BEFORE	**The Electricity Rulings Panel**
BETWEEN	**Haast Energy Trading Limited (Haast)** *Complainant*
AND	**Genesis Energy Limited (Genesis)** *Respondent*
AND	**The Electricity Authority (the Authority)**
UNDER	The Electricity Industry Act 2010 (the Act), The Electricity Industry (Enforcement) Regulations 2010 (the Regulations), The Rulings Panel Procedures 2017 (the Procedures) and The Electricity Industry Participation Code 2010 (the Code[1]), and
IN THE MATTER OF	A complaint made of breaches of Clause 13.2A of the Electricity Industry participation by Genesis Energy Limited

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Rulings Panel Decision

Decision: Genesis has not breached clause 13.2A of the Code

Counsel
R Butler for the Complainant
J Edwards and C R Shrive Counsel for Respondent

Rulings Panel Members:

M Orange	Chair
G Baumann	Deputy Chair
D O'Rourke	Panel Member

[1] The 1 November 2018 version of the Code has been applied to the Panel's considerations on the basis that it weas the published version at the time of the alleged breach. The Code provisions in relation to clause 13.2A were unchanged since the 21 June 2018.

Contents

Introduction

[1] The complaint made was an allegation by Haast that Genesis had breached clause 13.2A of the Code. It provides:

> ***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] Haast submits that between 1 November 2018 and 13 January 2019, Genesis knew that there would be prolonged planned outages at the Pohokura gas field in February 2019 and that, as a result of the planned outages, there would be a significant curtailment of its gas supply, which would impact its thermal generation capacity and contract position. It argued that, given those factors, Genesis ought to have expected the information to have a material impact on prices in the wholesale market if disclosed and, on that basis, that the information was "disclosure information" as defined in the Code.

[3] The relief sought by Haast in its reg 31 Notice filed with the Panel was:

(a) A s 54(1)(b) public reprimand; and

(b) The imposition of additional reporting requirements under the Code in the event that similar events occur under s 54(1)(c) of the Act.

[4] Genesis disputed the allegation. The parties agreed that the matters for Panel to determine were:[2]

(a) Whether Haast has standing to make the Complaint under reg 31 of the Regulations and, specifically, whether Haast has suffered loss as a result of the alleged breaches as required by reg 31(1)(b);

(b) Whether the information is disclosure information as defined in clause 1.1(1) of the Code and, specifically, whether Genesis ought reasonably to have expected the

[2] Paragraph 13 of the Joint Memorandum of Counsel dated 3 February 2020.

information, if disclosed, to have a material impact on prices in the wholesale market;

(c) Whether, if the information is disclosure information, any of the exclusions in clause 13.2A(2)(ba), (c) and/or (f) applies;

(d) What remedial order(s) should be made under s 54 of the Act 2010 if the Panel determines that Genesis did breach clause 13.2A.

Complaint background

[5] 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".

[6] On 27 June 2019, an Investigator was appointed under reg 12. On 1 July 2019, notice of the complaint was given to Genesis under reg 16, and the investigation was publicised under reg 17.

[7] On 5 December 2019, there being no settlement, the Investigator's Report was a provided to the Authority under reg 19 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.

[8] The Authority (acting through its Compliance Committee) decided to take no further action on Haast's complaint under reg 23(3)(a). In doing so, the provisions of reg 28 were activated.

[9] On 20 December 2019, the Authority notified Haast of its decision informing Haast that it could file a complaint directly with the Panel under reg 31.

[10] On 14 January 2020, Haast filed a Notice of Commencement (as required under the Rulings Panel Procedures) with the Rulings Panel, alleging a breach by Genesis of clause 13.2A of the Code.

[11] On 14 January 2020, the Rulings Panel issued a reg 33 notice of the complaint, and on 3 February 2020, Haast and Genesis filed a joint memorandum through Counsel proposing a process for dealing with some of the issues of Haast's access to the unredacted Investigator's Report, the Pohukura Forecasts, and the Gas Supply Agreement (GSA) between Genesis and OMV (collectively the Disclosure Documentation).

