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To whom it may concern,

### **Options Paper - Level Playing Field**

Octopus Energy welcomes the opportunity to respond to the Level Playing Field Measures Options Paper and commends the Electricity Authority (EA) for prioritising fair competition in New Zealand's electricity market.

We strongly support the EA's initiative to implement non-discrimination obligations as an urgent first step towards addressing market competition issues. While necessary, these obligations alone are insufficient. We advocate for a comprehensive framework that includes accounting separation, internal trading protocols, enhancements to the contracts market, robust enforcement mechanisms, and ultimately, corporate separation—to create a genuinely level playing field for all market participants.

In addition to this submission, we are party to a joint submission with other independent retailers. Relevant information is also contained in our previous submissions to the EA's Risk Management Review and our joint proposal with other independent retailers for an urgent Code change to implement corporate separation.

For further insight, please also see the attached note from expert electricity market consultants FTI outlining how non-discrimination requirements and other level playing field measures positively impacted competition in Great Britain's power market, and why these measures represent an intervention baseline for New Zealand.

### **Market failures require a comprehensive policy response**

New Zealand's electricity market suffers from significant structural issues stemming from high market concentration and market power, including:

- Insufficient new generation investment, particularly in firming capacity
- Low liquidity in hedge markets, hampering independent retailers' ability to compete
- Retail margin squeeze driven by vertically integrated pricing practices
- Concerns from independent power producers about gentailer contracting practices
- Information asymmetries and limited regulatory visibility of internal gentailer

## operations

For New Zealand's electricity sector to thrive, the market must enable entry by new generators and retailers. These new participants are essential for effective competition—introducing competitive pressure, fostering innovation, providing greater consumer choice, challenging incumbents, and bringing much-needed capital for new supply and smarter systems.

### **A comprehensive policy response including corporate separation**

We strongly support the EA's immediate implementation of non-discrimination rules to clearly signal that discriminatory practices are unacceptable. However, to be fully effective, these must be part of a broader framework that includes corporate separation. We see options outlined in the paper as complementary rather than mutually exclusive.

While ownership separation is the gold standard for addressing discrimination and vertical competition issues, we acknowledge this would require complex political decisions and primary legislation. Corporate separation<sup>1</sup>—allowing common ownership but requiring separate legal entities—represents a pragmatic middle ground that should be implemented alongside the proposed non-discrimination rules. This would provide greater transparency and create clearer incentives for gentailer business units to operate competitively.

Our recommended response includes elements set out in the escalation pathway. However, rather than introducing these as escalations, we strongly recommend implementation as soon as is practically feasible to effectively address existing market failures.

*Our recommended comprehensive framework includes:*

- Corporate separation as the preferred reform pathway—or at a minimum, retained as a near-term escalation measure if initial reforms prove insufficient
- Mandatory and auditable accounting separation between generation and retail businesses to ensure transparency and detect cross-subsidisation
- Clear internal trading rules and portfolio construction requirements to prevent informal or preferential arrangements that favour internal arms
- Market-based trading of hedge products wherever possible to improve price transparency and ensure fair access
- Expanded market-making obligations with mandatory spreads on both baseload and peak products, extended over a longer duration (10 years)
- Strengthened monitoring, reporting, and enforcement—including meaningful penalties for non-compliance and director-level certification of adherence

In the Options Paper it is suggested that corporate separation would require primary legislation. We have received legal advice confirming that the EA can implement corporate separation via the Code. We believe the evaluation of this option overstates costs and understates benefits:

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<sup>1</sup> For further details please refer Independent Retailers Urgent Code Change Proposal prepared by Matthews Law, August 2024

- Establishing a legal entity involves modest costs and can be achieved quickly
- “Demerging” activities and new operating protocols will largely be required under other options in any case
- System and service sharing agreements are common commercial practice, eliminating the need for full system cost replication
- Separate employment arrangements help clarify management incentives
- Monitoring and compliance costs may be lower for both the EA and firms

This framework should also benefit independent generators contracting with gentailers for power purchase agreements (PPAs), which are often structured as energy sales rather than risk management products. Ensuring trading with independent generators is fully covered will support the needed expansion of supply and competition in the generation market while preventing gaming (e.g., a gentailer writing PPAs to its retail arm).

