ELECTRICITY AUTHORITY
TE MANA HIKO

Wholesale market information disclosure

Permanent change to definition of disclosure information

Consultation paper

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Executive summary

The purpose of this paper is to consult with stakeholders on a proposed permanent change to the definition of 'disclosure information' in the Electricity Industry Participation Code 2010 (Code).

In January 2021, the Rulings Panel made a decision in the *Haast v Genesis* case relating to the wholesale market information disclosure rules which could mean the rule is less effective than the intended policy, and could result in less information being disclosed to the market.

The Rulings Panel found the use of the wording "will have" in the definition of 'disclosure information' created a higher threshold for disclosure than was intended by the policy. The policy intent is that information should be treated as disclosure information where it is likely to have a material impact on prices.

In response to this, in March 2021 the Electricity Authority (Authority) amended the definition of 'disclosure information' in the Code under urgency. This amendment will expire after nine months on 5 January 2022.

The Authority is now proposing to make that Code change permanent.

The proposed amended definition of 'disclosure information' is 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, *is likely to* have a material impact on prices in the wholesale market (rather than 'will' have a material impact).

The Authority encourages participants to consider what this proposed amendment could mean for their compliance activity, including what types of information their business holds that could be classed disclosure information.

Information relevant to the wholesale market is both held by and informs the decision making of a wide variety of market participants, for example from large generators to distributed energy resource owners, and others in between, and correspondingly the wholesale market information disclosure rules apply to all market participants. The Authority encourages all participants to familiarise themselves with the proposed amendment and provide feedback on this consultation paper to ensure the settings are correct.

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1 What you need to know to make a submission

What this consultation paper is about

1.1 The purpose of this paper is to consult with stakeholders on a proposed permanent change to the definition of 'disclosure information' in the Code.

1.2 In March 2021 the Authority amended the definition of 'disclosure information' in the Code under urgency – this amendment will expire after nine months.

1.3 The Authority is now proposing to make that change permanent. The amendment is intended to align the Code with the Authority's policy intent.

1.4 Section 39(1)(c) of the Act requires the Authority to consult on any proposed amendment to the Code and corresponding regulatory statement. Section 39(2) provides that the regulatory statement must include a statement of the objectives of the proposed amendment, an evaluation of the costs and benefits of the proposed amendment, and an evaluation of alternative means of achieving the objectives of the proposed amendment. The regulatory statement is set out in part 4 of this paper.

How to make a submission

1.5 The Authority's preference is to receive submissions in electronic format (Microsoft Word) in the format shown in Appendix B. Submissions in electronic form should be emailed to wholesaleconsultation@ea.govt.nz with "Consultation Paper—Permanent change to definition of disclosure information" in the subject line.

1.6 If you cannot send your submission electronically, please contact the Authority to discuss alternative arrangements.

1.7 Note the Authority wants to publish all submissions it receives. If you consider that we should not publish any part of your submission, please:

(a) indicate which part should not be published

(b) explain why you consider we should not publish that part

(c) provide a version of your submission that we can publish (if we agree not to publish your full submission).

1.8 If you indicate there is part of your submission that should not be published, we will discuss with you before deciding whether to not publish that part of your submission.

1.9 Please note that all submissions we receive, including any parts that we do not publish, can be requested under the Official Information Act 1982. This means we would be required to release material that we did not publish unless good reason existed under the Official Information Act to withhold it. We would normally consult with you before releasing any material that you said should not be published.

When to make a submission

1.10 Please deliver your submissions by **5pm** on Tuesday **3 August 2021**.

1.11 Staff will acknowledge receipt of all submissions electronically. Please contact the Authority via wholesaleconsultation@ea.govt.nz or 04 460 8860 if you do not receive electronic acknowledgement of your submission within two business days.

2 The wholesale market information disclosure regime seeks to achieve an 'efficient' level of disclosure

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

2.2 The Code 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 (clause 13.2A).

2.3 Prior to the March 2021 urgent Code amendment, clause 1.1 defined 'disclosure information' as 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 have a material impact on prices in the wholesale market.

2.4 The design of the clause aligns closely 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 test[2]). The obligation to disclose information is subject to several exclusions that may excuse a participant from publishing information if they apply.