[12] On 27 February 2020, Haast filed a status update and made submissions concerning access by the Rulings Panel and Haast to the Disclosure Documentation. On 5 March 2020, Genesis responded, agreeing to provide some (but not all) of what it claimed was confidential information to Haast and all of the information to the Rulings Panel.

[13] On 21 May 2020, the Panel directed that the Authority was to provide the Panel with copies of both the redacted and the unredacted Investigator's Report as presented to the Compliance Committee, and that Genesis was to provide the Panel with the Pohukura

forecasts and its GSA contract with OMV. On 12 June 2020, the Panel issued a notice seeking copies of legal opinions referred to by the parties in the various submissions.

[14] On 29 June 2020, the Panel issued an Interlocutory Decision on the application for the Disclosure Documentation. The Panel ruled that it would not order the release of the Disclosure Documentation on the basis considered that the disclosure was not required for Haast to make submissions on the substantive matter or for it to argue its case about the alleged breach. The parties were directed to file submissions on the substantive matters.

Code provisions

[15] Clause 13.2A sits within Part 13 of the Code which provides for the processes by which, amongst other things, purchasers and generators submit and revise bids and offers for electricity. Clause 13.2A itself provides:

> ***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**[3]; or*
>
> *(b) [Revoked]*
>
> *(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**.*

[3] ***excluded Code information*** *means information—*

> *(a) that relates to **bids**, **offers**, **reserve offers**, or any **asset capability statement**; or*
>
> *(b) that is provided to the **Authority**, any investigator, or the **Rulings Panel** and that is required to be kept confidential under this Code or the **Act**; or*
>
> *(c) in relation to which the **Rulings Panel** has prohibited publication or communication*

> *(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.*

[16] Disclosure information is defined in clause 1.1 of the Code as:

> ***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 have a material impact on prices in the **wholesale market***

[17] Clause 13.2A is preceded by clause 13.2, which places a positive duty on participants not to disclose any misleading, deceptive or incorrect information or which is likely to have that effect:

> ***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, 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.*

[18] Given the above provisions, the steps a participant needs to take are:

1. Is the information "disclosure information" as defined?
2. If it is then is it misleading, deceptive, or likely to mislead or deceive?
3. If, when assessed on a reasonable and prudent basis, it is not, do any of the exclusions in clause 13.2A(2) apply?

Was the information "disclosure information"

[19] There are three elements to the definition of disclosure information. The elements are collective. All three have to be established in order for the information to come within the definition. The first two elements are that the information must be about the participant and the participant must hold it. Neither party contended that the information was not about Genesis or held by Genesis. What was in dispute was whether the third element, had been satisfied. The third element relates to the effect the information would have if disclosed. If the participant expects, or ought reasonably to expect, that the information, if made available to the public, will have a material impact on prices in the wholesale market, then disclosure is required (provided none of the exclusions apply).

[20] The parties framed the question on the third element of the definition around whether Haast had suffered a loss. Whilst a loss would, prima facie, establish that the third element had been satisfied the Panel does not consider that the issue for it to determine is that narrow. The third element requires consideration of the definition of "wholesale market":

> ***wholesale market*** *means—*
> *(a) the spot market for* ***electricity****, including the processes for setting—*
> *(i)* ***real time prices****:*
> *(ii)* ***forecast prices*** *and* ***forecast reserve prices****:*
> *(iii)* ***provisional prices*** *and* ***provisional reserve prices****:*
> *(iv)* ***interim prices*** *and* ***interim reserve prices****:*
> *(v)* ***final prices*** *and* ***final reserve prices****:*
> *(b) markets for* ***ancillary services****:*
> *(c) the hedge market for* ***electricity****, including the market for* ***FTRs***

[21] Given that definition, what the participant holding the information needs to assess and determine is whether they reasonably expect the information to have an impact on any of the matters referred to in the definition above, not to whether any particular participant will be impacted. In this respect, it needs to be borne in mind that if the assessment is that the information will have an impact, then the outcome is public disclosure, not limited or restricted disclosure to specific persons, entities or bodies.

