

FTR MANAGER



---

**CONSULTATION ON A VARIATION TO  
FTR ALLOCATION PLAN:  
SUMMARY OF SUBMISSIONS**

13 November 2014



## Disclaimer

1. EMS, as FTR Manager, will only accept a party as an FTR participant if the party meets all of the following requirements:
  - (a) Meets the prudential requirements in relation to FTRs set out in Part 14 of the Electricity Industry Participation Code 2010 (**Code**), as determined by the Clearing Manager under the Code.
  - (b) Is a natural person resident in New Zealand, a body corporate that is incorporated in New Zealand, or a person with a branch office or other substantial physical presence in New Zealand through which it conducts its FTR participation.
  - (c) Is within one of the categories of “approved participant” in The Authorised Futures Dealers (Financial Transmission Rights) Notice 2012.
  - (d) Is registered by the Electricity Authority as an Industry Participant under section 9 of the Electricity Industry Act 2010 as a trader in electricity.
  - (e) Agrees to the standard FTR participation agreement, **(authorised persons)**.
2. Information about FTRs made available by EMS through any medium (**FTR information**) is not:
  - (a) advice on, or a recommendation of, FTRs or any other investment, financial product or risk management arrangement;
  - (b) an offer or solicitation by EMS to issue or deal in FTRs or any other investment, financial product or risk management arrangement; or
  - (c) directed to any person who is not an authorised person.
3. Clause 2(c) applies to all FTR information including FTR information that is or may be accessible to persons who are not authorised persons, for example on the Internet or by being distributed outside New Zealand by persons to whom EMS initially made the FTR information available. No recipient of FTR information is authorised to distribute it outside New Zealand.
4. Prior to any person acquiring, entering into or dealing in any investment, financial product or risk management arrangement they should obtain their own tax, legal and financial advice.
5. EMS is not a financial products market licensed under the Financial Markets Conduct Act 2013 or an authorised futures exchange under the Securities Markets Act 1988 or otherwise. The FTR auction, reconfiguration auction and assignment facilities provided by EMS as FTR Manager are not regulated under New Zealand law other than by the Electricity Authority under the Electricity Industry Act 2010, Electricity Industry (Enforcement) Regulations 2010 and Electricity Industry Participation Code 2010.

## Table of contents

1	Introduction .....	5
1.1	Consultation scope .....	6
1.2	Submissions received .....	6
2	Summary of proposed variation .....	7
2.1	Requirements for participation .....	7
2.1.1	Consultation proposal .....	7
2.1.2	Submissions received and FTR Manager response .....	8
2.1.3	Proposal to the Authority .....	8
2.2	Timing of introduction .....	8
3	Other issues raised in consultation .....	9
3.1	Eligible Investor Certificate .....	9
3.2	Edits to Documentation .....	10
	Summary of submissions and FTR Manager response .....	12

## Tables

Table 1 – Summary of proposed documentation changes .....	10
Table 2 – Summary of FTR participant submissions and FTR Manager Response .....	12
Table 3 – Summary of individual FTR participant submissions to the FTR manager .....	16

# 1 Introduction

FTRs are financial products that are subject to legislative restrictions on how they are offered, issued and otherwise transacted. FTR participants currently trade in the FTR market under The Authorised Futures Dealers (Financial Transmission Rights) Notice 2012 (Dealer Notice) which was issued under the Securities Markets Act 1988. The Dealer Notice restricts FTR participants to defined classes of persons who are considered able to assess FTRs independently and using their own knowledge, skills and resources, without the need for prescribed disclosure.

The existence of the Dealer Notice in turn allows the FTR Manager to rely upon the Securities Act (Authorised Futures Contracts) Exemption Notice 2002 (Exemption Notice), so that the FTR Manager is not required to comply with the requirements of the Securities Act 1978 in connection with offers of FTRs (e.g. preparing an investment statement and prospectus in connection with offers of FTRs).

In September 2013 the Financial Markets Conduct Act 2013 (FMCA) was passed into Law<sup>1</sup>. The FMCA replaces the current legislative regime for transacting in financial products, and applies to FTRs from 1 December 2014.

