

Wholesale market information

Review of disclosure regime Decision

29 May 2018



Executive summary

The Electricity Authority (Authority) has consulted on amendments to clauses 13.2 and 13.2A of the Electricity Industry Participation Code 2010 (Code) relating to wholesale market information disclosure. The Authority has also consulted on proposed changes to the Authority's *Guidelines for participants on wholesale market information disclosure obligations* (guidelines) to help participants understand their disclosure obligations.

The consultation proposals had their origins in recommendations from the Authority's now-disestablished Wholesale Advisory Group (WAG).

After considering its statutory objective, feedback provided both in submissions and provided at a workshop, the Authority has decided to amend the wholesale market information disclosure obligations in clauses 13.2 and 13.2A of the Code by:

- replacing the 'commercial disadvantage' exclusion with a 'reasonable person' exclusion
- amending the timeframe for addressing misleading, deceptive, or incorrect information.

In respect to the guidelines, the Authority has decided to:

- retain most of the changes it proposed in the consultation
- make some further minor changes.

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1 Decision

- 1.1 The Electricity Authority (Authority) has decided to amend the wholesale market information disclosure obligations in clauses 13.2 and 13.2A of the Electricity Industry Participation Code 2010 (Code) by:
- (a) replacing the 'commercial disadvantage' exclusion with a 'reasonable person' exclusion
 - (b) amending the timeframe for addressing misleading, deceptive, or incorrect information.
- 1.2 The Authority considers the Code amendment promotes the competition, reliability, and efficiency limbs of the Authority's statutory objective.
- 1.3 The Authority has also decided to make some changes to the Authority's *Guidelines for participants on wholesale market information disclosure obligations* (guidelines).

2 Background

- 2.1 On 8 August 2017, the Authority published the *Wholesale market information: Review of disclosure regime* consultation paper (consultation paper),¹ which proposed:
- (a) replacing the 'commercial disadvantage' exclusion' with a 'reasonable person' exclusion in clause 13.2A(2) of the Code
 - (b) amending the timeframe for addressing misleading, deceptive, or incorrect information in clause 13.2 of the Code
 - (c) amending the guidelines to help participants understand their disclosure obligations.
- 2.2 These proposals originated from recommendations by the Authority's Wholesale Advisory Group (WAG).²
- 2.3 In the consultation paper, the Authority set out its views on the benefits of the proposed Code amendment in the context of its statutory objective. The Code amendment would:
- (a) reduce uncertainty and the costs of obtaining information
 - (b) enhance confidence in the wholesale market, particularly because more relevant information would need to be disclosed where previously it would not have been
 - (c) support the long term benefit of consumers because it would likely encourage greater participation (particularly in the hedge market), thereby promoting competition in the electricity market
 - (d) enhance the efficient operation of the industry through additional information being disclosed, which will enable more informed market participation and lower costs to obtain information
 - (e) contribute to reliability because it results in more information being disclosed, which supports security of supply through improved investment and operational decisions.

¹ <https://www.ea.govt.nz/dmsdocument/22417>.

² Wholesale Market Information: Review of disclosure exclusions, <https://www.ea.govt.nz/dmsdocument/21733>.

- 2.4 The Authority held a workshop on 12 September 2017 to clarify and further explain the proposed amendments to the Code, and the associated proposed updated guidelines.
- 2.5 After considering submissions on the consultation paper and feedback at the workshop, the Authority has decided to:
- (a) proceed with the Code amendments proposed in the consultation paper
 - (b) make some minor changes to the guidelines amendments proposed in the consultation paper.
- 2.6 This decision paper sets out the Authority's decision to proceed with amendments to clauses 13.2 and 13.2A of the Code and the guidelines and gives reasons for that decision.

3 Why the Authority made this decision

- 3.1 The Authority has made its decision by considering its statutory objective, submissions on the consultation paper, and feedback at the workshop.
- 3.2 The consultation paper included a qualitative analysis of the merits of the proposed Code amendments relative to the status quo (the existing information disclosure regime). This analysis showed the costs of the proposed amendments are expected to be small and outweighed by their benefits. The Authority also noted in the consultation paper that the proposed amendments supported the efficiency, reliability and competition limbs of our statutory objective for the long-term benefit of consumers.
- 3.3 Submitters largely supported the Authority's proposal to replace the 'commercial disadvantage' exclusion with a 'reasonable person' exclusion, and to amend the timeframe for addressing misleading, deceptive, or incorrect information. However, some submitters did not support how the Authority proposed to describe a 'reasonable person' in the guidelines. Some submitters also considered the Code should be more prescriptive—in particular, that a definition of a reasonable person should be in the Code rather than the guidelines.
- 3.4 The Authority considered the issues raised in submissions and decided to proceed with the proposed amendments (set out in Appendix A). We have also decided to make some minor changes to the guidelines in response to submissions.