[22] Given this, the Panel does not consider that Haast has to show a loss. Rather, what has to be shown is that the information would, if disclosed, have had a material impact on prices in the wholesale market. The submissions are illustrative of what the impact may have been on a specific participant, but a determination of whether the information is or is not disclosure information is not negated because a single participant cannot show a material impact.

[23] The general position taken by Haast was that thermal fuel supply information (including deliverability constraints) was a significant aspect of the forward price curve evaluation and of decision-making by all those who trade in the wholesale market. Genesis submitted that during the relevant period, it did not expect the reduction in gas supply from the Pohokura gas field to materially impact on Genesis' generation capacity.

[24] The Panel also notes that in making an assessment that Genesis was required to consider whether the information "will have" a "material impact". The use of the wording "will have" creates a higher threshold for disclosure[4]. If the Code had used the term "may have" then

[4] It is noted that the Authority's web page on information disclosure states that "disclosure information is

the threshold would have been lower, and a wider range of disclosure information would have been captured. Similarly, the use of the term "material impact" also operates to limit the amount of information that may otherwise be disclosed. It too imposes a higher threshold. Given the terms used the drafters of the Code must have intended that the overall threshold for disclosure be high and, looked at from a market perspective, it may be appropriate for the amount of information that must be disclosed to be limited to that which will have a material impact rather than the market being flooded with and potentially distracted by information that may have an impact.

[25] In this respect, it is noted that the Code requires an assessment as to whether the information could be misleading or deceptive. The Panel considers this reinforces the position that the intention in the Code is to restrict information that is disclosed to only that which will have a material impact.

[26] Material impact is not defined in the Code. The Authority has published a guide which is of assistance: Guidelines for participants on wholesale market information disclosure obligations. The guideline is the Authority's view. It states:

> *6.10 The Authority's focus is on information that is likely to have a material impact on prices in the relevant markets. The term "material impact" is not defined, nor are materiality metrics included in the Code or in these guidelines. 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.*
>
> *6.11 In the normal course of trading, information that has a material impact is most likely to be information that has a sustained effect across multiple trading periods. It is important to note that the facts and circumstances of a particular case could mean that having an effect over just a single trading period is sufficient to meet the test.*
>
> *6.12 The locational scope of the impact may also be relevant to determining materiality. A relatively small matter could have a material impact on localised prices in certain circumstances, particularly if there are constraints (for example, transmission, generation, fuel delivery). The Authority considers that this would meet the test of "material impact on prices" even though the impact may be relatively localised.*

[27] The guidelines go on to provide criteria that a participant could apply in making its assessment:

> 6.15 *Factors that holders of information may find it useful to consider when applying the "material impact on prices" test include the following:*
>
> *(a) would a reasonable person expect that the information would, if it were generally available to the market, have a material effect on the day-to-day decision-making of interested parties (see the following*

information that could have a material impact on prices in the wholesale market, that is about the participant and held by them. The Panel considers the use of the phrasing "could have" does not accurately reflect the disclosure provisions in the Code.

sections for discussion of "interested parties" and "day-to-day decision-making")?

(b) would the impact be significant enough to extend over several days, weeks, or months?

(c) would the participant expect another participant to disclose such information in similar circumstances?

(d) has a participant disclosed similar information in similar circumstances previously?

(e) would a reasonable person expect that the information could materially alter the primary energy balance (that is, supply margin)?7

(f) even if the extent of the impact is small on a national basis, might the impact be material in a localised area?

(g) even if the extent of the impact is uncertain in current circumstances, is there a reasonable chance that the impact could become "material" if circumstances change in the near future?

(h) for outages, could a small change in the volume available (such as a few megawatts) have a material effect on prices?

[28] The Panel considers the guideline to be of assistance but not determinative. It has taken the position that a material impact is one that will have a significant or substantial impact on one or more participants. It need not impact on the whole of the market. If it is regionalised, then it needs to be a region that is sufficiently large in size such that the information would have a significant or substantial impact on a participant within that region.