Although the FMCA contains transitional provisions that delay the commencement date of the FMCA for certain financial products, there are doubts regarding the effectiveness of these provisions in relation to the exemption relief provided by the Dealer Notice and the Exemption Notice, given the expected repeal of the Securities Markets Act 1988 from 1 December 2014. Accordingly, the FTR Manager considers that FTR transactions must comply with the requirements of the FMCA from 1 December 2014.

Under the compliance approach to be taken with the new law, participants will need to self-certify to the FTR Manager (described in Section 3 of this document) that they meet the wholesale investor requirements of the FMCA.

FTRs are only offered to wholesale investors because they are not suited to retail investors and the FTR Manager does not propose to carry out the level of product disclosure compliance that would be required for offers to retail investors (such as having a registered product disclosure statement). Instead, FTRs are only offered to persons who qualify as wholesale and as such should be in a position to satisfy themselves that their information needs are met before making an investment decision about FTRs.

The FTR Manager has consulted with the industry on changes to the Allocation Plan to reflect this change in legislation. The FTR Manager has also noted related changes to the Policy documents and the participation agreement.

The Code (clause 13.241) provides that the FTR manager may submit a request for a variation to the FTR Allocation Plan to the Authority, after following the consultation requirements:

- consult with persons that the FTR manager thinks are representative of the interests of persons likely to be substantially affected by the variations;
- consider submissions made on the variations; and
- provide a copy of each submission received to the Authority.

---

<sup>1</sup> <http://www.med.govt.nz/business/business-law/current-business-law-work/financial-markets-conduct-act>

EMS, as FTR Manager, released a consultation paper on 30 October 2014 seeking industry feedback on a variation to the FTR Allocation Plan. The consultation paper proposed minor changes to the Allocation Plan to reflect the new legislation. This paper summarises submissions received in response.

The reader is referred to the consultation paper, available on the FTR Manager's consultation page on the EMS website (<http://ems.co.nz/ftr/ftrconsultation>).

## 1.1 Consultation scope

The proposed variations to the FTR Allocation Plan presented in this FTR Manager consultation paper are to reflect the implementation of the FMCA as detailed above.

This consultation does not cover wider changes to the FTR Allocation Plan, beyond those necessary to reflect the changes required to comply with the FMCA.

While we welcome wider suggestions for variations, in accordance with section 1.2 of the FTR Allocation Plan 2014, any wider requests for variations to the FTR Allocation Plan received by the FTR Manager under Clause 13.241 of the Code will be judged on their merits. If not considered urgent, they will be considered as inputs to the consultation on the next scheduled update of the FTR Allocation Plan. The next scheduled update of the FTR Allocation Plan is the FTR Allocation Plan 2015 for which consultation will commence after the FTR market is launched in November 2014.

This consultation on proposed variations to the FTR Allocation Plan is to seek your feedback on whether we have reflected the law changes accurately, concisely and clearly.

## 1.2 Submissions received

The FTR Manager received submissions from:

- Genesis Energy
- Meridian Energy
- Smartwin Energy Trading

Submissions received have been published on the FTR Manager's consultation page of the EMS website (<http://ems.co.nz/ftr/ftrconsultation>), along with this summary document. The FTR Manager is required under clause 13.239(3) of the Code to copy all submissions received to the Authority.

## 2 Summary of proposed variation

The FMCA has been passed into law and the FMCA disclosure requirements come into effect for FTRs on 1 December 2014. The FTR Manager must meet the new requirements of the FMCA to allow it to continue to offer FTRs after 1 December 2014 without a product disclosure statement under the FMCA. The proposed changes to the FTR Allocation Plan are to align it with the new requirements under the FMCA. These changes affect the following sections of the Allocation Plan:

- Requirements for participation (FTR Allocation Plan section 1.3)

### 2.1 Requirements for participation

#### 2.1.1 Consultation proposal

In its consultation paper, the FTR Manager proposed an amendment to Clause 1.3 of the Allocation Plan. A red-line of the proposed variations is provided below.

