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Submissions
Electricity Authority
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Consultation Paper: Review of Thermal Fuel Information Disclosure– Meridian submission

Meridian appreciates the opportunity to provide feedback on the Authority's consultation paper 'Review of Thermal Fuel Information Disclosure'. Our comments on the consultation questions are set out below.

While Meridian supports the Authority in seeking to improve the availability of thermal fuel information, we consider the proposed amendments to the Code are not the best means of addressing the thermal fuel information gap the Authority is seeking to close, nor the causes of that information gap. The Authority acknowledges in the consultation paper that it currently lacks evidence to support a change to the substantive disclosure provision in the Code. However, rather than obtain evidence by use of its monitoring, investigation and enforcement powers under the Electricity Industry Act 2010 (the Act) the Authority proposes to permanently amend the Code to impose relatively onerous disclosure obligations on a newly defined category of 'major' industry participants regardless of whether they participate in the thermal fuel sector. This is unnecessary and disproportionate and likely to increase costs on industry without delivering commensurate benefits.

In particular, we note that under section 46 of the Act, the Authority has the power to require participants to provide certain information for the purposes of carrying out its monitoring, investigation and enforcement functions. We suggest the Authority is better placed to issue a standing request for information under section 46 of the Act from those that hold (or may hold) thermal fuel information, as a more targeted and proportionate means of addressing the real issue here. The Authority issued a standing request for information to enable it to monitor the impacts of COVID 19. That seems to Meridian the right approach in this case, for the following reasons:

- Meridian agrees with the Authority that thermal fuel information is the real information disclosure issue. Yet the proposed Code amendments do not target those with thermal fuel information, with the Authority instead seeking to broadly introduce an obligation on 'major participants' to provide quarterly reports, annual reports and annual certificates. In contrast, an information request issued to participants that hold (or are likely to hold) thermal fuel information will specifically target those participants that potentially create the information asymmetries identified by the Authority.

- A standing information request from the Authority that remained in place for up to a year (or potentially less) would strike the appropriate balance between the benefits and costs of more onerous information disclosure obligations. In particular, the costs of a targeted information request would fall only on those participants who hold, or may hold, thermal fuel information. Further a targeted information request would only be in place for so long as necessary for the Authority to obtain evidence on the issue of whether a change to the substantive disclosure provisions in the Code is necessary to improve thermal fuels disclosure. It would also deliver exactly the same level of benefit in terms of the information that was made available to the Authority, while avoiding the costs of regulatory over-reach.

- A targeted information request from the Authority would significantly raise awareness and help participants better understand and comply with their obligations under the existing information disclosure provisions.

We are also concerned that for listed companies on the NZX, the proposed amendments to the Code would cut across and be more burdensome than the obligations currently set out under the NZX Listing Rules and Financial Markets Conduct Act 2013. For example, a discussion concerning a confidential but incomplete proposal or negotiation does not require disclosure to the NZX under the NZX listing rules - however, details of that discussion would potentially need to be disclosed to the Authority under the proposed Code amendments. Disclosure to the Authority would in turn potentially trigger the obligation to disclose under the NZX Listing Rules (because confidentiality was no longer maintained). This would compromise the ability of listed companies to operate sensibly and reasonably. We urge the Authority to reconsider the proposed Code amendments for this reason alone.

We ask the Authority not to proceed with the proposed amendments and instead to explore the use of its existing investigation and monitoring powers as a better and more proportionate means of obtaining evidence on the issue of whether more onerous thermal fuel disclosure obligations need to be imposed and / or whether the existing obligations need to be more strongly enforced and / or whether the status quo should endure.

Please contact me if you have any questions regarding this submission.