4 Matters the Authority considered in making this decision

- 4.1 The Authority received submissions from the seven parties listed in Table 1. All submissions and a summary of submissions can be found on the Authority's website.³

Table 1: List of submitters

Submitter	Category
Contact Energy Limited (Contact)	Electricity generator and retailer
Genesis Energy Limited (Genesis)	Electricity generator and retailer

³ <https://www.ea.govt.nz/development/work-programme/risk-management/wholesale-market-information-clause-13-2-and-fuel/consultation/>.

Submitter	Category
Major Electricity Users' Group (MEUG)	Consumer representative
Mercury Energy Limited (Mercury)	Electricity generator and retailer
Meridian Energy Limited (Meridian)	Electricity generator and retailer
Pioneer Energy Limited (Pioneer)	Electricity (embedded) generator and retailer
Transpower New Zealand Limited (Transpower)	System operator

- 4.2 In addition to the submissions we received, the Authority also received feedback from interested parties at its workshop held in Wellington on 12 September 2017. The workshop slides and a summary of workshop feedback are both available on the Authority's website.⁴

The Authority considered eight matters to reach our decision

- 4.3 The Authority has considered the matters raised by submitters and considers they fall into eight categories:
- (a) interaction of the Code and guidelines
 - (b) replacing the 'commercial disadvantage' exclusion with a 'reasonable person' exclusion
 - (c) amending the timeframe for addressing misleading, deceptive, or incorrect information
 - (d) the interaction of the Planned Outage Co-ordination Process (POCP) and the guidelines
 - (e) the interaction of hedge disclosure requirements and the guidelines
 - (f) worked examples in the guidelines
 - (g) miscellaneous Code changes
 - (h) other guideline changes.

Interaction of the Code and guidelines

What the Authority proposed

- 4.4 The Authority noted in the consultation paper that the guidelines help participants understand the Authority's expectations around disclosing information, and how they can meet their obligations. However, the Authority did not make a proposal or state a position on how the Code and guidelines should interact.

⁴ <https://www.ea.govt.nz/development/work-programme/risk-management/wholesale-market-information-clause-13-2-and-fuel/events/>.

Submitters' views

- 4.5 Genesis and Meridian expressed concerns with the interaction of the Code and guidelines generally:
- (a) Genesis was wary of the Authority's desire to proceed with non-prescriptive Code amendments supplemented with amended guidelines—unless those guidelines were capable of absolute, consistent interpretation, Genesis felt it risked creating an environment where any challenge of market participant disclosure behaviour was extremely difficult, if not impossible, to rule on.
 - (b) Meridian considered that, while the guidelines were useful, the Code ultimately needed to 'stand on its own two feet' and be capable of being applied to a range of situations without resorting to the guidelines.
- 4.6 Contact and Genesis submitted the guidelines should be referenced in the Code. Genesis also considered the Code should include a requirement that the guidelines only be amended following industry consultation.
- 4.7 Contact and Meridian submitted the reasonable person definition should be in the Code rather than the guidelines:
- (a) Contact submitted the reasonable person definition should be in the Code, as it is the Code that sets out industry participants' responsibilities.
 - (b) Similarly, Meridian submitted the reasonable person definition should be included in the Code as it is the only way to give participants comfort and certainty that the example definition (currently in the guidelines) is the one that will ultimately be applied. Meridian submitted the guidelines did not 'bind' the Authority in the same way as the Code itself, the Code could also be enforced by participants, and the Rulings Panel are not constrained in their interpretation of the Code by guidelines issued by the Authority.⁵
- 4.8 Conversely, Mercury considered it was preferable not to incorporate the guidelines into the Code as doing so would add too much technical detail, limit the flexibility of the regime, and add compliance costs and uncertainty. Mercury believed the Authority had struck the right balance between being too prescriptive and being too vague. Mercury thought the guidelines should be reviewed regularly to ensure they remain fit for purpose.