[29] Finally, by way of preliminary matters, the assessment of the issue by the Panel needs to be what Genesis expected, or ought reasonably to have expected the impact to have been. The assessment must be made on an objective basis. A reasonable person test applies. Both parties agreed that, in this context, a reasonable person was not the person in the street but a sophisticated participant familiar with the purpose and scope of disclosure obligations under the Code, the market and regulatory framework and the publicly known circumstances. The Panel has adopted that test which it has framed as the reasonable market participant.

[30] The assessment also needs to be made at the time the information comes into Genesis possession and then, on an ongoing basis whilst it is in their possession. It is not a one-off assessment as to whether information is disclosure information. Wholesale market prices, and the matters which can impact on those prices, can change over time. Information that may not have had a material impact may over time, and with changing market conditions, become disclosure information. This is recognised in the guidelines which state:

> *6.13 The Authority notes that information which at one point had a non-material impact could have a material impact through a change in circumstances. The Authority encourages participants to consider how sensitive the materiality might be to changing circumstances when making a disclosure decision.*

[31] Turning to the question of whether the information would have had a material impact from the reasonable market participant perspective the Panel does not consider that the information was, at the time it was obtained by Genesis, disclosure information. The Panel finds that it has not been established that, if disclosed, the information would have had a

material impact on prices in the wholesale market. It was clear to the Panel that the information might have had an impact but that it could not determine that it would have met the required higher threshold.

[32] It is not a case of what, in retrospect, did happen. It is a question of what Genesis as a reasonable market participant having made its assessment, believed would have been the impact.

[33] Haast, in its submissions, pointed to the following general factors:

(a) Pohokura is New Zealand's largest producing gas field;
(b) Genesis owns the Huntly power station, the largest thermal power station in New Zealand which uses gas to generate;
(c) Genesis procures gas primarily from the Pohokura and Kupe fields, but also through other gas supply arrangements; and
(d) Gas accounted for 80% of thermal generation in the last five calendar years.

[34] Haast also submitted that specific factors, when considered with the above, meant that disclosure should have been made. It pointed to notifications from OMV to Genesis of planned outages that were to last for multiple days which would impact the amount of gas available to Genesis during the outages. Haast noted that the outages were subject to change but that it was clear that they would occur.

[35] Haast submitted that thermal fuel supply information (including deliverability constraints) is a very significant aspect of the forward price curve evaluation and of decision making by all those who trade (directly or indirectly) in the wholesale market. It noted that the Authority Guidelines pointed to significant changes in fuel supply as something that could have a material impact on prices.

[36] The Haast submissions went on to deal with how Genesis might have dealt with the effects of the outages and the impacts they may have and did have on the wholesale market. As previously noted, what did happen is of assistance but is not determinative.

[37] Haast submitted:

> *45. In Haast's submission, when all of the above is taken into consideration, Genesis ought reasonably to have expected the Information to have a material impact on prices in the wholesale market if disclosed. By November 2018, it should have been obvious to Genesis that there would be strong interest in news of further disruptions to its Pohokura gas supply and that the Information would result in an increase in wholesale market prices.*
>
> *46. It follows that the Information was disclosure information as defined in cl 1.1. Genesis was therefore required to make it readily available, arguably as soon as it received the first Pohokura forecast on 1 November 2018, unless one of the exclusions in 13.2A(2) applied.*

[38] Genesis responded to the above noting that Genesis has a diverse generation portfolio of thermal and renewable generation, which provides it with the flexibility to respond to a range of market conditions, including gas and hydro shortages. It noted that gas productions at the relevant time and its interests in the Kupe Joint Venture which, amongst other things, it uses for fuel flexibility.