#### PROPOSED VARIATION TO THE FTR ALLOCATION PLAN

##### Proposed variation to FTR Allocation Plan 2014 – Section 1.3

#### 1.3 Requirements for FTR participation

Any party may apply to the FTR Manager to be an FTR Participant.

The FTR Manager may only accept a party as an FTR Participant if the party meets all of the following requirements:

- Meets the prudential requirements in relation to FTRs set out in Part 14 of the Code, as determined by the Clearing Manager.
- ~~Is within the category of persons to whom the FTR Manager is authorised to issue FTRs. That is:~~
- Is a natural person resident in New Zealand, a body corporate that is incorporated in New Zealand, or a person with a branch office or other substantial physical presence in New Zealand through which it conducts its FTR participation. ~~and~~
- Has provided the FTR Manager with either:
  - a current and valid eligible investor certificate under clause 41 of Schedule 1 of the Financial Markets Conduct Act 2013 (FMCA) in respect of the issue or sale of FTRs, together with a written confirmation of the certification in accordance with clause 43 of schedule 1 of the FMCA; or
  - a current and valid wholesale investor certificate under clause 44 of Schedule 1 of the FMCA. ~~Is within one of the categories of “approved participant” in The Authorised Futures Dealers (Financial Transmission Rights) Notice 2012.~~
- Is registered by the Authority as an Industry Participant under section 9 of the Electricity Industry Act 2010 as a trader in electricity.
- Agrees to the standard FTR participation agreement.

The FTR Manager will keep a register of FTR Participants.

### 2.1.2 Submissions received and FTR Manager response

Three Market Participants responded to the consultation supporting the proposed changes.

There was only one comment on the proposed wording change to the Allocation Plan. The submitter noted that Clause 41 of the FMCA refers to clause 43. Therefore the reference “together with a written confirmation of the certification in accordance with clause 43 of schedule 1 of the FMCA” in the variation is unnecessary, and should be deleted. For clarity we have retained the proposed wording.

### 2.1.3 Proposal to the Authority

The FTR Manager proposes the variation to the FTR Allocation Plan as consulted on, specified in section 2.1.1 above.

## 2.2 Timing of introduction

The proposed change to the Allocation Plan will take effect from 1 December 2014, to align with the introduction of the new FMCA disclosure requirements.

The self-certification notice must be provided to the FTR Manager by 28 November 2014. Any participant that has not provided the self-certification notice to the FTR Manager will not be permitted to participate in the FTR market from 1 December 2014.

## 3 Other issues raised in consultation

In the responses to the consultation one participant responded with a detailed query regarding the subjective verification of the eligible investor criteria.

A Participant did not consider that the grounds currently set out in the eligible investor certificate would be adequate and as such might need to be tailored for each investor.

The perceived difficulty relates to the 'grounds' upon which self-certification by the investor happens. The premise is that in order for certification grounds to meet with participation criteria, they must be explicit to each investor, and as such are comprised of too much subjectivity. On this basis, the participant has requested greater consideration of the grounds for eligible investor to ensure on-going usefulness of self-certification.

The points raised are addressed below.

### 3.1 Eligible Investor Certificate

The compliance approach to be taken under the FMCA is that FTR transactions will be limited to "wholesale investors" as defined in clauses 3(2) and 3(3)(a) of Schedule 1 of the FMCA. The most generally applicable category of "wholesale investor" is likely to be the "large investor". Smaller investors are likely to need to qualify as "eligible investors". However there are also other categories of wholesale investor, including those who meet the FMCA requirements for:

- an investment business;
- investment activity criteria; or
- government agencies.

Participants must provide a signed self-certification as an eligible investor or other wholesale investor to the FTR Manager to allow them to continue to participate in the market after 1 December 2014. To illustrate the requirements, we describe the "large" and "eligible investor" categories below, and a form of certificate is provided for each of those categories with this Consultation Document.