The Authority's response

- 4.9 The Authority acknowledges the concerns raised by Genesis and Meridian about the interaction of the Code and guidelines. However, the Authority considers the principles-based style of regulation (which describes the objective sought and requires interpretation by participants according to circumstances which vary between each participant) is appropriate. This is because the participant is best placed to apply the reasonable person test to its own disclosure information. The Authority does not have access to each participant's disclosure information, and is therefore not able to prescribe which specific factors the participant should consider in the circumstances to determine whether the exclusion applies.
- 4.10 The Authority considers it helpful to issue guidelines as an educational tool for certain aspects of the Code from time to time. The Authority decided to issue guidelines for

⁵ Meridian also proposed that further detail be added to the definition of reasonable person. This is addressed in the next section, beginning at paragraph 4.24(b).

clause 13.2A of the Code as part of the new regime that came into effect in 2013. This decision was supported by a WAG recommendation.

- 4.11 The role of these guidelines is to assist participants to understand their obligations under clause 13.2A of the Code. The Authority considers the amended guidelines achieve this aim.
- 4.12 It is important to emphasise the distinction between the Code and the guidelines: the Code is a legal instrument imposing obligations on participants, whereas guidelines are not legally enforceable and are an educational tool to assist participants understand or apply those legal obligations. For this reason, the Code takes precedence over the guidelines.
- 4.13 The purpose of the guidelines is to provide guidance to participants on how the Authority is likely to apply the Code.
- 4.14 The Authority does not agree with Contact and Genesis that the Code should refer to the wholesale market information guidelines. This is because:
 - (a) reference to the wholesale market information guidelines in the Code would not in and of itself incorporate the guidelines by reference into the Code, and this could create confusion as to the legal standing of the guidelines
 - (b) the “law” must be set out in the Code, with the wholesale market information guidelines used to aid interpretation of the Code (particularly, its obligations). This could be misconstrued by referring to the guidelines in the Code itself
 - (c) the visibility and accessibility of the wholesale market information guidelines could be better resolved by education and publicity, rather than referring to the guidelines in the Code.
- 4.15 The Authority does not consider it appropriate to include a definition of reasonable person in the Code:
 - (a) Each participant is expected to consider whether the ‘reasonable person’ exclusion applies to their own specific situation.
 - (b) The description of a reasonable person in the guidelines is not intended as a definition, but rather guidance on factors to consider when determining whether the exclusion applies.
 - (c) Adding a definition of reasonable person into the Code would be inconsistent with the principles-based style of regulation used in this Code amendment.
 - (d) The interpretation and understanding of what a reasonable person is in the wholesale market information context may evolve over time.
- 4.16 The Authority’s views on this aspect of the guidelines are discussed further in the next section, beginning at paragraph 4.24.
- 4.17 The Authority will review the guidelines again in the future if there are any changes to clause 13.2A of the Code. Where practicable, the Authority will undertake industry consultation before the guidelines are amended if it considers there are any substantive changes proposed that would benefit from consultation. The Authority’s Consultation

Charter sets out provisions relating to consultation in circumstances where there is no obligation under the Electricity Industry Act 2010 to consult.⁶

Replacing the ‘commercial disadvantage’ exclusion with a ‘reasonable person’ exclusion

What the Authority proposed

- 4.18 Under clause 13.2A, participants must disclose relevant information to the public unless one of nine specified exclusions applies. One of these exclusions is that a participant is not required to disclose information if doing so will commercially disadvantage them in a material manner.
- 4.19 In the consultation paper the Authority noted the exclusion in clause 13.2A(2) relating to commercial disadvantage may lead to disclosure outcomes that do not support our statutory objective. This is because it:
- (a) allows participants to avoid disclosing information that, if disclosed, would better promote an orderly and efficient wholesale market
 - (b) risks undermining confidence and competition in the wholesale market by creating the potential for some participants to benefit from more and/or better information than others, leading to inefficient decision-making and poor market outcomes
 - (c) makes enforcing the obligations under clause 13.2A difficult, because the exclusion could apply in most circumstances.
- 4.20 The Authority proposed replacing the ‘commercial disadvantage’ exclusion with a ‘reasonable person’ exclusion. This would mean a participant would not have to make information relevant to the wholesale market readily available to the public if “a reasonable person would not expect the disclosure information to be made readily available”.
- 4.21 The Authority noted in the consultation paper that it considered the interpretation of the ‘reasonable person’ exclusion would be aided by a substantive body of legal precedent, which was an advantage with respect to the existing ‘commercial disadvantage’ exclusion.
- 4.22 The Authority also proposed a new section for the guidelines to help interested parties understand the Authority’s views and expectations. This new section includes guidance on what a reasonable person is and is not (paragraphs 7.8 to 7.13 of the guidelines).