[39] Genesis also noted that the Pohokura Forecasts from OMV were subject to, and did change as follows[5]:

> *(e) The Pohokura Forecasts from OMV were subject to change and did, in fact, change. For example:*
>
> *(i) The forecast received on 1 November 2018 showed a rig mobilisation between 7 February 2019 and 15 February 2019, with expected Available Capacity at approximately half of before. The forecast received on 18 January 2019, post the Public Announcement, showed a change in the rig mobilisation to between 6 February 2019 and 17 February 2019. The rig arrived on site on 10 February 2019 and the first outage in offshore production occurred between 10 February 2019 to 23 February 2019.*
>
> *(ii) The forecast received on 19 December 2018 showed a reduction in the Available Capacity on 26 January 2019 and 27 January 2019. This did not occur. OMV informed Genesis that the Available Capacity on 26 January 2019 and 27 January 2019 would no longer be affected in the forecast received on 18 January 2019, after the Public Announcement.*

[40] The Genesis submissions went on to outline its fuel supply arrangements and the options open to it, from both a supply and a generation perspective, in the event of a curtailment in the Pohokura supply. Genesis also noted other market conditions at play at the time of the forecasted outages. It submitted[6]:

> *(i) During the Relevant Period, Genesis did not believe:*
>
> *(i) that it would not be able to secure gas supply from other sources if required; and*
>
> *(ii) even if gas supply to Genesis' 400MW gas plant (Unit 5) was constrained to some extent, that market conditions during the relevant trading periods would not allow Genesis to prioritise the running of its coal and gas thermal units in accordance with its commercial strategy and portfolio approach. At the time that Genesis received the Pohokura Forecasts, hydro storage reached close to normal levels, and Genesis expected that hydro availability in January and February 2019 would be good given the seasonal pattern of South Island generators building hydro storage for the winter and the low electricity demand in the summer months. This typically meant electricity prices would be low, and Genesis reasonably did not expect that disclosing the Alleged Information would have a material impact on prices.*

[41] Genesis submitted:

> *56. Taking all the above factors into consideration, it was not reasonable for Genesis to have expected that making the information publicly available would materially impact prices in the wholesale market.*

[5] Paragraph 55 of the submissions
[6] Ibid

[42] As noted, and submitted by the parties, the Panel needs to step into Genesis' shoes. On the basis of the evidence and submissions provided, when doing so, the Panel finds that the thresholds of "will have" and "material impact" has not been reached. There was no certainty to the Pohukura outages, and from a Genesis perspective, on the basis of the information available to them including alternative fuel and generation options, it was reasonable for Genesis to take the position it did that disclosure was not required. In essence, it was reasonable for Genesis to assess (and continue to assess) that the information it received from OMV would not have a significant or substantial impact on one or more participants as regards prices in the wholesale market.

[43] The result is that the information was not "disclosure information". As such, disclosure under clause 13.2A was not required. Accordingly, Genesis has not breached Code.

Exclusions

[44] The Panel further finds that even if the information was "disclosure information" it was subject to a confidentiality agreement and that clause 13.2A(2)(c) of the Code applied. The clause provides an exception to the disclosure requirement in 13.2A(1) where the information is confidential:

> ***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—*
> *(c) the **participant** is bound by a legal obligation to keep the **disclosure information** confidential;*

[45] Genesis relied on clause 13.2A(2)(c) on the basis that the GSA with OMV required that it treat the information as confidential and that it would have been a breach of the GSA if it did disclose.

[46] The Panel was, pursuant to an Interlocutory Decision dated 21 May 2020, provided with the GSA. The Panel reviewed the confidentiality provisions in the GSA[7] and, on 25 June 2020, decided that it would not, as part of the proceedings, order disclosure of the GSA to Haast. The decision was made on the basis that disclosure was not required for Haast to make submissions on the substantive matter, or for it to argue its case about the alleged breach. At the time the Panel noted that it was not making any form of ruling as regards whether clause 13.2A(2)(c) applied. The Panel did note that the GSA contained a general non-disclosure clause and that the Pohukura Forecasts were covered by the clause. The Panel has since had the benefit of the party's submissions and has decided that confidentiality exclusion to the disclosure requirement in clause 13.2A(1) would apply had there been an obligation to disclose.