2.5 Information disclosure arrangements need to strike a careful balance to best serve the long-term interests of consumers. Difficulty in accessing reliable information can cause market inefficiency or hinder competition, both of which are not in the best interests for consumers. On the other hand, requiring parties to disclose information may reduce innovation, facilitate collusion and increase compliance costs.

The policy intent behind the disclosure regime is to require disclosure of information that is likely to impact prices

2.6 In-line with the overall policy intent, the Authority considers it is appropriate that participants disclose information about themselves that is likely to have a material impact on prices. This is evidenced by Compliance Committee decisions, the *Guidelines for participants on wholesale market information disclosure obligations* (Guidelines) and historical policy documents, for example:

(a) Compliance Committee decision relating to the *Haast v Genesis* case, where the Committee determined Genesis was in possession of disclosure information

(b) the Guidelines:

(i) *[6.5] The definition of disclosure information is… aimed at capturing a participant's own contribution to the collective position.*

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[1] Rules: https://www.nzx.com/regulation/nzx-rules-guidance/main-board-debt-market-rules

Guidance: https://www.nzx.com/regulation/nzx-rules-guidance/nzx-mo-announcements/guidance-notes

[2] This interpretation of the words "ought reasonably to expect" is based on case law.

(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 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[3] 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.*

2.7 This paper assumes the policy intent, that information should be treated as disclosure information where it is likely to have a material impact on prices, is set at the right level to achieve an efficient level of disclosure. Reviewing the intent of the policy is not within scope of this paper.

3 A high threshold for disclosure could detrimentally affect consumers

3.1 As discussed above, the Authority has a consistent and long-standing policy intent regarding what should be treated as 'disclosure information', which is a key component of the wholesale market information disclosure regime in the Code. The Authority's position is that participants should disclose information that is likely to have a material impact on prices.

[3] The overall provisions this definition sat within were reviewed in 2012 due to concerns they were too broad, hard to enforce and hard to comply with. Staff have found no specific issue taken with the wording of 'is likely to'.

3.2 In January 2021 the Rulings Panel issued a decision[4] in which it found the use of the wording "will have" in the definition of disclosure information in the Code created a higher threshold for disclosure. It found that even though it was clear that the information could have a material impact on prices this did not meet the higher threshold. This decision could materially reduce participants' obligation to disclose wholesale market information when compared to the Authority's policy intent (see Appendix C for more detail).

3.3 It is difficult to identify a specific example of information that would not be classed as disclosure information if the definition were to revert to the higher threshold of 'will have' a material impact. This is because much information is published for different and overlapping reasons (for example, a specific disclosure may be required by each of the following: the Code, NZX listing rules, and resource consents) and each situation depends on its particular circumstances. However, the Authority has identified the following relevant considerations:

(a) Genesis' coal stockpile disclosure: during the tight security situation in 2018 Genesis published more frequent updates on the level of its coal stockpile.[5] The 13.2A rules are likely to have been the only disclosure regime this information was required by. It is unlikely that this information would have been disclosed if the higher threshold for disclosure identified by the Rulings Panel had been applied to this information

(b) the disclosure which was the subject of the Rulings Panel decision. Although the Authority notes the Rulings Panel decision was that an exclusion applied (on the grounds of confidentiality), this is still a useful example of a situation in which information would not have been covered by the 'will have' disclosure regime[6]

(c) the Guidelines provide examples of information that may be material, depending on the individual circumstances, including;

(i) a major gas generator has difficulties in sourcing fuel due to a gas production outage. The gas production outage has been disclosed by the producer but there is no public information on which gas users will be affected

(ii) a generator's coal stockpile is running low meaning its availability to generate electricity may be restricted in the near future.

The Authority amended the Code under urgency to protect consumers

3.4 In March 2021 the Authority acted to ensure the information disclosure settings in the Code are appropriate.[7]

3.5 Part (c) of the definition of 'disclosure information' was amended to:

(c) the participant expects, or ought reasonably to expect, if made available to the public, <u>is likely to</u> have a material impact on prices in the wholesale market.

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[4] The decision is published here: https://www.electricityrulingspanel.govt.nz/decisions/

[5] Refer: https://www.genesisenergy.co.nz/about/media/news/managing-huntly%E2%80%99s-coal-stockpile

[6] In addition, as the information is not *disclosure information,* the Authority would still have no visibility of it under the new reporting regime requiring reporting on use of exclusions.