Submitters’ views

- 4.23 Submitters supported replacing the ‘commercial disadvantage’ exclusion with a ‘reasonable person’ exclusion, with no submitters against this change.
- 4.24 However, some submitters did not support the definition of a reasonable person proposed in the guidelines:
- (a) Genesis questioned whether the definition accurately represented a reasonable person participating in the New Zealand electricity market.
 - (b) Meridian supported the definition, but added two qualifiers to the definition:

⁶ See Section 4 of Part 2 of the Consultation Charter at <https://www.ea.govt.nz/dmsdocument/14242>.

- (i) A reasonable person would not expect a participant to disclose information if doing so would unreasonably prejudice that participant's position and activities in the wholesale market or in their commercial operations more generally.
 - (ii) A reasonable person would not expect a participant to disclose its aggregate electricity hedge market position or FTR position, whether at a nodal, regional, island-wide or national level.
 - (c) Pioneer recommended removing the requirements to be:
 - (i) 'sophisticated', because any market participant can hold material information and all market participants are a 'reasonable person' in their view
 - (ii) familiar with the purpose and scope of the continuous disclosure regime as this is a necessary consequence of being a market participant.
- 4.25 Contact and Mercury supported the Authority's definition of a reasonable person, while MEUG did not comment on the definition.
- 4.26 As noted in the previous section, Contact and Meridian submitted the reasonable person definition should be in the Code rather than the guidelines. Other submitters did not comment specifically on whether the reasonable person definition should be in the Code or in the guidelines.
- 4.27 Meridian considered the Authority was incorrect when it asserted in the consultation paper that interpretation of the 'reasonable person' exclusion would be aided by a substantive body of legal precedent. Meridian argued there was little to no case law on the New Zealand Stock Exchange (NZX) 'reasonable person condition' and, even if there was, it may be of only limited relevance because the NZX test is a 'reasonable person condition' and not a 'reasonable person exclusion'. Meridian noted there was no other legal precedent or case law it was aware of that would be directly applicable. Meridian requested the Authority refer to relevant cases in the guidelines.

The Authority's response

- 4.28 The Authority has decided to replace the 'commercial disadvantage' exclusion with the 'reasonable person' exclusion as proposed in the consultation paper. We note no submitters raised any concerns about removing the 'commercial disadvantage' exclusion and adding a 'reasonable person' exclusion.
- 4.29 The Authority does not consider it appropriate to include a definition of reasonable person in the Code, for the reasons outlined in the previous section. It therefore follows the Authority does not consider it appropriate to include the 'unreasonably prejudice' factor in the Code (Meridian proposed this factor be included in the definition of reasonable person in the Code). The Authority has however included more detailed guidance on this factor in the guidelines, drawing on section 9(2)(b)(ii) of the Official Information Act 1982 (OIA) as discussed at the workshop. This is set out later in this paper, beginning at paragraph 4.81.
- 4.30 The Authority has also included in the guidelines, as an example of the 'reasonable person' exclusion, its expectation that a reasonable person would *not* expect disclosure of a participant's aggregate hedge market position.
- 4.31 The Authority continues to consider there is sufficiently substantive case law on the interpretation of a reasonable person. The Authority considers the interpretation applied

by the High Court in *Auckland International Airport Ltd v Air New Zealand Ltd* (2006)⁷ is relevant. The Court in that case interpreted the meaning of reasonable person to be a sophisticated market participant, or more specifically, someone who was familiar with:

- (a) the purpose and scope of the continuous disclosure regime (in the relevant industry)
 - (b) the market within which it operated
 - (c) the statutory consultative process provided by the Airport Authorities Act 1966
 - (d) the publicly known circumstances of the parties.
- 4.32 The Authority also notes that while there are some changes in formulation between the NZX 'reasonable person' test and the wording of the Code amendment, the Authority considers the wording is sufficiently close to make the case helpful.
- 4.33 Applying this case to the disclosure requirements under clause 13.2A of the Code, this would mean a reasonable person would be interpreted as a sophisticated participant in the energy market.
- 4.34 In relation to Genesis' and Pioneer's comments on the definition of a reasonable person, the Authority:
- (a) considers the proposed definition remains appropriate
 - (b) notes the description in paragraphs 4.31 and 4.32 of a reasonable person for the purposes of the new exclusion is different from a description of a party that may hold disclosure information under clause 13.2A.