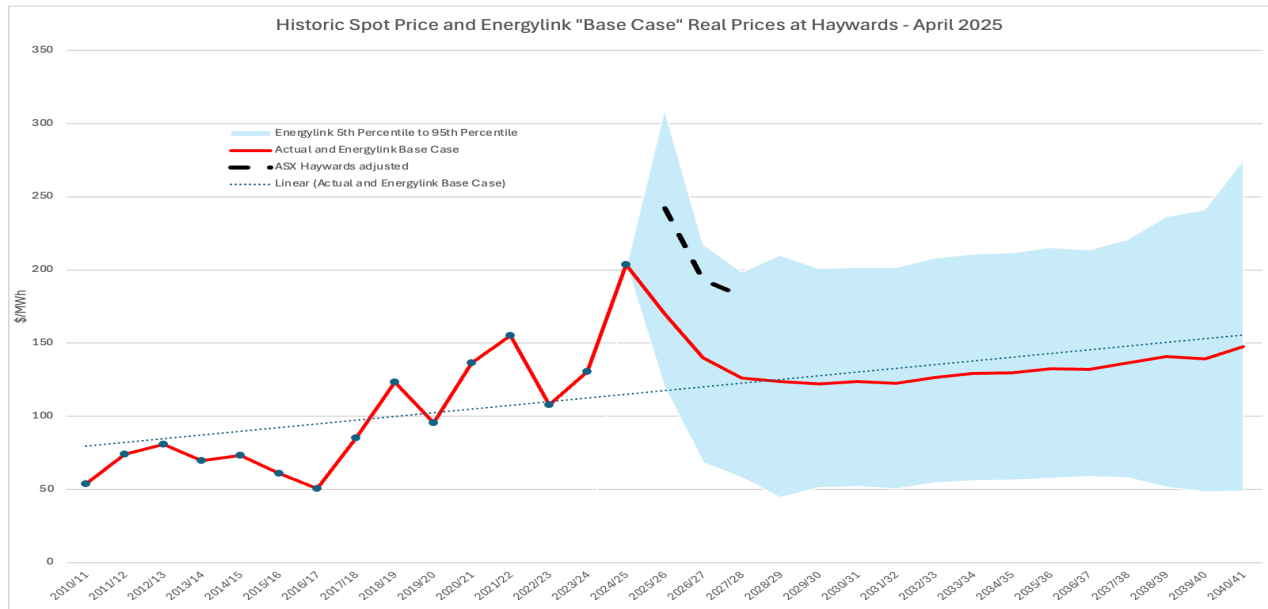
We have proposed changes to the principles to clarify what is considered discriminatory and what is expected of gentailer trading activity. We also recommend specific data be collected, published, and monitored by the EA (refer to appendices).

Furthermore, we recommend the EA develop formal rules rather than guidance to provide greater clarity and certainty. Alternatively, guidance could transition into rules after a specified period.

## **Maturing of risk management tools, fair and efficient access**

High levels of market concentration and vertical integration have led to competition problems and a lack of a maturing and liquid contracts market. The problems arising from market power in the contracts market will persist without targeted measures to address them. This increases risk and transaction costs, particularly for independent retailers, generators and industrials.

It is crucial for the EA to ensure that market power is not being exploited within the contracts market. The EA considers the ASX to be ‘efficient’, but prices have been elevated above LRMC since 2018, a more thorough examination is warranted regarding the persistent discrepancies between contract pricing, energy analysts' spot price forecasts, internal pricing, and investment in new generation. As illustrated in the chart below there is a disconnect between ASX futures pricing and forward spot price projections.



The chart illustrates that there seems to be unjustified risk premiums to products traded well in advance. These “extreme case” premiums based closer to 95th percentile spot estimates reflect the exercise of market power held by the four major gentailers.

In addition, maturing contracting arrangements is critical for supporting increased investment in generation, enhancing wholesale competition and enabling a competitive retail market - all contribute to lowering prices for end consumers and accelerating an affordable energy transition.

The current contracts market lacks transparency in its forward curve beyond three to four years, and is limited in scope to baseload products. Enhancing the visibility and tradability of diverse products across longer timeframes is crucial for fostering market confidence.

We acknowledge the EA’s work at pace to develop a standardised super peak product, this is a positive step, however a more comprehensive set of standardised risk management products and access terms should be developed.

Extension of existing market making and mandatory spread limitations for a forward curve duration of 10 years would support better price discovery and entry from entrant generators, this will in turn stimulate competition in the retail market and downward pressure on prices.

Mandatory spread limitations would reduce the incentive to misprice market risk. It would put competitive pressure on the generation market and support independent generation entry. To simplistically illustrate, consider a scenario where the 10-year forward price is \$150/ MWh. If an independent generator can build for \$112 MWh base load equivalent, a gentailer would be compelled to contract with them. Consequently, if a mandated spread of \$10 exists, the traded price would decrease to \$122 (\$112 + \$10).