[7] Refer: https://www.ea.govt.nz/development/work-programme/risk-management/wholesale-market-information-disclosure/development/amended-definition-of-disclosure-information-in-the-code/

3.6 The amendment was made urgently to support the expected tight supply situation in the subsequent six months. A tighter security situation means information coming out of the gas sector can have a bigger impact on electricity prices. If less information is disclosed about the gas supply situation in a dry year than intended, other market participants may not have a complete picture to base trading and pricing decisions on, creating inefficient prices and reducing confidence.

3.7 The amendment was intended to align the Code with the Authority's policy intent.

That amendment will expire and needs to be replaced

3.8 The urgent Code amendment was effective from 6 April 2021 and will expire nine months after it comes into force as required by the Act (5 January 2022).

3.9 If the urgent amendment expires and the definition reverts to 'will have a material impact on prices…', participants may adopt the higher threshold for disclosure information. This could reduce the effectiveness of the wholesale market information disclosure regime.

3.10 If materially less information is disclosed to the market than the policy intent for the wholesale market information disclosure regime, participants may lose confidence in the market and make less optimal operational decisions, which would be detrimental to consumers.

3.11 Because the urgent amendment will expire, the Authority is now consulting on a permanent change to the definition of 'disclosure information'.

3.12 In considering whether and how to change the definition of disclosure information, the Authority is interested to hear evidence from stakeholders about what impact the recent events have had on disclosure behaviour in the industry. The three policy states we have considered are described in the table below:

Table 1 Definition of 'disclosure information': recent policy states

	Description	Relevant dates	Definition of disclosure information
1	Pre-Rulings Panel decision	Before 28 January 2021	Definition: 'will have a material impact'
2	Post-Rulings Panel decision, pre-urgent Code amendment	29 January – 5 April 2021	Definition: 'will have a material impact' plus Rulings Panel finding of it being a higher threshold than the policy intent
3	Post-urgent Code amendment	6 April 2021 onwards	Definition: 'likely to have a material impact on prices'

Q1. Do you agree if the original drafting (*will impact prices*) were left to stand this could negatively impact outcomes for consumers?

Q2. Regarding the three 'policy states' described above, have you noticed a change in participants' disclosure behaviour between any of these times?

Q3. Regarding the three 'policy states' described above, has your organisation changed its disclosure behaviour between any of these times?

4 Regulatory Statement for the proposed amendment

Objectives of the proposed amendment

4.1 The purpose of amending the definition is to align the Code with the Authority's policy intent, which is to require disclosure of information that is likely to have a material impact on prices (as opposed to the higher threshold of disclosure created by the 'will have' wording).

4.2 This amendment should lead to a higher likelihood that material information is disclosed than if it is not made, which should ensure that market participants are better informed in their decisions. This should promote competition in the electricity industry, the reliable supply of electricity to consumers and the efficient operation of the electricity industry and is consistent with the Authority's statutory objective, as required by section 32 of the Act.

4.3 If materially less information is disclosed to the market than the policy intent, participants may lose confidence in the market and make less optimal operational decisions, which would be detrimental to consumers.

4.4 This proposal also aligns with;

(a) the Rulings Panel's recommendation to consider amending the definition of 'disclosure information' (see Section 5)

(b) comments from the Electricity Price Review[8], the Minister of Energy and Resources[9], and the recent draft advice from the Climate Change Commission[10] that have all highlighted the importance of effective information disclosure.

Q4. Do you agree with the objectives of the proposed amendment? If not, why not?

The proposed amendment

4.5 The Authority is proposing to make the urgent Code change permanent.

4.6 The revised permanent definition of 'disclosure information' would be 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, *is likely to* have a material impact on prices in the wholesale market (rather than 'will have' a material impact).

4.7 The drafting of the proposed amendment is in Appendix A.

Q5. Do you agree with the wording of the proposed amendment? If not, why not?

The proposed amendment's benefits are expected to outweigh the costs

4.8 The Authority has conducted a qualitative analysis of the costs and benefits of the proposed amendment and is confident that the proposal would be of net benefit to consumers.