Yours sincerely

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Legal counsel

Wholesale market information disclosure consultation

Submission prepared by: Meridian Energy Limited

Question		Comment
Q1.	Do you agree with the Authority's problem definition: "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 because some useful thermal fuel information is absent from the market?"	We agree in part with the Authority's problem definition, although the Authority's reference to 'confidence' is potentially unhelpful and distracting from the real issues at stake. The key outcome for an effective wholesale market is 'efficient prices' rather than 'confidence in efficient prices'. The Authority's statutory objective is not to promote 'confidence in' competition in, reliable supply by, and the efficient operation of the electricity industry for the long-term benefit of consumers. It is to promote those things directly. Meridian considers that better disclosure of thermal fuel information would lead to more informed and efficient decisions in the electricity market, particularly for parties like Meridian that do not have access to any information about contracted gas prices and volumes. Given the interconnectedness between the electricity wholesale market and gas market, Meridian considers that thermal fuel disclosure requirements that are the same as those under the electricity wholesale market will level the playing field.
Q2.	Do you agree that there are concerns with both what thermal fuel information is disclosed and the ability to access, interpret and use thermal fuel information that is disclosed?	Yes, it is apparent that significant information gaps exist in relation to the New Zealand electricity market and the Authority's investigation into the September 2018 UTS claim highlighted that participants are not using all available sources of information relevant to the electricity market, and that some of the information available is difficult to find and interpret. We note that the Gas Industry Company and the Authority have been aware for some time of problems with gas market and thermal fuel information disclosures. Meridian has commented a number of times that given the interconnected nature of the electricity and gas markets, information disclosure rules should be broadly consistent to increase efficiency and promote consumer benefits. While there have been developments towards a voluntary disclosure code for planned outages in the gas sector, those developments still fall short of the disclosure that is required to enable efficient outcomes in downstream markets across the energy sector. We also agree with the concerns that participants are not using all available sources of information relevant to the electricity market, and that some of the information available is difficult to find and interpret. Accordingly, we consider there is a role for the Authority to educate market participants about the information that is already publicly available and to provide a platform through which participants could easily access and interpret the information that is available.
Q3.	Do you agree that thermal fuel disclosure is the most pressing wholesale information disclosure issue?	Yes, which is why we consider a targeted approach by the Authority using its powers under section 46 of the Act to require disclosure of thermal fuel information is most appropriate.

Q4.	Of the other information disclosure issues listed in Appendix E, which are the priority issues? Are there any issues missing from this list?	We agree with the information disclosure issues listed in Appendix E. In particular, we consider that demand forecasting by the System Operator is in need of serious improvement, particularly if there is a move towards real time pricing. Trustpower's generation data is also notably absent from EM6 generation files and should be published alongside all other generators. We also note here that in tight supply conditions the value of gas and coal information is even greater and the release of that information can have a larger impact. In the short term, daily extraction and transportation is critical to disclose (with a lens of how that affects electricity generation) whilst in the medium term, storage and reservoir levels become important to inform participants about how other fuel reserves (e.g. lake storage) should be utilised.
Q5.	Do you agree with the Authority's stocktake of current thermal fuel information disclosure? Has the Authority missed any information in the stocktake or misrepresented disclosure?	Yes, we agree with the Authority's stocktake but make further comments below on information that has been missed or misrepresented by the Authority. In addition to the values used to assess disclosure, we consider that it is important to identify the environmental outcomes as a result of better disclosure of thermal fuel information, such as: • better information about the costs and benefits of gas relative to renewable fuels for electricity generation investments; and • better management of gas generation risks by electricity market participants and therefore more efficient electricity prices; this in turn could have an impact on consumer decisions regarding the electrification and decarbonisation of transport and industrial process heat. Meridian's view is that information which has the potential to materially impact wholesale prices in the gas or electricity markets generally should be provided. Broadly this information would include (but not necessarily be limited to): • planned and unplanned outages, covering timing and the level of curtailment; • current and historic gas flows; and • current forward price curve, level of trading and level of depth.
Q6.	Are you aware of disclosure information where one of the exclusions in clause 13.2A(2) has been relied on to not make the disclosure information publicly available? If so, what exclusion(s) were relied on?	
Q7.	Do you agree with the factors leading to non-disclosure of thermal fuel information? Are these factors leading to inefficient prices in the wholesale market?	We agree with the factors identified by the Authority. 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 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.
Q8.	Do you agree with the barriers to accessing and interpreting thermal fuel information? Are these factors leading to inefficient prices in the wholesale market?	We agree with the barriers identified by the Authority and that these barriers are potentially leading to inefficient prices in the wholesale market.
Q9.	Do you agree the proposed Code amendment captures the appropriate players in the market?	Meridian disagrees with the proposed Code amendments to require quarterly and annual reporting and certification. If the Authority nonetheless proceeds with the proposed Code amendment, Meridian's view is that the amendments would need to extend to all participants that may hold material information, not just "major participants". This will ensure alignment with the existing provisions of the Code. We are not sure of the reason for the distinction between "major participants" in the proposed amendment and "participants" for the purposes of clause 13.1A. For example, a participant holding disclosure information is required to disclose information under clause 13.2A. However, a participant that is not a major participant is not required to submit quarterly reports, annual reports or annual certificates under the proposed Code amendments. Any new disclosure provisions should instead align with existing Code provisions and apply to those participants that are currently required to disclose under clause 13.2A.
Q10.	What requirements in the proposed Code amendment will assist participants to be freely able to disclose the information requested?	If the Authority proceeds with the proposed amendment, contrary to this submission, we agree that a template for the quarterly disclosure reports would minimise the risk that parties provide different information or information in differing formats.
Q11.	Are there any unusual situations (whether arising out of contract, law or otherwise) that the Authority needs to consider in amending the current disclosure regime?	See our comments in the cover letter in relation to our concerns with disclosure obligations under the proposed Code amendments and existing disclosure obligations under the NZX Listing Rules and Financial Markets Conduct Act 2013.
Q12.	Please provide any feedback on the approach proposed to privilege given the powers (and protections) that exist under sections 46 – 48 of the Electricity Industry Act and the limitations proposed on the use and publication of the information.	The Authority's proposal in relation to legal professional privilege misunderstands sections 46 – 48 of the Electricity Industry Act 2010. Enacting the clauses as proposed would be outside the Authority's powers. ***Legal professional privilege***