Additionally market making and mandatory spreads should at least be applied to a peak or the super peak product. This would introduce liquidity and price discovery for different risk parameters helping to rebuild confidence in the market and help stimulate investment in flexible generation or batteries.

### **Sequencing and transition arrangements**

We support a phased approach, where non discrimination principles are implemented immediately and other measures are implemented as soon as they can be developed. This will ensure the regime evolves to meet the market's needs without delaying urgently required action.

We believe the EA should also develop a set of transition rules that provide specific instructions to gentailers regarding the construction of an initial internal retail portfolio and to ensure risk management access for 3rd parties and prevent gaming. The EA will need to oversee implementation of a portfolio and rebalancing of risk management contract prices to avoid a price shock and prevent more monopoly rents from being extracted. Without such oversight, Gentailers may lift average pricing rather than rebalance it. Additionally, left to their own devices an obstinate Gentailer could say their retail business is 'unhedged' and not construct a portfolio or engage in trading externally.

Octopus Energy supports the EA's proactive steps to promote competition in the electricity sector. Non-discrimination obligations must be implemented now—but to be meaningful, they must be rapidly supported by further practical and enforceable rules that target the root causes of market distortion.

We appreciate the EA's ongoing work and welcome continued engagement to ensure New Zealand's electricity market becomes more transparent, competitive, and resilient for the benefit of all consumers.

Yours sincerely,

Margaret Cooney  
Chief Operating Officer  
Octopus Energy New Zealand

## Responses to questions

### Question

*Q1. What are the benefits of vertical integration between generation and retail?*

### Response

While vertical integration offers internal efficiency for managing risk, in New Zealand's highly concentrated electricity market it creates serious competition concerns. It slows contracting innovation, suppresses demand response, and discourages timely investment and creates barrier to independent entry which is necessary to spur price competition.

More details are provided in our joint IER submission.

*Q2. Do you agree with our description of competition concerns from Gentailer vertical integration?*

Yes, but the issues are more significant than described. Vertical integration combined with market power has led to underinvestment, inefficient use of demand response, and margin squeeze behaviour. Evidence of discriminatory pricing and limited hedge availability supports immediate regulatory action.

More detail is provided in our joint IER and in previous submissions including our Urgent Code Change Proposal in August 2024 and Risk Management Review Submission. Additionally in complaints to the Commerce Commission.

*Q3. Does vertical integration of Nova and Pulse raise concerns?*

No. These smaller players demonstrate the challenges of competing against gentailers with entrenched market power. Their limited growth reinforces that simply building generation is not a sufficient solution.

*Q4. Other areas where Gentailer market power and vertical integration are causing concerns?*

Yes – including inefficient internal pricing of risk, delayed or refused contracting with third parties, lack of PPAs with independent generators, and cross-subsidisation between business units. These behaviours reduce competition and slow the energy transition.

*Q5. Do you support a proportionate Level Playing Field measure?*

Yes. Non-discrimination obligations are necessary and urgent, but must be supported by additional targeted measures such as accounting separation, enforceable internal trading protocols, and ideally corporate separation. In addition we have outlined suggested enhancements to market contracting arrangements in the cover letter. Market power is clearly being exercised and further reform is required.

*Q6. Have we focused on the right Level Playing Field options?*

Some options are helpful, but Negotiate-Arbitrate is unworkable in practice.

The options aren't mutually exclusive and we think accounting separation, non discrimination obligations, escalation measures, and corporate separation should all be implemented without delay.

*Q7. Are there other important factors when identifying options?*

Yes. Effectiveness of enforcement is critical—rules must not only be designed well, but be practically enforceable. Independent participants must be empowered, real-time monitoring enabled, and costs of implementation clearly understood.

*Q8. Other features or trade-offs to consider for the four options?*

The Negotiate-Arbitrate model would be slow and expensive. Options that build on existing market structures while introducing enforceable transparency and

*Q9. Have the right criteria been used to assess the options?*

accountability are preferred.

Broadly yes, but regulatory effectiveness should be front and centre—especially the ability to prevent and detect harmful conduct.

*Q10. Do you agree with how the assessment criteria have been applied?*

Largely yes, but there should be more weight on enforceability and timely implementation.

*Q11. Other material benefits or risks to consider?*

Yes – the risk of entrenching gentailer dominance is significant. If left unaddressed, market concentration will increase, prices will rise, and the energy transition will be delayed.

*Q12. Do you support non-discrimination obligations as the preferred approach?*

As a starting point, yes. However, they must be backed by additional obligations: accounting separations, operational separation rules and incentives on management, corporate separation and improvements to the contracts market. Without these changes discrimination opportunities will remain. Non-discrimination rules must be robust, transparent, and enforceable.