[7] The Rulings Panel considers that the proposed approach of obtaining and reviewing the disputed material in order to make a decision is consistent with the approach to challenges to confidentiality in High Court proceedings as laid out in r 8.25 of the High Court Rules 2016.

[47] The Panel was provided with alternative approaches to interpreting clause 13.2A(c) of the Code. These were based on diverging opinions provided to the Electricity Authority in respect of clause 13.2A, but with regard to a different matter.

[48] The divergence in approach between the two opinions was, put simply, whether clause 13.2A(2) of the Code should be determined prior to any consideration of 13.2A(1), or vice-versa. The Panel prefers the interpretation approach that the clause in the Code is dealt with sequentially as set out in the Code and as noted in paragraph [18] herein.

1. Is the information "disclosure information" as defined?

2. If it is then is it misleading, deceptive, or likely to mislead or deceive (provided for in clause 13.2, a precursor clause to 13.2A)?

3. If, when assessed on a reasonable and prudent basis, it is not, do any of the exclusions in clause 13.2A(2) apply?

[49] As noted, the Panel determined that the Pohukura Forecasts were not disclosure information. Nevertheless, the Panel has decided to consider and make a decision in respect of the second and third points noted above in paragraph [48].

[50] In line with the above approach, the second matter for consideration is whether the information, if disclosed, would have been misleading, deceptive, or likely to have mislead or deceive. Clause 13.2A(2)(g) of the Code has a similar effect. It states:

> *the **disclosure information** comprises matters of supposition or is insufficiently definite to warrant being made readily available to the public; or*

[51] Genesis submitted that clause 13.2A(2)(g) applied. Genesis noted at paragraphs 24 and 25 of its 21 September 2020 submissions:

> *The quality of information that Genesis had during the Relevant Period was different to the quality of information that OMV had at the time that OMV made its public announcement on 13 January 2019. OMV made its own disclosure only when it had sufficient certainty about the planned outages.*
>
> *In fact and on the contrary, disclosure would have risked misleading the market by implying that it was inevitable that generation capacity would be affected. This was simply not the case. This is supported by the fact that no other thermal electricity generator disclosed during the Relevant Period that their thermal generation capacity and contract position would be materially impacted by the planned outages at the Pohokura gas field.*

[52] In this respect, the Panel notes that there was a degree of uncertainty with regard to the Pohukura Forecasts and that information did change over time. Those circumstances could have brought clauses 13.2 or 13.2A(2)(g) of the Code into play[8]. Notwithstanding the Panel did not consider that the information, if released, would have been misleading or deceptive or that it was insufficiently definite. The Panel considers that any potential to mislead or deceive could have been cured through appropriate cautions being issued along with the

[8] The same could also be said of clause 13.2A(2)(f) of the Code which covers an "incomplete proposal or negotiation".

information. It also believes that recipients would have interpreted the information within the context of a forecast which was subject to change.

[53] The Panel is also of the opinion that whether the information was sufficiently definitive when Genesis received it goes back to the question of whether it was disclosure information under 13.2A(1) of the Code. The indeterminate nature of the information was a factor in whether Genesis believed it would have had a material impact on wholesale prices. The same reasoning applies to clause 13.2A(2)(ba). It deals with whether *"a reasonable person would not expect the disclosure information to be made readily available".*

[54] Clause 13.2A(2)(ba) of the Code does not, in the Panel's opinion, sit well within clause 13.2A(2). Rather the Panel believes it is a matter that should be considered as part of the considerations as to whether information is disclosure information under clause 13.2A(1) and the definition of the term "disclosure information" in clause 1.1 of the Code. The Panel has approached its interpretation on that basis.

[55] The next, and final consideration for the Panel, is whether the confidentiality exclusion applied.