Amending the timeframe for addressing misleading, deceptive, or incorrect information

What the Authority proposed

- 4.35 Clause 13.2(2) of the Code requires a participant to act immediately upon discovering it previously disclosed misleading, deceptive, or incorrect information. In the consultation paper, the Authority noted it considered this timeframe:
- (a) was unreasonably onerous, particularly for participants not operating a business on a "24 hours, 7 days a week" basis
 - (b) was inconsistent with the timeframe to disclose information under clause 13.2A, which is 'as soon as reasonably practicable'
 - (c) risked the participant releasing further misleading or incorrect information in their haste to act.
- 4.36 The Authority proposed amending clause 13.2(2) by replacing the word 'immediately' with the words 'as soon as practicable'. The Authority considered this would:
- (a) lead to a small efficiency gain by removing an unreasonably onerous obligation to act immediately
 - (b) reduce the risk a participant discloses further misleading, deceptive, or incorrect information.

⁷ 3 NZCCLR 382.

Submitters' views

- 4.37 Contact, MEUG and Mercury all supported replacing the word 'immediately' with the words 'as soon as practicable' in clause 13.2(2). The other four submitters did not comment on this specific Code amendment.

The Authority's response

- 4.38 Submitters did not raise any concerns with replacing the word 'immediately' with the words 'as soon as practicable' in clause 13.2(2). The Authority also considers there is no downside risk to making this Code amendment.
- 4.39 Therefore, the Authority has decided to amend clause 13.2(2) by replacing the word 'immediately' with the words 'as soon as practicable'.

The interaction of POCP and the guidelines

What the Authority proposed

- 4.40 The Authority proposed adding a new section to the guidelines giving guidance on factors participants need to consider when using the POCP platform to meet their wholesale market information disclosure obligations for outage information.
- 4.41 The proposed revisions to the guidelines also described the two sets of obligations relating to outage information—wholesale market information disclosure and outage notification for co-ordination of outages.

Submitters' views

- 4.42 At the workshop it was noted the voluntary nature of POCP can create issues—for example, sometimes the system operator receives an outage notification by email, but is unable to enter this information into POCP. A suggestion was made at the workshop that it may be useful if the system operator was given user-access, so it could include outages notified to it by email.
- 4.43 In its submission, Transpower strongly disagreed with the suggestion at the workshop that the system operator be given user-access to POCP. Transpower submitted the suggestion would create double handling, which was inefficient and would increase the time taken to convey information to POCP. Transpower submitted that if inefficient notification remained, it would support an alternative approach of mandating a single repository for all asset owner planned outage information.
- 4.44 Contact supported the use of POCP for disclosing outage information but thought POCP should be referenced in the Code. Contact also questioned whether end users would now be responsible for publicly disclosing planned outages.
- 4.45 Meridian and Pioneer both questioned whether putting outage information on POCP satisfied all the requirements of making disclosure information readily available:
- (a) Meridian asked for guidance on whether the POCP website currently meets the requirement that "...an interested party should be able to locate the information using a straightforward internet search with suitable search engine... and appropriate keywords".⁸
 - (b) Pioneer questioned whether all participants have access to POCP (such as small retailers without generation assets) and whether the information available on the

⁸ Excerpt from paragraph 10.4(b) of the current guidelines.

POCP platform is in a form that makes it clear to all participants whether a particular outage is 'material'. Pioneer asked the Authority to review whether the convenience of adding data in only one form or on one platform achieves the objectives of this continuous disclosure regime.

The Authority's response

- 4.46 The outage disclosure provisions relating to POCP are in Part 8 of the Code. Amendments to those provisions are therefore out of scope for this Code amendment, which is confined to the provisions in Part 13. Even if they were in scope, the Authority would be unlikely to reference POCP in the Code and/or make its use mandatory because:
- (a) POCP is a software system developed and operated on a voluntary basis outside of the Code by the system operator on behalf of participants with outage obligations under Part 8
 - (b) the system operator and/or participants with Part 8 outage disclosure obligations may choose to develop and use a different software system that better meets their needs (ie, innovate)
 - (c) mandating the use of POCP through a Code amendment may limit the flexibility of the system operator and Part 8 outage disclosure participants to innovate.
- 4.47 The Authority has, however, noted in the guidelines its strong support for using POCP to disclose outages.
- 4.48 To meet their Part 13 disclosure obligations, the Authority considers end users should disclose any planned outages meeting the definition of 'disclosure information' in Part 1, unless an exclusion applies.
- 4.49 The Authority also considers the POCP website meets the accessibility requirement noted by Meridian and is accessible by all participants. Regarding whether POCP clearly identifies 'material' outages, the Authority notes this depends on context, which is why the holder of the information is best placed to consider materiality when deciding whether to disclose information. This applies to all wholesale market information, not just outage information.
- 4.50 The Authority acknowledges Transpower's concerns regarding POCP and is engaging directly with the system operator in the context of a potential future review of POCP.
- 4.51 Given the comments raised by submitters to this consultation, the system operator has indicated its interest in directly receiving feedback from participants to understand any potential improvements to POCP. In particular, the system operator is interested in whether suggestions relate to how POCP is used, its relationship with the Code, or more functional aspects of POCP. This feedback would help the system operator to frame up any potential review, if they determined such a review is needed.
- 4.52 At this time, the Authority has decided to provide all submitter feedback received about POCP from this consultation to the system operator. This will allow the system operator to take this feedback into account when deciding whether to initiate a review of POCP.