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[8] Recommendation D1 in the Final Report, https://www.mbie.govt.nz/assets/electricity-price-review-final-report.pdf

[9] For example https://www.beehive.govt.nz/speech/speech-business-energy-council-breakfast

[10] Refer Chapter 17, p33: https://www.climatecommission.govt.nz/get-involved/our-advice-and-evidence/

4.9 The Authority considers a quantitative analysis of the costs and benefits of the proposal is not practical in this case because outcomes from the proposed Code amendment are heavily influenced by subjective judgements about participant behaviour so it is difficult to meaningfully quantify estimates of the costs and benefits.

4.10 The following sections assess the costs and benefits of the proposed permanent Code amendment against a status quo in which the original definition was retained ('will have a material impact on prices…') (ie, comparing policy states 2 and 3 in Table 1).

Benefits of the proposed amendment

4.11 The amendment is expected to increase the amount of information classed as 'disclosure information', support market confidence, and increase the certainty of the test. These benefits are expected to be reasonably significant. If the amendment is not made these benefits would not be achieved and significant detriment could arise.

The amendment is likely to increase the amount of information classed as 'disclosure information'

4.12 To understand the benefit of the proposed amendment, the Authority assessed the likelihood of more information being classed as 'disclosure information' and the likelihood of that being published (not coming under an exclusion), compared to an outcome where participants widely adopted the higher threshold for disclosure information under the 'will have' wording.

4.13 It is difficult to be precise, but the Authority considers there is a reasonable possibility of additional information being classed as 'disclosure information'. If that information is also then disclosed (ie, if it is not covered by an exclusion) this will benefit consumers through more efficient prices because the market would be better informed. An example of this could be coal stockpile information; as described at 3.3(a), if the higher threshold were applied, it could be the case that this would not be classed as disclosure information.

4.14 The Authority encourages participants to consider what this proposed amendment could mean for their compliance activity, including what types of information their business holds that could be classed disclosure information.

The amendment will increase market confidence

4.15 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), and market confidence will benefit from the perception that the fundamental disclosure requirement is at the right threshold. For example, information of the type in the *Haast v Genesis* case may still not be disclosed under the amendment if the confidentiality clause applies, but the first limb of the test would have identified it as disclosure information.

4.16 The Authority has been advised by participants their market confidence would be negatively impacted in a material way if the higher threshold for disclosure information was left to stand.

The amendment increases the certainty of the test

4.17 There will always be uncertainty regarding how participants will interpret the rule regarding particular circumstances, and how it will be enforced. Arguably the Rulings Panel decision has increased the uncertainty regarding this rule as it has highlighted that the rule does not align with the Authority's policy intent. Overall, the amendment should increase the certainty of the test because it aligns the policy with the intent.

4.18 Additionally, if the urgent Code amendment lapsed and the definition changed back to the original wording, this could increase uncertainty for participants if the threshold of the rule appears to keep changing.

4.19 To support the certainty of the test under the proposed amendment, the Authority intends to undertake more monitoring and enforcement of this aspect of the Code and explore ways to socialise the lessons from this activity to develop a shared understanding across industry regarding the interpretation of the rule. This aligns with the Authority's commitment to focus in the coming years on our monitoring, enforcement and compliance functions.

Potential costs from the proposed amendment

4.20 Because the intent of the amendment is to align the Code with the original policy intent, the cost to participants of the proposed amendment should be immaterial as it should cause no material change to their compliance actions. Comparing the proposed amendment to an outcome where participants widely adopted the higher threshold for disclosure information, participants would still consider the same or a very similar number of instances for market disclosure.

4.21 Another potential cost is that the amendment will result in information that may not be material being classed as 'disclosure information', which if published, could cause confusion. However, the Authority considers that this potential cost is mitigated by exclusions which, for example, could apply if information concerns an incomplete proposal or negotiation (clause 13.2A(2)(f)) or comprises matters of supposition or is insufficiently definite to warrant being made readily available to the public (clause 13.2A(2)(g)).

4.22 Another potential downside of the proposed amendment is the move away from the similar wording of the test in the NZX continuous disclosure regime for material information. However, the Authority does not consider this will be significant for the following reasons.

(a) The NZX test was the starting point for the drafting of the electricity disclosure rules. The NZX test is that material information is information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of the issuer's quoted Financial Product. This is similar in meaning to the original electricity disclosure test ('will').