		The Authority does not have the power to require disclosure of material subject to legal professional privilege. Section 48(1) of the Act makes clear that the Authority's powers do not abrogate legal professional privilege. Not only does the Act expressly preclude the Authority from requiring disclosure of material subject to legal professional privilege but also a long line of case law confirms that legal professional privilege can only be abrogated where Parliament does so expressly (e.g. *Rosenberg v Jaine* [1983] NZLR 1). Accordingly, paragraph 4.21 of the Consultation Paper is wrong to claim that the proposed amendments would require disclosure of legal professional privileged material. ***Privilege against self-incrimination*** In relation to the privilege against self-incrimination, the Authority also misunderstands the Act. The Act gives the Authority powers to seek information for the purposes of *monitoring*, *investigation* and *enforcement* in relation to the Act and Code (see section 45). It does not give the Authority power to seek such information for the purposes of *publication* to others. Yet proposed clause 13.2F(1) would have the effect of disclosing that information. Further, the Authority's proposal to seek information under the Act for disclosure to other regulators in relation to other regulation (clause 13.2G(1)(c)) is wholly outside the power the Act gives the Authority. Further, the privilege against self-incrimination is a part of the fundamental right to silence (*Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394). Due to its importance, statutory abrogation of that right must be read narrowly. Accordingly, while sections 48(2) and (3) abrogate the privilege against self-incrimination in relation to section 46 powers, they do not authorise the Authority to abrogate the privilege by publishing that material to third parties.
Q13.	Please provide any feedback on the limitations proposed in relation to the use of the information requested.	We are concerned that the Authority is seeking to permit itself to disclose a participant's confidential information if it does not consider ("on reasonable grounds") that the participant is bound by a legal obligation to keep the disclosure information confidential or that disclosure would be a breach of law. We do not consider "on reasonable grounds" to be the appropriate test here - the Authority should only be permitted to disclose information to which 13.2F(3) applies if the participant is in fact *not* bound by a legal obligation to keep disclosure information confidential, or disclosure of the disclosure information would *not* breach a law. As foreshadowed above, legal professional privilege may only be waived if a participant expressly elects for that waiver. The Authority should not have the ability to overrule a participant's right to disclose or not disclose privileged information.
Q14.	Please provide any comments on the proposed audit power.	Meridian disagrees with the proposed audit power. Given the sensitivity of the information that would be available to an auditor, we suggest that it is inappropriate for the Authority to effectively outsource its role to an auditor and consider the Authority is better placed to undertake such audits. In addition, and consistent with the comments made above, Meridian doubts the Authority has the power to compel the provision of privileged information to an auditor (and equally, that information should not be provided to the Authority if the Authority was to take on the role of the auditor under the proposed amendments).

Q15.	Do you agree with proposal 1: a Code change to require quarterly reporting of disclosure activities, provision of an annual directors' declaration and an annual report on policies? Please explain why or why not.	As set out in our cover letter, Meridian considers that the Authority should instead use section 46 of the Act to issue targeted information requests in order to obtain thermal fuel information, as opposed to the proposed Code amendments. However, should the Authority proceed with the proposed Code amendments: • We suggest half yearly rather than quarterly reporting would strike a better balance in how frequently information should be disclosed (too frequent updates can be unduly onerous). • We are concerned with the breadth of proposed clause 13.2B which requires a party that legitimately did not make information available, to disclose that information to the Authority in any event. • The requirement to advise the number of times the participant has not published disclosure information during the reporting period, why the information was withheld, and which exclusions were relied upon in each case would, by definition, result in information being disclosed. This could be fairly onerous, given for example, clause 13.2B(2) would require a participant to disclose all incomplete proposals and negotiations or matters of supposition or matters that are insufficiently definite. Participants potentially have a number of "significant commercial decisions" which do not require disclosure under existing Code obligations, but which would ultimately now be required to be disclosed to the Authority under proposed clause 13.2B(c). As indicated above in the covering letter, disclosure to the Authority would potentially trigger other disclosure obligations for listed entities (because confidentiality was no longer maintained). This would potentially make it difficult for such entities to operate effectively.
Q16.	Do you agree with proposal 2: to update the Guidelines regarding thermal fuel disclosure? Please explain why or why not.	Yes. In particular, Meridian suggests that whilst the Authority has included some examples of disclosure information in the guidelines there is benefit in the Authority developing case studies that are based on scenarios that parties have observed in practice – particularly for coal and gas supply disclosure situations.
Q17.	Do you agree with proposal 3: to raise awareness and utilisation of existing disclosures through a disclosure reference webpage? Please explain why or why not.	Yes. It is also important that disclosure obligations and the guidelines are continually promoted and that new entrants are reminded to refer to them. We are generally supportive of the Authority allocating resources towards further education and monitoring of how the disclosure obligations are being implemented by market participants, although suggest a targeted approach through section 46 information requests is more appropriate and better targets the appropriate players in the market.
Q18.	Do you agree with proposal 4: that thermal fuel information disclosures under clause 13.2A should be made to a central location? Please explain why or why not.	Yes, the development of a centralised aggregated information source would complement a principle-based disclosure regime. This would be similar to what occurs in the electricity market through anonymised disclosure of contracts via the Authority's disclosures website. We consider that thermal fuel information should also be aggregated with similar disclosure information from other participants. The information disclosed needs to be made available in a usable, downloadable format. Meridian's initial preference is that information is disclosed using WITS or POCP (depending on the information). We suspect these options will provide the fastest routes and cost efficiency for implementation.

