

Permanent change to the definition of disclosure information

Decision

26 October 2021



Executive summary

The Electricity Authority (the Authority) has decided to amend the definition of ‘disclosure information’ in clause 1.1 of the Electricity Industry Participation Code 2010 (the Code).

The amendment will permanently change the definition of ‘disclosure information’ to information that is about and held by a participant, and that a participant expects, or ought reasonably to expect, if made available to the public, will, or is likely to, have a material impact on prices in the wholesale market.

The Authority consulted on the proposed amendment and, after reviewing submissions, the Authority considers permanently amending the definition of disclosure information as described will address the issue it has identified with the current drafting and will provide net benefits to consumers.

The permanent change allows for an effective disclosure regime where relevant information is disclosed into the market. It is important that consumers are in the best possible position to benefit from a well-functioning market where market participants are well informed to make decisions that increases competition leading to more efficient pricing for consumers.

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1 The Authority has decided to amend the Code

1.1 The Authority has decided to amend the definition of 'disclosure information' in clause 1.1 of the Code. The amendment will change the definition of 'disclosure information' as follows:

information that is about and held by a participant, and that a participant expects, or ought reasonably to expect, if made available to the public, will, or is likely to, have a material impact on prices in the wholesale market

1.2 The rest of this paper sets out the steps the Authority has taken in coming to this decision, the reasons for the Authority's decision, and the steps it will take to implement this decision.

2 Background

2.1 An effective disclosure regime is a fundamental feature of a well-functioning electricity market. An effective regime can reduce inefficient information asymmetry between informed and uninformed market participants. Information asymmetry in a market can lead to transfers of wealth from uninformed to informed market participants when they trade with each other, potentially leading to inefficient market outcomes.

2.2 An effective disclosure regime can also reduce information costs, assist existing and potential market participants in making informed decisions, and enhance confidence in the integrity of the market by removing opportunities for insider trading and the creation of a false market.

2.3 Clause 13.2A of the Code was introduced in 2013 and imposes 'continuous disclosure' obligations on participants in relation to information they hold that is relevant to prices in the wholesale electricity market. The wholesale electricity market comprises the spot market, the hedge market (including financial transmission rights), and the ancillary services market.

2.4 Clause 13.2A requires each participant to make 'disclosure information' readily available to the public, free of charge, as soon as practicable after becoming aware of the information.

2.5 Prior to March 2021, clause 1.1 defined 'disclosure information' as information that:

- (a) is about the participant;
- (b) is held by the participant; and
- (c) 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.

2.6 The continuous disclosure obligation (and definition of disclosure information) was added to the Code after a comprehensive review by the Authority's Wholesale Advisory Group (WAG) in 2012, and subsequent Code amendment by the Authority in 2013. The Authority stated at the time that an effective information disclosure regime should:

- (a) build confidence in the electricity market;
- (b) promote efficient monitoring and information provision; and
- (c) reduce any information asymmetry between informed and uninformed market.

- 2.7 The design of clause 13.2A closely aligns with the NZX continuous disclosure obligations which uses similar wording.¹ The test in the Code requires looking at both what the participant actually expects and what a reasonably informed participant, being aware of the information that the participant holds, would expect in the circumstances (this second part is called the reasonable person test²). The obligation to disclose information is subject to several exclusions that may excuse a participant from publishing information if they apply.
- 2.8 Prior to these changes in 2013 the Code required certain participants to disclose ‘relevant information’, which was defined to include information ‘*disclosure of which would, or is likely to, materially affect the price of electricity or of any contracts relating to electricity traded under this Code*’.
- 2.9 As explained in more detail below the Authority initiated an urgent change and subsequent review of the definition of ‘disclosure information’ in early 2021 in response to a Rulings Panel determination. The scope of the review was focussed on the specific issue arising from the definition of ‘information disclosure’. For example, the review is not considering the information disclosure regime in its entirety because the regime was comprehensively reviewed in 2013 and with the exception of the exclusions potentially being used inappropriately no other issues have been identified.
- 2.10 In its recently concluded review of thermal fuel disclosures the Authority signalled to stakeholders that it was concerned that some of the exclusions may be inappropriately preventing relevant disclosures. The Authority intends to use the data received under the new disclosure reporting regime (effective 1 April 2021) to monitor reliance on all the exclusions and will conduct a review in future if required.
- 2.11 The Authority also notes that the current exclusions do not privilege or ‘shield’ the confidential information of non-participants over that of participants. The Code allows participants to withhold disclosure information where the participant is bound by a legal obligation to keep the information confidential. This does not mean that confidential information of non-participants is privileged in any way, and participants must apply the words of the Code without regard to whether their counterparty is a participant or not.
- 2.12 As part of its review the Authority consulted stakeholders on a proposal (discussed more below) and received six submissions from seven parties, as set out in Table 1 below. The Authority would like to thank those participants who provided submissions. Submissions are available on the Authority’s website at:
<https://www.ea.govt.nz/development/work-programme/risk-management/wholesale-market-information-disclosure/consultation/>.