[56] Haast, in its 31 August 2020 submissions, raised concerns about using confidentiality clauses to advantage the party seeking to rely on them. Haast noted, at paragraph 69 of the submissions:

> *In the 2020 Consultation Paper the Authority notes the potential for the confidentiality exclusion to be gamed. It further states: "We are concerned about the interaction between a confidentiality agreement between two parties and the disclosure obligations under the Code, and that the current formulation of the confidentiality exclusion may effectively be preventing relevant disclosures because of boilerplate contract clauses." Those concerns are fully justified if RMV's approach to cl 13.2A is to be adopted. On the other hand, they are substantially reduced under DC's approach.*

[57] Whilst that may occur, the Panel does note the provision in clause 13.2A(6) go some way toward addressing the issue:

> *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*

[58] The Panel also notes that the Code has provided for mandatory disclosure provisions with respect to areas where disclosure is fundamental to the operation of the wholesale market. At the same time, it provides for a self-regulating framework for other "disclosure information". The Panel considers that if information like the Pohukura Forecasts had been considered by the drafters of the Code to have been fundamental to the operation of the wholesale market, then mandatory disclosure would have been imposed. It is also noted that fuel disclosure requirements are currently being considered by way of consultations in both the electricity and the gas markets and that Code changes would be the appropriate way for matters such as this to be dealt with so as to create certainty.

[59] Turing to confidentiality, Haast submitted at paragraph 85 and 86 of its 31 August 2020 submissions that:

> *Haast accepts that the Pohokura forecasts are subject to cl 16.1 of the GSA. However, it does not necessarily accept that disclosure of the Information would disclose their contents. Genesis may have been able to disclose the upcoming curtailment of its gas supply without expressly disclosing the forecast Pohokura outages.*
>
> *In any event, Genesis was not under a legal obligation of confidence to keep the Pohokura forecasts and therefore the Information confidential. Pursuant to cl 16.1.1, the obligation in cl 16.1 does not apply to the extent that Genesis considers in good faith and on reasonable grounds that disclosure is required by law. In this case, Genesis should have reached that conclusion, because disclose of the Information was required by cl 13.2A(1).*

[60] The High Court decision in *Auckland International Airport Ltd v Air New Zealand Ltd*[9] was brought to the Panel's attention as a relevant authority on the question of how "required by law" provisions in confidentiality agreements should be interpreted. That decision dealt with continuous disclosure of material information within the context of the New Zealand Stock Exchange. It did not deal specifically with the question under consideration in this matter of disclosure required by law. It did discuss disclosure that would be a breach of the law. In this respect, it is noted that clause 13.2A(d) of the Code contains an exception from disclosure where *"doing so would be a breach of the law"*.[10]

[61] Of relevance to the issues at hand, however, Justice Harrison did note:

> *[51] The exception contained in LR10.1.1 imports both subjective and objective components. It starts from the premise that 'every Issuer' is bound to release to NZX 'any Material Information concerning it' on becoming aware of it. However, the statutory identification of exceptions recognises that the duty is not absolute where confidential information is at issue. The dangers of prematurely releasing information in this category are well known.*

[62] The same applies to confidentiality clauses. The duty is not absolute. Disclosure can be required by legislative provisions and disclosure may not be a contractual breach in such circumstances, even if a contract does not have a "required by law" provision. In this instance, the potential for there to be an overriding legal requirement to disclose in certain circumstances was recognised in the GSA. The question for the Panel is what does "required by law" encompass.

[63] The submissions from Haast, noted above in paragraph [59], was that as the information was, in their submission, disclosure information under clause 13.2A(1) of the Code and that, because of this, the GSA confidentiality "required by law" proviso applied as the disclosure was required by the Code. As such, Genesis submitted that clause 13.2A(2)(c) was not available to Genesis.

[64] The Code applies to "participants" as defined in the Act. The GSA was entered into between OMV and Genesis. Genesis is a participant. OMV is not. Genesis submitted, at paragraph 76(f) in its 21 September 2020 submissions:

[9] 2006) 9 NZCCLR 382 (HC)

[10] Neither party raised this as an issue for consideration by the Panel.