(b) In amending the Code to a 'likely to' test, the rule would move away from this alignment. The effect of this would be less relevance of cases about the NZX rules, and where a participant is also subject to the NZX rules, their familiarity in applying the NZX rule will be of less assistance to making decisions under clause 13.2A (marginally increasing compliance costs) and the scope of additional disclosures that would be required above the NZX disclosures would increase.

(c) However, the move away from the NZX test is only one part of the wording. The use of the reasonable person test remains in both the Code and the NZX rules.

(d) 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. There is one relevant Court case concerning Auckland International Airport regarding the reasonable person test.

Q6. Do you agree the benefits of the proposed amendment outweigh its costs?

The Authority has identified other means for addressing the objectives

4.23 The Authority has evaluated alternative means to address the objectives and considers the proposed amendment is preferred. Alternatives included:

(a) amend the definition of ‘disclosure information’ to *may* materially impact prices

(b) amend the Code to include specific provisions on particular categories of information

(c) no change (let the urgent Code amendment expire and revert to the original definition of ‘disclosure information’: *will* materially impact prices).

Disclosure information *may* impact prices

4.24 An alternative option is to use ‘may have a material impact on prices’ instead of ‘likely to have a material impact on prices’. This should make it even more likely that disclosure would be required than under the ‘likely to’ wording. The Rulings Panel mention if the Code had used this terminology the threshold would have been lower, and a wider range of disclosure information would have been captured.

4.25 However, the Authority considers this could create too low a threshold, and could result in the disclosure of a significantly larger amount of information that is not very material, causing market confusion and unnecessary compliance costs for participants.

Specific provisions on particular categories of information

4.26 Another alternative is to add a clause to Part 13 of the Code specifying particular categories or kinds of information as being disclosure information. This is similar to what the Rulings Panel in paragraph [70] suggests that the Authority consider.

4.27 For example, to capture Pohokura outage information, a new clause could be added:

13.2BA Particular kinds of disclosure information

The following categories of information are ***disclosure information*** *that relates to a participant:*

(a) information held by a ***participant*** *who is a* ***generator*** *and a* ***trader*** *about any material reduction in its fuel supply, or about any significant risk of a reduction in its fuel supply, where:*

(i) that fuel supply would likely be used, if the reduction did not occur, for the generation of [x]% of the electricity sold to the ***clearing manager*** *by the* ***participant*** *in and* ***trading period****; and*

(ii) the ***generator*** *is a* ***trader*** *and has sold to the* ***clearing manager*** *an amount of electricity at least equivalent to 5% of the total amount of electricity sold in any months of the preceding 12 months by all* ***generators*** *who are* ***traders*** *to the* ***clearing manager****, as measured in* ***MW****; …*

4.28 A consequential amendment to the definition of’ ‘disclosure information’ would also need to be made. This amendment would mean that such information is disclosure information, providing more certainty to participants making disclosures and to the market.

4.29 However, it could result in information being classified as disclosure information which isn't actually material to price. The Authority considered this idea in the recent review of thermal fuel information disclosure. The Guidelines have recently been updated to include more detail on fuel disclosure. There are disadvantages to writing specific provisions into the Code, for example the risk of creating loopholes or the opportunity for gaming.

No change

4.30 The final option is to do nothing, ie, no Code amendment, let the urgent Code amendment expire and revert to the original definition of 'disclosure information': *will* materially impact prices. The advantages of this approach are that it may reduce compliance costs for participants if less information needs to be disclosed. However, the Authority does not recommend this option as the market confidence issues of reduced disclosure would persist indefinitely, and as noted above the additional compliance costs to participants is likely to be minimal if any.

Q7. Are there any alternative options that could achieve the objectives?

Q8. Do you agree the proposed amendment is preferable to the other options? If you disagree, please explain your preferred option in terms consistent with the Authority's statutory objective in section 15 of the Electricity Industry Act 2010.

The proposed amendment complies with section 32(1) of the Act

4.31 The Authority's objective under section 15 of the Act is to promote competition in, reliable supply by, and efficient operation of, the electricity industry for the long-term benefit of consumers.