Q19.	Do you agree that the current Code clearly spells out the disclosure obligations to market participants? If not, why not?	As a general comment, for simplicity and to reduce administrative burden, Meridian considers that disclosure obligations that are better aligned with the NZX Listing Rules (with changes to reflect the electricity market) would assist participants in understanding their disclosure obligations. As above, the Authority should remind new entrants to the market of the obligations under the Code and the guidelines.
Q20.	Do you have any comments on the validity of the exclusions in clause 13.2A(2)? Do you consider there are benefits of removing the confidentiality exclusion in clause 13.2A(c)?	While we consider the exclusion provisions to be largely appropriate, we believe the Authority should give some consideration to better aligning the Code disclosure rules in this respect with those in the NZX Listing Rules.
Q21.	Do you believe the currently available penalties and remedies are sufficient?	Yes. Any regime is only as effective as its associated compliance regime and we consider the current penalties and remedies remain appropriate.
Q22.	Do you agree with the objectives of the proposed amendment? If not, why not?	Yes, although reference could be made to the interconnected nature of the electricity and gas markets and that thermal fuel information disclosure rules should be broadly consistent with that in the electricity market to increase efficiency and promote consumer benefits.
Q23.	Do you agree the benefits of the proposed amendment outweigh its costs?	No. As indicated above we believe the costs of the proposed amendment will outweigh the benefits and believe the better course is for the Authority to issue a standing section 46 request for information to market participants with interests in the thermal fuels sector. This would enable the Authority to gather information to assess whether more substantive change is needed.
Q24.	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.	See our comments in the cover letter.
Q25.	Do you agree with the Authority's proposed amendment complies with section 32(1) of the Act?	We consider the jury is still out on this. As indicated above we believe that as a first step a standing section 46 information request should be issued to market participants in the thermal fuels sector.
Q26.	Do you have any comments on the drafting of the proposed amendment?	We note that proposed clause 13.2B(5) seems to be over-reach by the Authority. In particular, the Authority seems to be trying to elevate the Electricity Industry Participation Code into some form of 'higher legislation' so that regardless of what that other legislation says, the Code can 'override' it. We doubt this is permissible. In the same vein providing via the Code that disclosures under the Code are deemed to comply with all laws (13.2B(5)(b)) would not seem to be something that is within the Authority's power to legislate. The wording of clause 13.2F(3) is problematic. That clause requires the Authority to keep confidential information confidential except where that is deemed necessary for the Authority to perform its functions. This effectively makes any supposed obligation of confidentiality completely illusory.

		On Meridian's understanding the Authority must act in pursuit of its statutory objective and in accordance with its prescribed functions in sections 15 and 16 of the Act, and the Code may only contain provisions necessary or desirable for those goals – see section 32 of the Act. However via 13.2G(1)(c) the Authority purports to give itself the power to use quarterly disclosure reports to provide disclosure information "to any other regulatory agency for a purpose related to that agency." Disclosure of information to other regulatory agencies is not a statutory function of the Authority and we consider such disclosure by the Authority would be ultra vires its Code making powers. Accordingly, clause 13.2G(1)(c) should be deleted. The reference to clause 13.2G(1)(d) in clause 13.2F(3) is incorrect. The reference should be to clause 13.2G(1)(c). The drafting of the proposed amendment also contains a number of references to 12.2A(i) that are in error. The references should be to clause 13.2A(i).