The interaction of hedge disclosure requirements and the guidelines

What the Authority proposed

- 4.53 The Authority proposed adding a new section to the guidelines. The new section gives guidance on factors participants need to consider when choosing to use the Authority's hedge disclosure platform to meet their wholesale market information disclosure obligations for contract information.
- 4.54 The proposed revisions to the guidelines also described two sets of obligations relating to contract information—wholesale market information disclosure and hedge disclosure.

Submitters' views

- 4.55 Genesis and Meridian both welcomed the Authority's clarification of how participants can use the hedge disclosure platform to meet their wholesale market information disclosure obligations.
- 4.56 Contact submitted they would welcome a review of the hedge disclosure platform, particularly the disclosure requirements for electricity contracts.

The Authority's response

- 4.57 The Authority acknowledges a review of the hedge disclosure platform, including the disclosure requirements for electricity contracts, would be welcome.
- 4.58 The Authority has decided to consider including this review in the Authority's work programme for 2018/19 and out years.

Worked examples in the guidelines

What the Authority proposed

- 4.59 The Authority asked the WAG to review the wholesale market information disclosure exclusions in late 2015. As part of this review, the WAG suggested it would be useful to include more worked examples in the guidelines.
- 4.60 The Authority noted in the consultation paper that the guidelines already include some worked examples, but that we would like to include additional examples (where relevant) if they were consistent with the Authority's disclosure expectations for wholesale market information.
- 4.61 The Authority encouraged submitters to provide case studies we could consider including as anonymised worked examples in the guidelines.

Submitters' views

- 4.62 At the Authority's workshop there was some high-level discussion of possible case studies to include in the guidelines. Possible case studies discussed included information on idle (unoffered but not on an outage) plant, snow pack, fuel contracts/prices, and fixed-price variable-volume contracts (commonly known as FPVV contracts).
- 4.63 Mercury submitted the examples collected at the workshop on the proposed guidelines would be helpful, as would case studies around counterparty disclosure.

- 4.64 Meridian suggested the Authority develop case studies based on the scenarios parties say they have observed and which were referenced in clause 5.4 of the consultation paper.
- 4.65 The other five submitters (Contact, Genesis, MEUG, Pioneer, and Transpower) did not provide or suggest any case studies for inclusion in the guidelines.

The Authority's response

- 4.66 The Authority considers including worked examples in the guidelines is helpful.
- 4.67 In response to submissions and discussion at the workshop, the Authority has included the following additional examples in the guidelines:
- (a) a 'swaption disclosure' example
 - (b) an example relating to the aggregate hedge book
 - (c) an example relating to models.
- 4.68 The example relating to models is included in response to Meridian's suggestion to amend the definition of 'disclosure information' in the Code, discussed in more detail below in paragraphs 4.74, 4.75 and 4.77.
- 4.69 The Authority will also consider including other examples in future revisions of the guidelines as they evolve over time. This could include examples relating to the scenarios referred to in section 5.4 of the consultation paper (as suggested by Meridian).

Miscellaneous Code changes

What the Authority proposed

- 4.70 The Authority did not propose any other amendments to the Code.