Table 1: List of submitters

Submitter	Category
Contact Energy	Generator/Retailer
Electric Kiwi and Haast Energy	Retailer/Trader

¹ Guidance note: [NZX Guidance Note Continuous Disclosure](#)

² This interpretation of the words “ought reasonably to expect” is based on case law.

Submitter	Category
Genesis	Generator/retailer
Meridian	Generator/retailer
Nova	Generator/Retailer
Transpower	System operator/grid owner

3 An effective disclosure obligation requires the disclosure of information even if the impact on prices is not certain

- 3.1 The Authority considers that an effective information disclosure regime is a fundamental feature of a well-functioning electricity market, and that an effective disclosure obligation is one that captures information even if it is not certain that the information will have a material impact on prices. Such information is important to informing views about what prices may be in the future, which in turn will inform participants' decision making from the short-term (eg, operational decisions) through to the long-term (eg, investment decisions).
- 3.2 The alternative is a disclosure regime that only applies to circumstances in which the impact of the information is certain. In the context of the Authority's information disclosure regime, that would require a reasonable person to be certain that a particular piece of information would have a material impact on prices before it was subject to the information disclosure regime. This is undesirable for several reasons.
- 3.3 In practice this would result in very little information being disclosed – this is because it is difficult for any party to be certain that any particular piece of information will have a material impact on prices. Prices in the wholesale market are determined by a complex and dynamic interaction between supply, demand, and transport factors. Even after the fact it can be difficult to determine causation within this complex system, and so a test that requires a reasonable person to be certain that a piece of information would cause a material impact on prices ahead of time would likely be very hard to meet.
- 3.4 The Authority considers that the features of an effective disclosure regime include that it reduces information asymmetries and that it increases confidence in the electricity market. A regime that only required disclosure of information that is certain to have a material impact on prices would significantly restrict the amount of information captured by the regime, and result in less information being disclosed. This would do little to reduce information asymmetry between informed and uninformed participants, and would not increase confidence in the electricity market.
- 3.5 The Authority acknowledges that one of the reasons for reform as stated by WAG and accepted by the Authority was that the (pre-2013) *definition of information that needs to be disclosed is very wide, so a participant may be required to disclose information that is of little or no value to the electricity market.*³

³ The Authority consultation paper: <https://www.ea.govt.nz/assets/dms-assets/13/13939Wholesale-Market-Information-Disclosure-Obligations.pdf>

