling Panel noted "the Code has provided for mandatory disclosure provisions with respect to areas where disclosure is fundamental to the operation of the wholesale market. At the same time, it provides for a self-regulating framework for other "disclosure information".

The Rulings Panel also stated it "considers that if information like the Pohokura Forecasts had been considered by the drafters of the Code to have been fundamental to the operation of the wholesale market, then mandatory disclosure would have been imposed" and that "fuel disclosure requirements are currently being considered by way of consultations in both the electricity and the gas markets and that Code changes would be the appropriate way for matters such as this to be dealt with so as to create certainty". The Authority adopted similar philosophy for the proposed new TPM: "structural and fundamental aspects of the methodology need to be in the proposed TPM rather than in other documents".¹⁸

We consider the Rulings Panel has articulated an appropriate approach to information disclosure. The Authority has stated the same thing in relation to trading conduct:¹⁹

The adoption of standards are useful where bright-line tests are not practical: precise rules are appropriate where it is possible to stipulate required behaviour in advance, but standards are necessary where it is not practical to specify a behaviour in advance (or where the application of the rule may depend on the circumstances, and the market regulator must determine after the event whether the behaviour met the rule). ...

The above commentary on standards versus principles is consistent with road safety rules. There are rules that can be hard-wired, and provide a high degree of certainty, such as speed and alcohol limits, but these can't capture everything, so they are combined with principles-based rules or 'catch-alls' such as the requirement for "Drivers not to be reckless or dangerous".²⁰ The principles-based prohibition on reckless and dangerous driving complements, rather than substitutes for, speed and alcohol limits.

We agree with Sapere "a clear standard is necessary (in the same manner that the road code prohibits dangerous driving without attempting to identify all possible forms of driving dangerously)".²¹

Sapere has similarly commented many rules "are expressed in general or imprecise terms. Economists refer to imprecise rules as "standards". Precise rules are used where it is possible to stipulate efficient behaviour in advance. Standards are used where it is not feasible to specify behaviour in advance, or where the application of the rule may depend on the circumstances, and the interpreting body must determine after the event whether the behaviour met the intent of the rule. ..."²²

The consultation paper stated that "There are disadvantages to writing specific provisions into the Code, for example the risk of creating loopholes or the opportunity for gaming". It is unclear what the loopholes or opportunities for gaming might be.

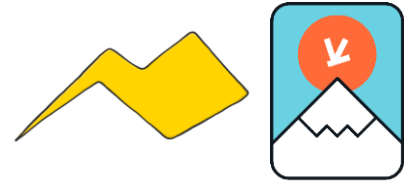
¹⁸ https://www.transpower.co.nz/sites/default/files/uncontrolled_docs/36.%202022%20Mar%202021%20-%20Letter%20from%20EA%20%28Transpower%20TPM%20Checkpoint%20B%20Submission%29.pdf

¹⁹ Electricity Authority, MINISTERIAL BRIEFING Electricity Authority: HSOTC Compliance Investigations, 16 April 2021.

²⁰ Section 7, Land Transport Act 1998.

²¹ Kieran Murray and Toby Stevenson, Sapere, Cross submission comments: draft decision of the Electricity Authority: alleged UTS on 26 March 2011, 19 May 2011.

²² Sapere, Kieran Murray, Claimed undesirable trading situation, 26 March 2011, 6 April 2011.



We do not consider the Authority's previous conclusions provide a safe basis for rejecting the approach of prescribing disclosure requirements for fundamental parts of the disclosure regime. The Authority appears to have misconstrued our arguments on this matter, which is reflected in the comments from our previous submission on WMID:²³

Clarification of our view on Code versus the Guidelines

In our previous submission, we commented "The Authority has put too much faith in voluntary Guidelines: As a general rule, for voluntary guidance to be preferred there would need to be some advantage in providing market participants discretion over what is disclosed" and "Some elements of the Guidelines belong in the Code e.g. the information listed in clause 6.27 as non-comprehensive examples of information the Authority considers could reasonably be expected to have a material impact on prices in the relevant markets and therefore is disclosure information".

We appreciate that the Authority has responded to our submission point.

In the response, the Authority commented that: "It is appropriate for the Guidelines to be more detailed than the Code. The Authority cannot detail every situation where disclosure may be required, and judgment is needed in each circumstance to apply the rules appropriately."

There is nothing in this response we disagree with, or that is inconsistent with our original submission points. The response doesn't mean the Code cannot or should not include more detail than at present, including specific examples.

Including some of the elements of the Guidelines into the Code would appropriately reflect the balance between principles and prescription, while recognising the Guidelines should be more detailed than the Code, and that the Code cannot anticipate everything that should be disclosed.