"Required by law" is a standard carve out and common exception in confidentiality agreements. Following Duncan Cotterill's approach, most (if not all) confidentiality agreements would have no effect. This would be contrary to the limited scope of clause 13.2A(6). On Duncan Cotterill's approach, parties would have far greater discretion to disclose what the party who the obligation is owed to considers to be confidential. Haast's submits that Russell McVeagh's approach erodes the disclosure obligation in clause 13.2A(1) ignores that disclosure obligations under the Code are focused on information about the generator. For example, if Genesis knew that Unit 5 at Huntly would be out of service, it would be required to disclose that information. Here, the information is OMV's information and Haast is speculating about the impact of OMV's information on Genesis. OMV is not a participant under the Code and it is reasonable that the Code applies such that third parties can protect their confidential information, according to the common law position. Contrary to Haast's submissions, this scenario arises only some of the time in relation to disclosure information.

[65] The Panel agrees with the submission. It considers that the term "required by law" does not apply to the disclosure term under Clause 13.2A(1) of the Code. Whilst this interpretation might cause gaming the Panel notes, as did Genesis in its reply submissions dated 5 October 2020[11], that clause 13.2A(6) operates to prevent contracts that seek to avoid 13.2A(1).

[66] The Panel also considers that it would be somewhat circular, and contrary to the intent of the provisions in clause 13.2A of the Code as a whole. If clause 13.2A(2)(c) or (d) could not be relied on in cases where clause 13.2A(1) applied then they would not have been included. As stated earlier, the correct approach is to consider 13.2A(1) and then to decide whether any of the provisions in 13.2A(2) override an obligation to disclose. In this instance, the obligation to maintain confidentiality did override the obligation to disclose.

Decision

[67] The Panel's decision is that:

(a) the Pohukura Forecasts were not "disclosure information" under clause 13.2A(1) of the Code and Genesis was not obliged to them under clause 13.2A(1) of the Code; and

(b) even if the Pohukura Forecasts were "disclosure information" clause 13.2A(2)(c) of the Code applied and Genesis was not obliged to them under clause 13.2A(1) of the Code.

Code and Act Recommendations

[68] 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 considers there is potentially too much latitude for a recipient to argue that the information does not come within the "will have a material impact on prices in the wholesale market". Consideration should be given to whether a lower threshold should be introduced to bring more information within the definition of "disclosure information".

[11] At paragraph 22(f)(ii).

[69] The Panel is also of the opinion that clause 13.2A(2)(ba) of the Code should be incorporated into the definition of "disclosure information" in clause 1.1 on the basis of the reasoning set out in paragraph [54] herein.

[70] The Panel considers that continued consideration should be given by the Electricity Authority as to whether specific provisions for fuel disclosure should be incorporated into the Code.

[71] Finally, as noted below as regards costs, the Panel may only award costs if it finds that there has been a breach of the Code. When the Authority is the party laying a complaint that may be appropriate. It may not be where it is one participant alleging a breach by another participant. The Panel therefore recommends that the Minister consider an amendment to s 54 of the Act to allow the Panel a greater discretion to award costs.

Costs

[72] The Panel's power to impose costs in relation to a complaint is in s 54(1)(g) of the Act. Section 54(1), however, relates to remedial orders where the Panel has decided that an industry participant has breached the Code. No finding of a breach has been made. It follows that there is no power to impose costs. The parties may, however, have a different view on the question of costs and, as such, the following directions are made:

A. Genesis may file written submissions on costs with the Panel within 10 working days of this decision; and

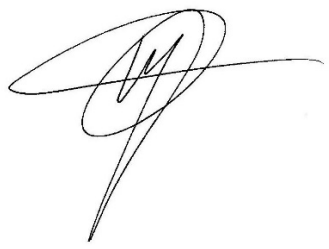
B. Haast may file written submissions on costs within five working days from receipt of any submissions from Genesis; and

C. Genesis may file written cross-submissions (if any) within five working days from receipt of any submissions from Haast.

Right of Appeal

[73] Under s 64 of the Act, there is a right of appeal to the High Court on a question of law against a decision of the Rulings Panel.

Issued this 28th day of January 2021



M.J. Orange
Rulings Panel Chair