- 3.6 However, it is not clear that the WAG or the Authority considered the term ‘likely’ to be the only factor contributing to the concern that information that is of little or no value to the electricity market may be disclosed. For example, WAG’s 2012 discussion paper incorrectly stated that the relevant test was whether the information *would (or is likely to) affect the price of electricity or any contracts relating to electricity traded under the Code*. That is, it omitted the word ‘materially’ from the test completely.⁴ The Authority’s 2012 consultation paper correctly stated the test to include ‘materially affect’, stating the proposed new test was ‘less broad’ (only requiring information that is expected to ‘have a material impact on prices’) and that the greater clarity and improved awareness of the proposed disclosure obligations would lead to an overall increase in the information disclosed by participants.
- 3.7 In any event, the Authority is considering the costs and benefits of amending the definition of ‘disclosure information’ afresh in the section below.
- 3.8 The Authority has evidence that its position (that an effective disclosure obligation requires the release of information where its impact on prices is not certain) is long-standing:
- (a) the Authority’s compliance function, and the Authority’s Compliance Committee, have previously determined that information about risks and uncertainties was within scope of the disclosure obligation in the Code. For example, the investigator’s report for the Compliance Committee found that Genesis was in possession of disclosure information in the *Haast v Genesis* case prior to it being determined by the Rulings Panel.
 - (b) the Authority’s guidelines on information disclosure,⁵ which were drafted contemporaneously with the 2013 Code amendments, state:
 - (i) *[6.5] The definition of disclosure information is... aimed at capturing a participant’s own contribution to the collective position.*
 - (ii) *[6.10] The Authority’s focus is on information that is likely to have a material impact on prices in the relevant markets. ... 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.*
 - (c) historical policy documents:
 - (i) The “Letter of Expectations” from the Minister of Energy to the Authority Board (26 October 2010) sets out a number of initial priorities for the newly formed Authority, including:

requiring all generators above a certain size, including SOEs and listed privately-owned companies, to disclose information (such as hydro reserves, fuel stockpiles and availability, planned outages and net hedge

⁴ The wording of the Code at the time was *information that is about and held by a participant, and that a participant expects, or ought reasonably to expect, if made available to the public, will have a material impact on prices in the wholesale market.*

⁵ The Authority’s guidelines for disclosure obligations: <https://www.ea.govt.nz/assets/dms-assets/15/15138Wholesale-market-information-WMI-disclosure-guidelines.pdf>

positions) which informs the marketplace on supply risks and management of risks.

This makes it clear that creation of a disclosure regime was a key initial priority, and that its purpose should be broad and encompass information about risks, ie, uncertain information.

- (ii) Information disclosure rules in effect until 30 September 2013 required the disclosure of ‘relevant information’, which includes, amongst other things, information:

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

- (iii) Electricity Industry Participation (Disclosure Obligations) Code Amendment 2013 certified amending instrument and Gazette notice states with regards to the purpose of the amendment which introduced the current provisions:

The amendment updates and clarifies the obligations of participants in relation to making information readily available to the public if the information is likely to affect prices in the relevant markets.

4 A 2021 Rulings Panel decision illustrated that the current disclosure regime may not be effective

- 4.1 In January 2021 the Rulings Panel determined that the words “will have” in the definition of disclosure information created a high threshold before information could be classed as disclosure information. As a result of this determination the Authority considers that a reasonable person would have to be *certain* that a particular piece of information would materially impact prices before the disclosure obligation applied.⁶
- 4.2 As discussed above, a requirement for certainty between the information and a material impact on prices is inconsistent with the Authority’s understanding of an effective information regime, the Authority’s intent at the time of the 2013 reforms, and with the Authority’s application of the relevant parts of the Code since then.
- 4.3 In response to the Ruling Panel’s determination the Authority amended the Code under urgency to ensure the information disclosure settings in the Code were appropriate to protect consumers. This was to support the expected tight supply situation over winter 2021, as a tighter security situation meant information coming out of the gas sector could have a bigger impact on electricity prices. If less information was disclosed about the gas situation in a dry year than intended, other market participants may not have had a complete picture to base trading and pricing decisions on, thus creating inefficient pricing and reducing confidence. The urgent Code amendment came into effect on 6 April 2021 and will expire as a matter of course on 5 January 2022.
- 4.4 The urgent Code amendment changed the definition of ‘disclosure information’ as follows:

... information that:

⁶ Rulings Panel decision *Haast v Genesis*: <https://www.electricityrulingspanel.govt.nz/assets/dms-assets/27/28-Jan-2021-Rulings-Panel-final-decision.pdf>

- a) *is about the participant; and*
- b) *is held by the participant; and*
- c) *the participant expects, or ought reasonably to expect, if made available to the public, ~~will~~ is likely to have a material impact on prices in the wholesale market.*

4.5 The issue the Authority is seeking to address is that, when the urgent Code expires, the definition of ‘disclosure information’ will revert to a test requiring certainty between the information and a material impact on prices. If this occurs consumers may lose the benefit of more efficient pricing caused by an increase in competition enabled by effective information disclosure.