Compliance monitoring and enforcement is important for building trust and confidence

Regardless of the outcome, the Rulings Panel decision highlights compliance action can provide clarity and precedent about Code requirements.²⁴ The Rulings Panel identified a number of policy issues with the current WMID rules, not just the "will have" disclosure threshold, which should be addressed as part of the Authority's proposed Code amendment consultation.

We consider it regrettable the Authority failed to take enforcement action against Genesis itself. Instead the Authority relied on Haast to argue on the side of consumers. If Haast had not stepped in the problems which resulted in the urgent Code amendment and this consultation would not have been identified.

The Authority has a poor record of creating and enforcing wholesale market competition rules which protect consumers, most notably in WMID and trading conduct. The Authority has still never referred a matter to the Rulings Panel concerning either area of the Code, even though there being numerous alleged breaches. No trading conduct case has been referred to the Rulings Panel despite the Authority's own investigator recommending referring Genesis to the Rulings Panel in relation to Tekapo A 'islanding', and the Authority finding Genesis, Mercury and Meridian have each breached the HSOTC rules on separate occasions.

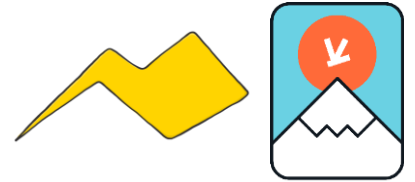
It is positive the Authority recognises it needs to take "a robust regulatory approach which enhances transparency, promotes good market behaviour, and demonstrates suitable compliance and enforcement".²⁵

²³ Electric Kiwi and Haast, The Authority proposals will improve the Guidelines for participants on wholesale market information disclosure obligations, 20 October 2020 <https://www.ea.govt.nz/assets/dms-assets/27/Electric-Kiwi-and-Haast.pdf>

²⁴ The Authority's recent investigation into the alleged breach of the HSOTC rules by Contact and Meridian similarly, for example, highlighted that the HSOTC rules needed to be replaced and that they "shielded" market participants engaged in market manipulation and/or mis-use of market power.

It is likely the issues with the HSOTC/safe harbour rules would have been identified earlier/been able to be addressed prior to December 2019 if the rules had been properly monitored and enforced e.g. Meridian has commented its December 2019 conduct is consistent with its normal risk management strategy, and the Authority identified what it considered to be a breach by Meridian in 2016.

²⁵ Electricity Authority, STATEMENT OF INTENT, 1 JULY 2021 – 30 JUNE 2025.



While we acknowledge the Authority is increasing its monitoring and enforcement resourcing and capability, the Authority will need to demonstrate it is willing to enforce the Code without fear or favour to build trust and confidence. It will take time for the Authority to build up a proven track record of enforcement and compliance.

Concluding remarks

Between 1 November 2018 and 13 January 2019, Genesis knew there would be prolonged planned outages at the Pohokura gas field in February 2019 and that, as a result of the planned outages, there would be a significant curtailment of its gas supply, which would impact its thermal generation capacity and contract position.

This is information, which could reasonably have been expected to impact on prices and/or inform expectations about future prices, meant Genesis had an information advantage over other market participants, and accordingly is information that should be required to be disclosed. Under the Authority's proposed Code amendment the information would still not have to be disclosed. The proposed Code amendment, while a welcome improvement, does not go far enough to address the problems with the WMID requirements or the EPR concerns about information disclosure rules.

While Genesis claimed that during the relevant period, it did not expect the reduction in gas supply from the Pohokura gas field to materially impact on Genesis' generation capacity, the Authority should consider the implication that this information would still not have to be disclosed with the proposed Code amendment, in light of its commentary that one of the reasons for high wholesale electricity prices is reduction in gas supplies including Pohokura:²⁶

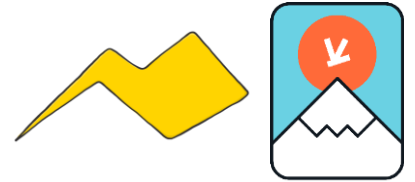
Gas supplies are reduced and the spot price for gas is higher than historical averages. All available gas is contracted, and users including some generators have had to accept a reduction in their contracted quantities. This is largely a consequence of a deterioration of output from the Pohokura gas field not anticipated so early in the field's life cycle.