If there is demand for self-certification forms for investment businesses, those qualifying as meeting investment activity criteria and government agencies (i.e. who do not simply qualify on the grounds of being "large"), we will provide a form of self-certification for those categories of wholesale investor.

#### *Large organisation*

A person is large if at least one of the following paragraphs applies at the time of giving the required certificate (bold terms as defined in the FMCA):

- (a) as at the last day of each of the 2 most recently completed financial years of the person, the net assets of the person and the entities **controlled** by the person exceeded \$5 million;
- (b) in each of the 2 most recently completed financial years of the person, the total consolidated turnover of the person and the entities **controlled** by the person exceeded \$5 million.

Calculations must be in accordance with any relevant frameworks and methodologies prescribed by the Financial Markets Authority.

### *Eligible investor*

A person is an "eligible investor", in relation to an issue or sale of FTRs, if they can certify that they have previous experience in acquiring or disposing of financial products that allows them to assess:

- (a) the merits of the relevant transaction or class of transactions (including assessing the value and the risks of the financial products involved); and
- (b) their own information needs in relation to the transaction or those transactions; and
- (c) the adequacy of the information provided by any person involved in the transaction or those transactions.

The person must state grounds for the above in their certificate, and their certificate must be confirmed by an authorised financial adviser, chartered accountant or lawyer who is independent of the FTR Manager, Clearing Manager or the Electricity Authority, and not otherwise disqualified from giving the certificate under clause 42(2) of schedule 1 of the FMCA.

Our expectation is that participants will only use the eligible investor certificate if they do not qualify under another category of wholesale investor, i.e. as large, investment businesses, meeting investment activity criteria or government agencies.

## 3.2 Edits to Documentation

The submissions contained a number of proposed edits to documentation. For clarity, these have been summarised in the table below with appropriate reference and status.

**Table 1 – Summary of proposed documentation changes**

ID	Title / Description	Document	Status / Comment
1	The warning statements set out in clauses 46 and 47 of Schedule 8 to the draft FMC Regulations should be included as appropriate.	Eligible Investor Certificate / Wholesale Investor Certificate	The prescribed warning statements have been added to the certificates (these were not published in the exposure draft regulations until shortly after the Consultation Document text was finalised).
2	The second paragraph of each certificate should refer to the certificate being given to the FTR Manager and other Participants.	Eligible Investor Certificate / Wholesale Investor Certificate	It is the responsibility of the FTR Participant to furnish the FTR Manager with a valid certificate supporting them as one of those types of investor.
3	As discussed above, we do not consider that the grounds currently set out in the eligible investor certificate will be adequate. The grounds for giving the certificate	Eligible Investor Certificate	The FTR Manager accepts that the certifier for an "eligible investor" certificate is likely to require specific details and evidence of the investor's grounds for giving the certificate and the form of certificate has

	will need to be tailored for each investor.		been amended to provide more direction in this regard.
4	Delete the words "in particular" in paragraph 1	Wholesale Investor Certificate	Remains in place within the updated Wholesale investor certificate.

## Summary of submissions and FTR Manager response

The following two tables summarise the feedback from submissions.

**Table 2 – Summary of FTR participant submissions and FTR Manager Response**

Consultation question	Submissions	FTR Manager's response
Q1 Have we reflected the legal requirement of the FMCA accurately in our proposed variations to the FTR Allocation Plan?	2 of 3 directly support the variation.	
	Of those offering direct support, one submitter made specific note of the need to self-certify as a condition of participation.	The FTR Manager will publish both a clear schedule and updated guidelines that highlight changes to participation.
	1 of 3 submissions supports the consultation question, but identified several key areas for review.	
	<p>Firstly, this submission proposed that Certificates be centrally published on the FTR Website. Specific reference was made to secondary sales:</p> <ul style="list-style-type: none"> <li>- FTR Participant needs to ensure compliance with FMCA when on-selling FTRs</li> <li>- Suggests FTR Participants also be given the benefit of FMCA safe harbour certificates</li> </ul>	<p>The FTR Manager proposes to modify the "safe harbour" certificates such that they are given for the benefit of the FTR Manager and the FTR Participants. The FTR Manager accepts that some FTR Participants would have greater comfort if the proposed modification is made, although the FTR Manager notes that this is not strictly necessary as on-selling can only take place to persons who have given the relevant certificate.</p> <p>The FTR Manager agrees that a practical method of providing the benefit of the certificates to FTR Participants is to publish</p>