4.6 If materially less information is disclosed to the market then participants may lose confidence in the market and make less optimal operational decisions, which could also be detrimental to consumers.

5 The Authority has considered several options to ensure the disclosure regime in the Code is effective

5.1 The Authority has considered the following options to address the issue identified above:

- (a) no change (let the urgent Code amendment expire and revert to the original definition of ‘disclosure information’: *will* materially impact prices).
- (b) amend the definition of ‘disclosure information’ to include a different certainty threshold between the relevant information and a material impact on prices, including the following:
 - (i) *likely to have* a material impact
 - (ii) *may* materially impact prices
 - (iii) *might* materially impact prices
 - (iv) *could* materially impact prices; and
 - (v) *expected to* materially impact prices;
- (c) amend the Code to include specific provisions on particular categories of information; and
- (d) reformulate the relevant test.

5.2 In assessing the various options, the Authority has considered:

- (a) the extent to which each option addresses the problem definition; and
- (b) the costs and benefits of each option.

Status quo (or do-nothing approach)

5.3 If the Authority takes no further action the urgent Code amendment it put in place in April 2021 would expire in January 2022 as a matter of course. This would revert the definition of ‘disclosure information’ to including information that ‘*will have* a material impact on prices’. As discussed above, this test would not meet the Authority’s criteria for an effective information disclosure regime and could result in material harm to consumers.

Different thresholds of certainty between information and a material impact on prices

- 5.4 The Authority has considered several different certainty thresholds between information and a material impact on prices. These different thresholds have been discussed in a variety of sources, including previous policy documents and in stakeholder submissions. The Authority prefers this approach because:
- (a) a small and targeted change to the Code will lessen the risk of unintended consequences; and
 - (b) it is within the scope of the Authority's review, and only targets the specific issue identified in the Rulings Panel decision.
- 5.5 The Authority's preferred certainty threshold is discussed in more detail below.

Prescriptive categories

- 5.6 An alternative the Authority has considered is to require the disclosure of specific categories of information. This approach was also recently considered by the Authority in its review of thermal fuel information disclosure.⁷
- 5.7 In the consultation paper the Authority identified several disadvantages to this approach, including that it could result in disclosure of information that has no material impact on price, and the risk that such an approach would create loopholes and opportunities for gaming by participants. The Authority has not received or identified any information to change its conclusion that this approach to information disclosure is undesirable and notes that such an approach would require constant Code revisions to ensure it is up-to-date and relevant.
- 5.8 The Authority also notes the Rulings Panel did not recommend this option, as has been incorrectly asserted by some submitters.

Reformulated test

- 5.9 One of the submissions received during consultation was to change the relevant test '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 Authority has assessed this proposal and considers that whether the information has a *"material impact on prices"* is a more appropriate test than whether the information *"inform[s] views or expectations about prices in the wholesale market"*.
- 5.10 While the term "materially impact" is not defined in the Code, a materiality test is a relatively well understood concept and is used in other regulatory regimes, for example the NZX which requires information to be material before it is disclosed. The Authority has also provided further guidance to participants in its disclosure guidelines on what information is likely to have a material impact, for example information that has a sustained effect across multiple trading periods. The guidelines also set out several factors that holders of information may find useful to consider when applying the "material impact on prices" test. As a result, the Authority considers the material impact test is sufficiently well understood by participants while still providing enough flexibility to allow participants to consider the facts and circumstances of the particular situation and

⁷ The Authority consultation paper – Review of Thermal Fuel Information Disclosure: <https://www.ea.govt.nz/assets/dms-assets/27/27060Wholesale-market-information-disclosure-consultation-paper.PDF>

exercise their judgment in the first instance as to whether the information is likely to have a material impact on prices. The Authority considers the holder of the information is in the best position to know the relevant facts and circumstances, and to exercise that judgment in the first instance.