Yours sincerely,

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²⁶ <https://www.ea.govt.nz/operations/wholesale/security-of-supply/spot-prices-and-the-wholesale-market-review/>



Appendix: Responses to the Electricity Authority's consultation questions

Question	Electric Kiwi and Haast response
Q1. Do you agree if the original drafting (will impact prices) were left to stand this could negatively impact outcomes for consumers?	Yes.
Q2. Regarding the three 'policy states' described above, have you noticed a change in participants' disclosure behaviour between any of these times?	<p>No.</p> <p>The change from “will have” to “likely to” and “will have” may not be sufficient, on its own, to significantly improve disclosure/wholesale market transparency particularly as it is coupled with the high threshold of “material impact”.</p> <p>The proposed Code amendment would not result in disclosure of the Pohokura outage information in similar circumstances to 2018.</p>
Q3. Regarding the three 'policy states' described above, has your organisation changed its disclosure behaviour between any of these times?	Not applicable.
Q4. Do you agree with the objectives of the proposed amendment? If not, why not?	<p>We do not agree with the policy intent as it is articulated in the consultation paper.</p> <p>The consultation paper has recast the Authority's policy intent from improved information, enhanced transparency and reduction in information asymmetries to “information should be treated as disclosure information where it is likely to have a material impact on prices”.</p> <p>The policy intent in the consultation paper confuses 'means' with 'ends'. The consultation paper specified the policy intent as the solution. This simply results in a circular and tautological outcome that the Code should require information to be disclosed “where it is likely to have a material impact on prices” because “The policy intent is that information should be treated as disclosure information where it is likely to have a material impact on prices”.</p>
Q5. Do you agree with the wording of the proposed amendment? If not, why not?	<p>The proposed amendment is an improvement on the status quo but does not go far enough to improve transparency/reducing information asymmetries in the operation of the wholesale electricity market.</p> <p>See response to Q7 for alternative drafting and WMID reform options.</p>
Q6. Do you agree the benefits of the proposed amendment outweigh its costs?	Yes. It should be recognised there isn't necessarily a linear relationship between compliance costs and the volume of information required to be disclosed e.g. a clearer set of disclosure rules that require disclosure of more information can have lower compliance costs than an unclear set of disclosure rules that require disclosure of less information.
Q7. Are there any alternative options that could achieve the objectives?	<p>Yes. Consistent with the response to Q4, we have answered this question in light of the policy intent articulated in the Authority's Annual Corporate Plan, Statement of Corporate Intent and Guidelines for participants on wholesale market information disclosure obligations:</p> <ul style="list-style-type: none"> • The threshold should be “may” or “might”, consistent with the Rulings Panel commentary, rather than “likely to”. We are concerned the requirements of “likely to”, “material impact” and the required link between the availability of the information and



Question	Electric Kiwi and Haast response
	<p>wholesale electricity prices, will still set too high a threshold for disclosure, and reduce the potential benefits of the proposed Code amendments</p> <p>It would be better to rephrase the requirement to something like “the participant expects, or ought reasonably to expect, [may][is likely to] inform views or expectations about prices in the wholesale market”. The “may” formulation is our preferred option.</p> <ul style="list-style-type: none"> <p>Electric Kiwi and Haast agree with the Rulings Panel that mandatory disclosure should apply “with respect to areas where disclosure is fundamental to the operation of the wholesale market”. Information like the Pohokura forecasts, and other circumstances where there has been “A significant change in fuel supply situation”,²⁷ are fundamental to the operation of the wholesale market, and the WMID requirements should explicitly require their disclosure.</p> <p>The Guidelines include an appropriate “bright-line test” that should be moved to the Code, and demonstrates it is not necessary to rely solely on principles-based standards.</p> <p>The Authority should follow Rulings Panel direction about the inter-relation between clauses 13.2A(2)(ba) and 13.2A(2): The Rulings Panel stated “Clause 13.2A(2)(ba) of the Code does not, in the Panel’s opinion, sit well within clause 13.2A(2). Rather the Panel believes it is a matter that should be considered as part of the considerations as to whether information is disclosure information under clause 13.2A(1) and the definition of the term “disclosure information” in clause 1.1 of the Code.”</p> <p>The Authority should amend the Code to require disclosure where only one party is a “participant” as defined in the Act. This would avoid the Genesis-OMV situation where “The GSA was entered into between OMV and Genesis. Genesis is a participant. OMV is not.” This element of the Rulings Panel decision isn’t touched on at all, even indirectly, in the current consultation.</p>
<p>Q8. Do you agree the proposed 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 Electricity Industry Act 2010.</p>	<p>No. See response to Q7.</p>
<p>Q9. Do you agree the Authority’s proposed amendment complies with section 32(1) of the Act?</p>	<p>Yes, to the extent that the proposal is better than the status quo.</p>
<p>Q10. Do you have any comments on the drafting of the proposed amendment?</p>	<p>See response to Q7.</p>

²⁷ Electricity Authority, Guidelines for participants on wholesale market information disclosure obligations, 23 March 2021, clause 6.30(b) at: <https://www.ea.govt.nz/assets/dms-assets/27/Guidelines-for-participants-on-wholesale-market-information-disclosure-obligations-clean.pdf>.