Section 32(1) of the Act says that the Code may contain any provisions that are consistent with the Authority's objective and is necessary or desirable to promote one or all of the following:

Table 2: How proposal complies with section 32(1) of the Act

(a) competition in the electricity industry;	The amendment will increase confidence amongst participants that rules are in place to encourage appropriate disclosure by participants. It is reasonably likely that the amendment will result in increased disclosure of information that does have a material impact on price, which will ensure that market participants are properly informed in their trading and risk management decisions. Information is critical to efficient and well-functioning markets. Having the appropriate information disclosure settings in the Code will reduce information asymmetries and ensure participants have access to the appropriate information on which to base trading decision, have more visibility of market activities and can
(b) the reliable supply of electricity to consumers;	
(c) the efficient operation of the electricity industry;	

	better manage risk. This will encourage competition and benefit consumers in the long-term through more efficient prices. More and better information about, for example, generation plant capabilities also contributes to the reliable operation of the industry.
(d) the performance by the Authority of its functions;	The proposed amendment will not materially affect the performance of the Authority.
(e) any other matter specifically referred to in this Act as a matter for inclusion in the Code.	The proposed amendment will not materially affect any other matter specifically referred to in the Act for inclusion in the Code.

Q9. Do you agree the Authority's proposed amendment complies with section 32(1) of the Act?

The Authority has given regard to the Code amendment principles

When considering amendments to the Code, the Authority is required by its Consultation Charter[11] to have regard to the following Code amendment principles, to the extent that the Authority considers that they are applicable. Table 2 (below) describes the Authority's regard for the Code amendment principles in the preparation of the proposal.

Table 3: Regard for Code amendment principles

Principle	Comment
1. Lawful	The proposal is lawful, and is consistent with the statutory objective (see section 4) and with the empowering provisions of the Act.
2. Provides clearly identified efficiency gains or addresses market or regulatory failure	The efficiency gains are set out in the evaluation of the costs and benefits (section 4). The proposed Code amendment will improve the efficiency of the Electricity Industry for the long term benefit of consumers by ensuring the right information disclosure settings are in place to drive the appropriate information disclosure.
3. Net benefits are quantified	The extent to which the Authority has been able to estimate the efficiency gains is set out in the evaluation of the costs and benefits (section 4).
Principles 4 to 9 apply only if it is unclear which option is best (refer clause 2.5 of the Consultation Charter)	

11 Refer: http://www.ea.govt.nz/about-us/documents-publications/foundation-documents/

5 Additional points on information disclosure

The Guidelines have been updated

5.1 The *Guidelines for participants on wholesale market information disclosure obligations* were updated in March 2021 to align with the urgent Code amendment.[12] Dependent on the Authority's decision on the permanent Code amendment following consultation, the Authority will consider whether any further updates to the Guidelines are required.

The recommendations from the Rulings Panel decision have been considered

5.2 In its decision the Rulings Panel made four recommendations. The table below provides the Authority's assessment of each recommendation.

Table 4 Summary of recommendations from the Rulings Panel

Recommendation	Authority response
Consideration should be given to whether a lower threshold should be introduced to bring more information within the definition of "disclosure information"	Covered above.
The existing exclusion of '*a reasonable person would not expect the disclosure information to be made readily available'* (clause 13.2A(2)(ba)) should be incorporated into the definition of "disclosure information" in clause 1.1	The Authority will consider this recommendation within the review of exclusions referred to in paragraph 5.3. The Authority does not consider this needs to be addressed with urgency.
Consideration should be given by the Electricity Authority as to whether specific provisions for fuel disclosure should be incorporated into the Code	The Authority considered this idea in the recent review of thermal fuel information disclosure and does not favour this recommendation. The information disclosure Guidelines have recently been updated to include more detail on fuel disclosure. There are disadvantages to writing specific provisions into the Code, eg, the risk of creating loopholes or the opportunity for gaming.
The Minister should consider an amendment to Section 54 of the Act to allow the Panel a greater discretion to award costs	The recommendation is within MBIE's scope to consider. The Authority and the Rulings Panel have engaged with MBIE regarding proposed amendments to the Electricity Industry Act 2010 and Electricity Industry (Enforcement) Regulations 2010. In its March 2021 consultation paper MBIE proposed to amend s54 of the Act to allow greater discretion for the panel to award costs and sought submissions on this issue.

[12] Refer: https://www.ea.govt.nz/operations/wholesale/information-disclosure/

The Authority has already signalled its intention to review the exclusions

5.3 The applicability of the confidentiality exclusion (clause 13.2A(2)(c)) was a key area of uncertainty when the Compliance Committee considered the *Haast v Genesis* case. The Rulings Panel found that the exclusion applied in that case. 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.