- 5.11 The use of “material impact on prices” also operates, as noted by the Rulings Panel, as a limit on the information that may be disclosed. Given the threshold will be lowered by the proposed “likely to” test, the Authority considers it appropriate that the materiality test remain in order to ensure the disclosure regime information relevant to prices.
- 5.12 The Authority considers the proposed “*inform views or expectations about prices*” test is not a well understood test, is not well used in other regulatory regimes or legislation, and will create greater uncertainty within the industry as to what information should be considered disclosure information.

6 The Authority has decided to require disclosure where information will, or is likely to, have a material impact on prices

- 6.1 The Authority’s preferred option is to amend the definition of ‘disclosure information’ in the Code to be:

... information that:

- d) is about the participant; and*
- e) is held by the participant; and*
- f) the participant expects, or ought reasonably to expect, if made available to the public, will, or is likely to, have a material impact on prices in the wholesale market.*

- 6.2 The Authority’s understanding of the meaning of ‘is likely to’ in the context of the definition of disclosure information is set out below. The Authority intends to amend the *Guidelines for participants on wholesale market information disclosure obligations* to include this as guidance:

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.

In this context the term “likely to” means that information that a participant holds about itself will be disclosure information if there is a real and substantial prospect⁸ of that information having a material impact on prices. The threshold for determining whether information is “likely to” (i.e. real and substantial prospect) have a material impact on prices is therefore above that of a mere possibility but is not so high as more likely than not.⁹

Participants will need to exercise judgement as to 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 is

⁸ *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1994] 2 NZLR 152, 161. See also *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 at 562 – 563, CA.

⁹ *Ibid.*

likely to have a material impact on prices, and to err on the side of disclosing the information.

- 6.3 Adding the words 'or is likely to' is the Authority's preferred option because it addresses the identified issue and the benefits to consumers outweigh the costs to consumers.
- 6.4 The option addresses the issue because it will result in a significant increase in information that is 'disclosure information'. This in turn is expected to increase the amount of information that is disclosed to the market, and will also increase the amount of information that participants must report to the Authority as part of their quarterly information disclosure reporting obligations. This will ensure a more effective disclosure regime, as the Authority has defined it, because it will reduce information asymmetry and increase confidence in the market.
- 6.5 The expected incremental benefits of the change arise from increased information being published, and increased visibility by the Authority of participants' disclosure activity. This is expected to benefit consumers by allowing for more effective competition (by reducing any information asymmetries) and increasing efficiency (by allowing for better informed decision making by participants). The Authority also accepts there will be incremental costs to its proposal, largely arising from the increased amount of information participants must actively manage in the public domain.
- 6.6 The Authority's analysis is explained in more detail below.

The Authority's preferred option will address the issue by reducing information asymmetry and increasing confidence

- 6.7 The Authority considers that this amendment will increase the amount of information that is 'disclosure information' compared to the status quo. As discussed above, the status quo test which requires a high degree of certainty that information will materially impact prices is a very high threshold and, given the complexity of price formation in many wholesale markets, is likely to result in relatively little information meeting the definition of 'disclosure information'.
- 6.8 If the increase amount of 'disclosure information' is also then published (i.e., if it is not covered by an exclusion) this will benefit consumers through more efficient prices because the market would be better informed. That is, participants will be able to make more efficient decisions, based on more and better information, which should flow through to consumers through the effects of competition. Even if the disclosure information was not disclosed (eg, through the operation of an exclusion), this will be reported as such to the Authority under the new reporting regime (clauses 13.2B-D of the Code), and market confidence may increase due to an understanding that the Authority is better able to monitor disclosure behaviour and will be able to make better informed policy decisions in future.

On balance, the Authority considers that its proposal will increase certainty

- 6.9 The Authority acknowledges that any change to the Code can create uncertainty, which can be detrimental to participants and consumers. However, on balance the Authority considers that the Code amendment will increase certainty amongst participants.
- 6.10 The Authority considers the Code amendment will address some existing uncertainty caused by a disconnect between the meaning of the Code as interpreted by the Rulings Panel, and the Authority's intent and industry's application of the Code. The Authority expects that aligning the intent and the wording of the rule will reduce uncertainty.