Submitters' views

- 4.71 Meridian submitted clause 13.2A(6) of the Code be amended as follows:
- 13.2A (6) A **participant** must not enter into a confidentiality agreement with another person for the sole purpose of avoiding making **disclosure information** readily available to the public under this clause.*
- 4.72 Meridian commented that when two parties sign a contract containing a confidentiality provision, the purpose of that confidentiality provision will be to preserve the confidentiality in a wide variety of scenarios and against a wide variety of potential third parties. Meridian submitted the current clause 13.2A(6) is unworkable, because any time a participant signs an agreement containing a confidentiality provision, the participant will potentially be in breach of clause 13.2A(6) of the Code.
- 4.73 Meridian also submitted amending paragraph 7.18 of the guidelines to reflect this Code change.
- 4.74 Meridian submitted the definition of 'disclosure information' in clause 1.1(1) of the Code be amended as follows:
- 1.1 (1) **disclosure information**, in relation to a **participant**, means information that—*
- (a) is about the **participant** (for example, a model or application developed by the participant is not information about the participant); and*
 - (b) is held by the **participant**; and*

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

- 4.75 Meridian sought this amendment to make it clear that a model or application developed by a participant is not information 'about' that participant and therefore need not be disclosed.

The Authority's response

- 4.76 The Authority considers the current wording of clause 13.2A(6) is sufficient to achieve the intended outcome that participants must not try to avoid making disclosure information readily available to the public by means of a confidentiality agreement. The Authority does not consider Meridian's proposed amendment is necessary.
- 4.77 The Authority is retaining the current definition of 'disclosure information' in Part 1 of the Code, because amending this definition is outside the scope of this consultation. However, as noted above in paragraph 4.67(c), we have included an example in the guidelines indicating a reasonable person would be unlikely to expect a model developed by a participant to be disclosed.

Other guideline changes

What the Authority proposed

- 4.78 The Authority proposed amending the guidelines to:
- (a) reflect the Code amendments proposed in the consultation paper
 - (b) clarify the Authority's expectations of disclosure in certain areas, particularly relating to outages and hedge contract information
 - (c) provide greater assistance to participants making disclosure decisions in those areas
 - (d) reflect changes to market operations since the guidelines were published.

Submitters' views

- 4.79 Meridian submitted a definition of a reasonable person should be included in the Code, and that the definition also include the 'unreasonably prejudice' factor. As outlined above, the Authority considers this is a matter for the guidelines, not the Code. The Authority has therefore included the 'unreasonably prejudice' aspect of Meridian's submission here.
- 4.80 Three submitters commented on other aspects of the guidelines not covered above:
- (a) Contact submitted that, for simplicity, the guidelines should be aligned with the NZX guidelines where possible.
 - (b) Meridian requested several paragraphs in the guidelines be amended to improve clarity in intent and effect:
 - (i) paragraph 6.23: Meridian asked for this paragraph be deleted or expanded—the reference to the retail market is confusing because the definition of the wholesale market makes it clear it does not include the retail market
 - (ii) paragraph 6.28(a): Meridian wanted some indication of what the Authority considered to be 'major' new generation or transmission assets

- (iii) paragraphs 6.28(c)-6.28(f): Meridian asked for some indication of what the Authority considers to be 'significant' in each case
 - (iv) paragraph 7.7: Meridian asked the Authority to include an additional explanation in the guidelines on what is meant by paragraph (a) of the definition of 'excluded Code information' "...relates to bids, offers, reserve offers...etc" and how far this extends
 - (v) paragraph 7.33: Meridian requested the Authority give examples of the types of things it considers might be 'trade secrets' in the wholesale electricity market context.
- (c) Pioneer did not support the introduction of the concept "inefficient information asymmetry" in paragraph 2.2 of the guidelines. Pioneer submitted any information asymmetry is a concern or essentially "inefficient" and therefore the word "inefficient" should be removed from paragraphs 2.2 and 2.4(c) of the guidelines.

The Authority's response

- 4.81 The Authority has included the 'unreasonably prejudice' factor as part of its guidelines on a reasonable person. This was drawn from section 9(2)(b)(ii) of the OIA which provides that information may be withheld if making the information available "would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information".
- 4.82 The Ombudsman's guide to help parties understand their obligations under the OIA suggests steps for determining whether information can be withheld under section 9(2)(b)(ii). Briefly, the steps are:
- (a) Consider whether the information at issue relates to the "commercial position" of the person who is the subject of the information or who supplied the information.
 - (b) Identify the prejudice that would be likely to result to that commercial position if the information were to be made available.
 - (c) Assess how likely it is that disclosure of the information would cause the predicted prejudice to occur.
 - (d) Explain why the prejudice is unreasonable.
 - (e) Explain why disclosure of the requested information would be so likely to cause the predicted prejudice that it is necessary to withhold the information in order to prevent prejudice from arising.
- 4.83 In the Authority's view, if a participant chose to withhold information on the basis that disclosing it would cause unreasonable prejudice to its commercial position, the Authority would expect the participant to be able to justify its position using roughly the steps outlined above.
- 4.84 The Authority has decided to include more detail in the guidelines about the 'unreasonably prejudice' factor, based on the Ombudsman guidance. The Authority also notes it presented this additional guidance on the 'unreasonably prejudice' factor at the workshop where it was favourably received.
- 4.85 The Authority considers the guidelines are already aligned with the NZX guidelines to the extent possible. The differences in the markets to which these two sets of guidelines apply means it is not possible for the two sets of guidelines to be aligned exactly. The

Authority may take the NZX guidelines into account in any future consideration around updating its guidelines.