Consultation question	Submissions	FTR Manager's response
	<ul style="list-style-type: none"> <li>- Suggests safe harbour certificates be published on the Participants' section of the FTR website</li> </ul>	<p>them on the Participants' section of the FTR website, as proposed by Meridian. This is a non-public part of the website. There is no issue with disclosing the identity of persons who have given certificates, as FTR Participants cannot keep the fact that they are Participants private in any case, due to publication of FTR trading information.</p> <p>Some FTR Participants may be concerned about confidential information contained in the certificates being published generally to other FTR Participants, particularly those relying on the "eligible investor" certificate, as these may include detailed grounds and supporting documents. However it is appropriate for those persons relying on a certificate to receive the full certificate. In any case, it is our expectation that use of the "eligible investor" certificate will be rare, with most FTR Participants fitting into the "wholesale investor" category.</p>
	<p>Secondly, the participant noted that the wording of the Allocation Plan variation should match current Certificates, or alternate certificates should be prepared for those investors that are wholesale investors, but do not qualify under the 'large' criteria.</p> <p>This can be summarised in that the FTR Allocation Plan should be limited to FTR Participants who are "large" or additional forms of certificate are prepared to cover other categories of "wholesale investor"</p>	<p>The FTR Manager does not accept this submission. The FTR Allocation Plan describes a class of persons who may be accepted as FTR Participants, i.e. those who are "eligible investors" or those who are "wholesale investors". It is not necessary to restrict the class to those in respect of which the FTR Manager has provided a form of certificate, and indeed, the certificates themselves are not part of the FTR Allocation Plan.</p> <p>It is the responsibility of the FTR Participant to furnish the FTR Manager with a valid certificate supporting them as one of</p>

Consultation question	Submissions	FTR Manager's response
		<p>those types of investor. Forms of certificate that are acceptable to the FTR Manager will be provided for convenience only, and as such the "large" certificate was prepared at this stage as the category likely to be most widely applicable. However as noted above, the certificates are not part of the FTR Allocation Plan and so providing only a form for "large" is not inconsistent with the FTR Allocation Plan (as it will be amended pursuant to the Consultation). The FTR Manager is able to accept a valid certificate in any of the named categories, and should not be limited to the "large" category of "wholesale investor" only.</p> <p>In fact the FTR Manager has now also prepared a form for the "investment business" category of "wholesale investor" in response to other feedback it has received.</p>
	Thirdly, the criteria for eligible investor were noted as being particularly subjective.	The FTR Manager accepts that the certifier for an "eligible investor" certificate is likely to require specific details and evidence of the investor's grounds for giving the certificate, and the form of certificate has been amended to provide more direction in this regard.
Q2 Does the language we are proposing for variation to the FTR Allocation Plan describe the legal requirements clearly and unambiguously, for existing and potential market participants alike?	3 of 3 submissions support that the appropriate language has been used in the Allocation Plan.	
	2 submissions did contain a number of relatively minor suggestions for editing.	A summary of the edits can be found in Table 1 – Summary of proposed documentation changes above.

Consultation question	Submissions	FTR Manager's response
<p>Q3 Does the form of FTR Self Certification meet participant requirements to be signed by your organisation, and submitted by the required due date?</p>	<p>3 of 3 support the consultation question.</p>	
	<p>1 submission noted suggestions for modifying the Wholesale Investors Certificate.</p>	<p>A summary of the edits and resolutions can be found in Table 1 – Summary of proposed documentation changes above.</p>
<p>Q4 Is it sufficient to provide forms of self-certification for eligible investors and wholesale investors who are "large" only, or is it also important to provide a form for other categories of wholesale investor (investment businesses, investment activity and government agencies)?</p>		<p>As discussed above, the FTR Manager is not obliged to provide forms of certificate in order to be able to accept different categories of "wholesale investor" as FTR Participants. The "large" certificate has already been provided as a convenience to FTR Participants.</p> <p>The FTR Manager has also now prepared a form for "investment businesses" and will consider preparing other forms based on needs of FTR Participants.</p>