- 6.11 There will always be uncertainty regarding how participants will interpret the rule and how it will be enforced – this is not a distinguishing feature of the options the Authority considered. However, interpretation of the word ‘likely’ in the amended definition of disclosure information is supported by a large body of case law, and the Authority will also update its *Guidelines* to include guidance on the interpretation and application of the amended definition of disclosure information.
- 6.12 As noted in the consultation paper, there is still some alignment between the NZX disclosure rules and the Authority’s information disclosure regime and this amendment only moves away from one part of the wording for the NZX disclosure test. The use of the reasonable person test remains in both the Code and the NZX rules. In addition, there do not appear to be any NZX decisions to date which provide a detailed analysis of what the threshold is for disclosure under its rules.

The Authority’s preferred option will likely increase compliance costs

- 6.13 The Authority accepts there will be an incremental increase in compliance costs. The costs should not be associated with identifying the information (participants should already have processes in place for considering what information they must disclose – the threshold in the test does not alter that). However, increased costs may arise from the administration of actually disclosing more information. For example, the costs associated with publishing it, ensuring it is sufficiently accurate for publication, and monitoring it to ensure it does not become out of date and misleading.

Other costs are less relevant

- 6.14 Some submitters raised other potential costs they considered were relevant to the Authority’s decision, such as an increased risk of litigation or the costs of applying judgement when determining whether to disclose information. The Authority does not consider that the risk of litigation is materially different across any of the options the Authority has considered, and (apart from having prescriptive disclosure rules) the same applies for participants having to exercise their own judgment. The information disclosure rules apply to sophisticated industry participants who understand wholesale markets, have access to a body of case law, as well as the Authority’s *Guidelines* document.

The Authority does not consider the proposal will increase the likelihood of collusion or decrease the likelihood of innovation in a meaningful way

- 6.15 In its consultation paper the Authority identified the potential costs of information disclosure as including reducing innovation and facilitating collusion. The Authority considers these are relevant considerations in designing disclosure obligations. However, on reflection and after reviewing submissions, the Authority does not consider the options it considered to materially impacts these costs, and so has not considered them further.

The Authority considers there is little risk of participants being confused by greater disclosure

- 6.16 The Authority has placed little weight on the concern that participants may be confused or overwhelmed by the amount of information disclosed. The Rulings Panel has highlighted the concern that important information may not be captured by the disclosure regime under the status quo. While the proposal seeks to increase the amount of disclosure information, the Authority considers its proposal is unlikely to increase the amount of disclosed information to the point that participants are confused. Regardless

of the 'certainty threshold, the material impact on prices test operates to limit the information that may otherwise be disclosed, and participants do not have to disclose information if it 'concerns an incomplete proposal or negotiation' or 'comprises matters of supposition or is insufficiently definite to warrant being made readily available to the public'.¹⁰ Participants are also barred from disclosing information that is misleading or deceptive.¹¹

- 6.17 The Authority expects participants to be capable of exercising their own judgement when assessing information and the impact it may have on themselves and the market.

The Authority has decided to add to, rather than replace, words in the Code to address a small risk

- 6.18 In its consultation paper the Authority proposed to replace 'will' with 'is likely to'. However, on reflection and further advice this approach raised a small risk that the test would exclude situations where the participant is certain the information will cause a material impact on prices. The Authority has amended its proposal to remove this risk.

7 Next steps

- 7.1 The Authority has begun the administrative processes to amend the Code and is targeting a go-live of 23 November 2021.
- 7.2 The Authority will update the *Guidelines for participants on wholesale market information disclosure obligations*, reflecting the amended Code. The Authority will publish the updated Guidelines at the time it amends the Code.

¹⁰ The Code, clause 13.2A(2).

¹¹ The Code, clause 13.2

Appendix A Approved Code amendment

A.1 The Authority will amend the definition of 'disclosure information' in clause 1.1 of Part 1 of the Code as follows:

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

- (a) is about the **participant**; and
- (b) is held by the **participant**; and
- (c) the **participant** expects, or ought reasonably to expect, if made available to the public, will, or is likely to, have a material impact on prices in the **wholesale market**.