4.86 In response to Meridian's comments, the Authority:

- (a) agrees paragraph 6.23 of the guidelines is confusing and has decided to remove it from the guidelines.
- (b) is wary of attempting to define terms such as 'significant' or 'major' in the examples in the guidelines (now in paragraph 6.27), as this is a matter for the holder of the information to determine given the circumstances at that time.
- (c) acknowledges the request to clarify the meaning of paragraph (a) of the definition of 'excluded Code information' in Part 1 of the Code. Because this definition was not within the scope of this consultation, at this time there will be no change to the guidelines, but the Authority has noted this for future consideration.
- (d) agrees with the Ombudsman's approach to determining whether something is a 'trade secret'. The Ombudsman suggests it may be helpful to consider certain criteria laid down by the Australian courts for determining whether information amounts to a trade secret. The Authority acknowledges an exact definition of a trade secret is not possible, and set out in the guidelines some factors to be considered in determining whether the information is trade secret. No further changes are proposed.

4.87 In response to Pioneer's comment, the Authority considers the references to 'inefficient' information asymmetry in paragraphs 2.2 and 2.4(c) of the guidelines are correct. In the Authority's view, the exclusions in clause 13.2A(2) of the Code are examples of efficient information asymmetry.

Appendix A Code amendment

Changes to Part 13

13.2 Misleading, deceptive, or incorrect information

- (1) A **participant** must not disclose to any person any information under this Part that, at the time the information was disclosed, was misleading or deceptive or likely to mislead or deceive when taken in the context of activities under this Part.
- (1A) In assessing whether information, at the time of disclosure, is misleading or deceptive or is likely to mislead or deceive, a **participant** must act reasonably and prudently.
- (2) If a **participant** discovers that information previously disclosed by it to a person under this Part was misleading, deceptive or incorrect, the **participant** must ~~immediately~~, as soon as reasonably practicable, —
 - (a) disclose further information so that the person is not misled or deceived by the information; or
 - (b) disclose corrected information to the person.

13.2A Participant must make disclosure information readily available

- (1) Each **participant** must make all **disclosure information** in relation to the **participant** readily available to the public, free of charge, as soon as reasonably practicable after the **participant** becomes aware of the information.
- (2) Despite subclause (1), a **participant** is not required to make **disclosure information** readily available to the public if—
 - (a) the **disclosure information** is **excluded Code information**; or
 - ~~(b) doing so will commercially disadvantage the participant in a material manner; or~~
 - (ba) a reasonable person would not expect the disclosure information to be made readily available; or
 - (c) the **participant** is bound by a legal obligation to keep the **disclosure information** confidential; or
 - (d) doing so will be a breach of law; or
 - (e) the **disclosure information** is already readily available to the public; or
 - (f) the **disclosure information** concerns an incomplete proposal or negotiation; or
 - (g) the **disclosure information** comprises matters of supposition or is insufficiently definite to warrant being made readily available to the public; or
 - (h) the **participant** claims legal professional privilege or privilege against self-incrimination in respect of the **disclosure information**; or
 - (i) the **disclosure information** is a trade secret.
- (3) A **participant** that relies on subclause (2) must, as soon as reasonably practicable, make the **disclosure information** readily available to the public, free of charge, if subclause (2) ceases to apply to the **disclosure information**.
- (4) If information ceases to be **disclosure information**, a **participant** is no longer required to make the information readily available to the public.

- (5) A **participant** that does not make information readily available to the public under this clause must, if required to do so by the **Authority**,—
 - (a) satisfy the **Authority** that subclause (2) applies to the **disclosure information**, if the **participant** relies on subclause (2); or
 - (b) satisfy the **Authority** that the information is not **disclosure information**.
- (6) A **participant** must not enter into a confidentiality agreement with another person for the purpose of avoiding making **disclosure information** readily available to the public under this clause.