

# MINUTES

Meeting number: 8

Venue: Electricity Authority, Boardroom, Level 7, ASB Bank Tower, 2 Hunter Street, Wellington

Time and date: 11:00am to 5:00pm, Wednesday, 5 September 2018

## Attendees

- Bruce Rogers (Acting Chair)
- James Flannery
- James Flexman
- Darren Gilchrist [items 1 to 4; left 4:19pm]
- Stu Innes [items 1 to 4; left 3:51pm]
- Rebecca Osborne
- Matt Rowe
- James Tipping [items 1 to 4; left 4:19pm]

## Apologies

- None

## In attendance

- Murray Henderson (Principal Market Analyst, System Operations, Transpower)
- Tim Street (Manager Wholesale Markets, Electricity Authority) [items 1 to 4; left 2:59pm]
- Craig Evans (Manager Retail and Network Markets, Electricity Authority) [item 4; joined 2:48pm, left 4:24pm]
- Doug Watt (Manager Market Monitoring, Electricity Authority) [item 3; joined 1:36pm, left 2:47pm]
- Alistair Dixon (Principal Adviser Market Design, Electricity Authority)
- Tuong Nguyen (Senior Analyst, Electricity Authority) [item 3; joined 1:36pm, left 2:47pm]
- Avi Singh (Administrator Market Design, Electricity Authority)
- Elly Kappatos (Personal Assistant to General Manager Market Design, Electricity Authority) [items 2 and 4; joined 11:29am, left 12:00pm; re-joined 2:48pm, left 4:24pm]
- John Stephenson (Partner, Sense Partners) [item 4; joined 2:48pm, left 4:24pm]

### *Guest speakers on Review of spot market trading conduct provisions*

- Jenny Stevens (Partner, Bell Gully) [item 3; joined 12:00pm, left 12:52pm]
- Laura Hardcastle (Solicitor, Bell Gully) [item 3; joined 12:00pm, left 12:52pm]

### *Guest speakers on Saves and win-backs*

- Luke Blincoe (Chief Executive, Electric Kiwi) [videoconference – item 4; joined 2:55pm, left 3:12pm]

*The meeting opened at 11:20am*

## **1 Reflections on Authority Board strategy day**

The MDAG briefly reflected on its strategy day session with the Authority Board.

## **2 Meeting Administration**

### **2A Apologies**

No apologies were received.

### **2B Interests register**

The Acting Chair:

- tabled the MDAG interests register
- reviewed the interests disclosed/updated
- gave relevant group members permission to act.

### **2C Minutes of previous meetings**

The Acting Chair tabled minutes of the:

- meeting on Tuesday, 26 June 2018 for the record
- previous meeting on Tuesday, 7 August 2018 for confirmation.

Matt Rowe proposed confirmation of the 7 August minutes, which Stu Innes seconded, subject to noting in the *Saves and win-backs* agenda item:

- the fact that existing market arrangements require losing retailers to be notified immediately when a customer has left them
- whether this occurs in other competitive markets
- how this has been addressed in other markets in which post-payment predominates.

### **2D Matters arising**

There were no matters arising.

### **2E Action list**

The Acting Chair noted all actions from the previous meeting were completed, except the ongoing action on the secretariat to present further detail on all items not yet considered in the *Review of spot market trading conduct provisions* term sheet by the following MDAG meeting.

## 2F Correspondence

The Acting Chair tabled correspondence sent and received for the group to note, namely:

- a letter from the former Chief Executive of the Authority to the former MDAG Chair outlining the Authority Board's feedback on a draft version of the *Saves and win-backs* issues paper
- a letter from the former MDAG Chair to the Acting Chief Executive of the Authority seeking clarity about the extent to which the MDAG is independent
- an email from the Regulatory Affairs Manager of Meridian Energy to the MDAG secretariat, inviting the MDAG to meet with the Chief Executive of Meridian Energy Australia to discuss the characterisation of Meridian Energy Australia's submissions to various Australian electricity market reviews by Electric Kiwi in its cross-submission on the *Saves and win-backs* issues paper.

The MDAG:

- noted the Authority was considering its response to the MDAG's letter regarding its independence
- decided not to take up Meridian Energy's invitation to meet with the Chief Executive of Meridian Energy Australia.

## 2G Rescheduling 25 October meeting

The group agreed to reschedule its 25 October meeting to be held on 6 November to allow the Acting Chair to attend.

The Acting Chair also noted he would be absent during the majority of October 2018. Stu Innes agreed to be the main contact point between the MDAG and the secretariat during the Acting Chair's absence.

## 2H Annual report

Subject to minor alterations, the MDAG approved its annual report for presentation to the Authority Board.

## 2I Work plan update

The Acting Chair tabled the work plan update for the group to consider. The MDAG agreed to update the project milestones included in the next meeting's work plan update.

## 3 Review of spot market trading conduct provisions

Guest speakers Jenny Stevens and Laura Hardcastle from Bell Gully outlined:

- what materials they would expect the courts to consider in analysing a trading conduct case in the New Zealand wholesale electricity industry
- the extent to which case law, guidance and concepts developed under the jurisdiction of both the Financial Markets Authority (FMA) and overseas energy markets might be applicable.