Appendix A Proposed amendment

A.1 The Authority proposes to permanently amend the definition of disclosure information in Part 1 of the Code to retain the urgent amendment made on 6 April 2021. The changes made by the urgent amendment are set out below.

Amending definitions in Part 1 of the Code:

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~~ <u>is likely to</u> have a material impact on prices in the **wholesale market**

Q10. Do you have any comments on the drafting of the proposed amendment?

Appendix B Format for submissions

Submitter	

Question		Comment
Q1.	Do you agree if the original drafting (*will impact prices*) were left to stand this could negatively impact outcomes for consumers?	
Q2.	Regarding the three ‘policy states’ described above, have you noticed a change in participants’ disclosure behaviour between any of these times?	
Q3.	Regarding the three ‘policy states’ described above, has your organisation changed its disclosure behaviour between any of these times?	
Q4.	Do you agree with the objectives of the proposed amendment? If not, why not?	
Q5.	Do you agree with the wording of the proposed amendment? If not, why not?	
Q6.	Do you agree the benefits of the proposed amendment outweigh its costs?	
Q7.	Are there any alternative options that could achieve the objectives?	
Q8.	Do you agree the proposed amendment is preferable to the other options? If you disagree, please explain your preferred option in terms consistent with the Authority’s statutory objective in section 15 of the Electricity Industry Act 2010.	
Q9.	Do you agree the Authority’s proposed amendment complies with section 32(1) of the Act?	
Q10.	Do you have any comments on the drafting of the proposed amendment?	

Appendix C Overview of the Rulings Panel decision

C.1 The Rulings Panel's *28 January 2021 Haast Energy Trading Limited v Genesis Energy Limited* decision can be accessed in full here.

Genesis was alleged to have disclosure information

C.2 On 17 January 2019, Haast lodged a formal complaint with the Authority under reg 8, alleging a breach by Genesis of clause 13.2A of the Code. In essence, Haast submitted that information Genesis received relating to forecast interruptions of gas supply to Genesis' generators was "disclosure information" under the Code and should have been made public by Genesis. Genesis, in turn, argued that this was excluded from disclosure because it was "confidential information".

C.3 On 5 December 2019, there being no settlement, the Investigator's Report was provided to the Authority with a finding that the information was "disclosure information" but reaching no conclusion on the issue of its exclusion. The report recommended that the Authority discontinue the investigation. The Authority (acting through its Compliance Committee) decided to take no further action.

C.4 In January 2021 Haast challenged that decision and it came before the Rulings Panel. This was the first time the Rulings Panel has considered a breach of clause 13.2A.

The Panel interpreted the disclosure regime as having a higher threshold for disclosure

C.5 The Panel decided that Genesis had not breached the Code. Its decision was that the information relating to the Pohokura Forecasts was not 'disclosure information' under the Code and Genesis was not obliged to make the information available to the public.

C.6 The Panel found the words in paragraph (c) of the definition that the participant expects or ought reasonably to expect that the information 'will have' a 'material impact' created a higher threshold for disclosure than was intended by the policy. This was informed by the use of the words 'will have a material impact', suggesting the market shouldn't be flooded with information that may have an impact, and the associated clause preventing participants publishing misleading or deceptive information (clause 13.2).

C.7 The Panel found the threshold of 'will have a material impact' was not met in this case. Genesis argued the information was uncertain, and it didn't reasonably expect it would have impacted its generation capability. While it was clear to the Panel that the information might have had a material impact on prices, the Panel could not determine that it would have met the required higher threshold of 'will have'.

C.8 The panel was of the opinion that the threshold for information to be "disclosure information" in the clause 1.1 definition in the Code might be too high. It considered there to be potentially too much latitude for a recipient to argue that the information did not come within the "will have a material impact on prices in the wholesale market". The panel recommended that consideration be given to whether a lower threshold should be introduced to bring more information within the definition of "disclosure information".

C.9 Furthermore, the Panel also found that even if the Pohokura Forecasts were 'disclosure information', clause 13.2A(2)(c) of the Code applied, and Genesis was not required to provide the information on the basis that it was bound by a legal obligation to keep the disclosure information confidential.