Table 3 – Summary of individual FTR participant submissions to the FTR manager

Consultation question	SWET	Genesis	Meridian
<p>Q1 Have we reflected the legal requirement of the FMCA accurately in our proposed variations to the FTR Allocation Plan?</p>	<p>The participant supported the proposed variation as reflecting the legal requirements of the FMCA.</p>	<p>The participant supported the proposed variation as reflecting the legal requirements of the FMCA.</p> <p>The submission did make note that the FTR Manager has chosen to make self-certification by participants as a condition of participation in the FTR market from 1 December 2014, to allow it the benefit of the “safe harbour” provisions in clause 44 of Schedule 1.</p>	<p>At a high level, the participant supported the proposed variation as reflecting the legal requirements of the FMCA. However, the submission contains several key points that were felt to warrant detailed analysis.</p> <p>Firstly, to mitigate the risk of participants assigning FTR’s to non-wholesale investors, this submission proposed that Certificates be centrally published on the FTR Website.</p> <p>Secondly, the point was made that the Wholesale Investor Certificate is specific to ‘large’ investors only. The participant noted that consequently, the wording of the Allocation Plan variation should match accordingly, or alternate Certificates prepared for those investors that are wholesale investors, but do not qualify under the ‘large’ criteria.</p> <p>Thirdly, the criteria for eligible investor were noted as being particularly subjective. This relates to the ‘grounds’ upon which self-certification by the investor happens. The premise is that in order for certification grounds to meet with participation criteria, they must be explicit to each investor, and as such are currently comprised of too much subjectivity. On this basis, the participant has requested greater consideration of the grounds for eligible investor to ensure on-going usefulness of self-certification.</p>
<p>Q2 Does the language we are proposing for variation to the FTR Allocation Plan describe the legal requirements clearly and unambiguously, for existing and potential market participants alike?</p>	<p>The participant supported the proposed language used in the variation to the Allocation Plan 2014.</p>	<p>The participant supported the proposed language used in the variation to the Allocation Plan 2014. The Participant also noted a suggested documentation change.</p>	<p>The participant supported the proposed language used in the variation to the Allocation Plan 2014, subject to the suggestions made in response to Question 1 above.</p> <p>The suggested documentation change has been captured in Table 1 – Summary of proposed documentation changes above</p>

Consultation question	SWET	Genesis	Meridian
<p>Q3 Does the form of FTR Self Certification meet participant requirements to be signed by your organisation, and submitted by the required due date?</p>	<p>The participant supported that the self-certification requirements could be met and returned by the due date.</p> <p>The submission also suggested that this process could be aided if the FTR Manager published a list of authorised Financial Advisors who are in a position to validate that the criteria are met (Eligible Investor Certificate)</p>	<p>The participant supported that the self-certification requirements could be met and returned by the due date. (for relevant certificate)</p> <p>This response included a suggestion that the certificate for wholesale investors in Appendix A should be developed to include other investors that do not explicitly meet the 'large' criteria.</p>	<p>The participant supported that the self-certification requirements could be met and returned by the due date, subject to the suggestions made in response to Question 1 above.</p>
<p>Q4 Is it sufficient to provide forms of self-certification for eligible investors and wholesale investors who are "large" only, or is it also important to provide a form for other categories of wholesale investor (investment businesses, investment activity and government agencies)?</p>	<p>The participant supported the self-certification form provisions.</p>	<p>The participant supported the self-certification form provisions, subject to the suggestions made in response to Question 3 above.</p>	<p>The participant supported the self-certification form provisions, subject to a recommendation that additional forms of certificate be prepared for Wholesale investors who seek to meet criteria other than 'large' investor.</p>