In particular, the guest speakers and the MDAG discussed:

- how the purpose of a conduct regime can significantly influence how the regime is expected to operate in practice, for example through the use of:
  - broader phrasing in Acts of Parliament
  - more specific phrasing in market regulations and rulebooks
  - guidance notes to supplement both approaches
- recent case law relating to market manipulation, following actions brought by the FMA under the Financial Markets Conduct Act 2013
- the extent to which the intent behind entering into a particular trade is relevant, especially if there is more than one purpose
- the impact of viewing conduct through the lens of the overall interests of consumers and/or the market, particularly in relation to the approaches taken by the FMA and the New Zealand Stock Exchange
- how common, historical industry practice does not automatically correlate to a high standard of trading conduct
- the use of guidance, including hypothetical examples, to aid understanding of conduct regimes in various markets
- how such guidance and other formal correspondence from regulators can help establish tentative legal precedents, particularly when there is little or no case law
- the extent to which the conduct regimes in energy markets in the United States of America, particularly the Pennsylvania, Jersey and Maryland power pool, may be relevant
- the absence of 'safe harbours' in conduct regimes generally, noting sections 31 to 33 of the Commerce Act 1986 relating to cartel behaviour were an exception
- the absence of materiality provisions in other conduct regimes, due to a focus on the nature of conduct being misleading or deceptive rather than the impact of such conduct
- the implications of imposing a *de minimis* threshold for any behaviour to be subject to a conduct regime.

After the guest speakers departed, the group noted:

- benchmarking the New Zealand market against overseas jurisdictions was a useful exercise
- the strong importance of identifying the purposes behind a particular trade
- the general focus of conduct regimes on behaviour over outcomes
- compliance actions by the Authority may form a tentative precedent, given the absence of any overriding judicial decisions to date.

The secretariat then gave a presentation considering pivotal and net pivotal situations in further detail. The MDAG noted:

- it was important to have clear and agreed definitions of key terms included in the trading conduct provisions

- being protected by the 'safe harbour' provision relating to lack of financial benefit at a node may depend on whether financial benefit is interpreted in the short or long term
- it was feasible a participant could benefit financially at only one node despite being pivotal at several nodes, and therefore fail to obtain protection under the 'safe harbour' provision.

Following this discussion, for the November MDAG meeting the group asked the secretariat to:

- provide an overview of the existing trading conduct provisions and how they interact
- prepare charts showing how often generators are pivotal during peak demand periods (including when generators are pivotal nationally)
- prepare charts showing when generators are pivotal in the other island
- develop illustrative scenarios of behaviour when a party is pivotal and net pivotal to help identify behaviour consistent with a high standard of trading conduct.

| **Action – 8.1:** Secretariat to provide overview of existing trading conduct provisions by next MDAG meeting

| **Action – 8.2:** Secretariat to prepare charts showing how often generators are pivotal during peak demand periods (including when generators are pivotal nationally) by next MDAG meeting

| **Action – 8.3:** Secretariat to prepare charts showing when generators are pivotal in the other island by next MDAG meeting

| **Action – 8.4:** Secretariat to develop illustrative scenarios of behaviour when a party is pivotal and net pivotal by next MDAG meeting

#### 4 Saves and win-backs

Guest speaker Luke Blincoe from Electric Kiwi joined the MDAG to discuss the data in the MDAG's issues paper in more detail. He broadly contended:

- the data demonstrated a trend of increasing win-back rates for incumbent retailers
- the impact of win-back activity is more relevant than the amount, and peak data points are more relevant than averages
- a 45-day moratorium on win-backs is the best regulatory response to prevent incumbent retailers gaining a second opportunity to offer a customer the best price.

The secretariat then gave a short presentation further analysing the data, and the group noted:

- a strong correlation between a retailer's market share and their win-back percentage in any one region may be evidence of a market or regulatory failure, particularly if this also correlated with higher prices overall in that region
- further analysis was required on whether a losing retailer receiving a switch notification could constitute a regulatory failure.

For its next meeting, the group asked the secretariat to carry out further analysis of save and win-back data, in particular identifying each retailer's market share and win-back percentage by region.

| **Action – 8.5:** Secretariat to carry out further analysis of save and win-back data by next MDAG meeting

The MDAG then considered the cross-submissions on its issues paper, and decided:

- not to take up Pioneer Energy's invitation to meet to discuss Pioneer's cross-submission
- to instruct the secretariat to prepare an early working draft of a recommendations paper, including a summary of feedback from submissions and draft responses where relevant, for the November MDAG meeting.

| **Action – 8.6:** Secretariat to prepare early working draft of *Saves and win-backs* recommendations paper by next MDAG meeting

## 5 Publication of meeting papers

The group:

- decided not to publish the summary of cross-submissions on its *Saves and win-backs* issues paper as it was still in heavily draft form
- approved publishing all other meeting papers on the Authority's website without alteration.

*The meeting ended at 4:37pm*

**I, Bruce Rogers (Acting MDAG Chair), certify that the minutes recorded disclose all issues discussed at the meeting (date at the top), are recorded truthfully and without bias.**

Signature:



Date: Wednesday 7 November 2018 (07.11.2018)