*Q13. Views on the roadmap for implementing non-discrimination obligations?*

The roadmap must be accelerated. Waiting years to act on clear problems creates ambiguity and undermines the policy intent. Escalation tools should be implemented as soon as they can be developed as described in the cover letter.

*Q14. Which hedge products should the obligations apply to?*

All risk management contracts and wholesale energy purchase contracts (i.e to cover PPA's). Restricting obligations to just super-peak products would enable continued discrimination through other instruments. Additionally as illustrated in previously tabled data rampant price discrimination and a continuing margin



*Q15. Feedback on the indicative non-discrimination principles?*

squeeze justify broad application.

Refer to our Appendix. We have proposed clearer and more comprehensive principles, including obligations to avoid cross-subsidisation, trade in good faith, and implement internal non-discrimination policies with board-level oversight.

*Q16. Are escalation options needed if non-discrimination rules are initially principles-based?*

Yes. As suggested previously we think elements of the escalation options should be implemented as soon as practical rather than waiting for problems to occur. There also needs to be significant consequences for non compliance. Market Making compliance show Gentailers will choose not to comply if it makes commercial sense not to do so.

Non compliance with non discrimination obligations should include consequences of disqualification as a market participant in order for them to have a deterrent effect.

Without effective enforcement mechanisms, compliance will be weak. Escalation should include independent audits, transparency measures, and firm triggers based on market behaviour.

*Q17. Is mandatory platform trading a suitable escalation?*

Yes It would support transparency and could help reduce preferential internal allocation of hedges if discrimination persists.

However we think mandatory market making obligations with restricted spreads as described in the cover letter would be better immediate implementation.

*Q18. Likely costs and benefits of prescriptive accounting rules?*

Prescriptive rules would enhance transparency and are critical to effective oversight. Costs are modest relative to the potential market-wide benefits. Without prescriptive rules that standardise accounting practices it will be impossible for activity to be monitored.

*Q19. How should non-discrimination requirements prevent favouring internal retail arms?*

Through legally enforceable internal trading protocols, accounting separation, board-certified policies, and mandatory transparency. Staff incentives should be aligned to compliance. In addition significant consequences should result from non compliance.

*Q20. What should trigger stronger regulation in the roadmap?*

As described many of the escalation measures should be implemented as soon as practical rather than delayed until further discriminatory conduct happens.

We have included suggested monitoring in the table attached to this submission. In addition evidence of continued discrimination, prices well above the cost of supply, hedge shortages, or pricing anomalies such as significant buy- sell spreads. Ongoing complaints from independent retailers or generators should also be taken seriously as potential indicators.

*Q21. Does the roadmap sufficiently reflect MDAG's recommendation for virtual disaggregation?*

MDAG's proposals were targeting equal access.

As described in the cover letter we think that a combination of market making and mandatory spreads should be implemented as soon as practical. Ideally there would be a consistent forward curve that all parties are incentivised to respond efficiently to. Mandating spreads in combination with wider non

discrimination requirements (e.g covering PPA's) would help incentivise efficient behaviour, particularly the expansion of supply.

Additionally, there is a need for transition arrangements where minimum volumes are made available. It may be the case that these remain in place until there is a sufficient level of liquidity.

*Q22. Is virtual disaggregation a useful tool to address competition concerns?*

Yes, it is a potential solution.. It will need wider non discrimination provisions as well.

## **Appendix: Revised Non Discrimination Principles**

In this appendix we suggest revised principles. The intent of the revisions is to make them clearer. We also suggest the definition of 'Buyer' be revised or replaced so that it incorporates third party sellers of energy and not just risk management products. The reason for suggesting this is that there is an opportunity for non discrimination rules to also benefit independent generators who also face barriers to contracting for PPA. Facilitating more generation market entry and investment is critical to an affordable and secure energy transition.

In addition we have suggested 2 additional principles:

- **Principle 7: Prohibition on cross subsidies** - the objective of this is to make it explicit that cross subsidies are prohibited, this intention is outlined in the options paper but there is no corresponding Principle. Additionally we have extended this to cross subsidies across segments, the intention of this is to prevent price discrimination - for example commercial customers have faced more significant price increases than residential consumers as a result of this segment having less retail competition.
- **Principle 8: Obligation to trade in good faith** - one way to abuse market power is to frustrate the negotiation/ trading process. Gentailers should be obligated to demonstrate they are trading in a constructive and timely way.
- **Principle 9: Obligation to have in place a Non discrimination policy** - this principle is aimed at ensuring that there is Governance level awareness and scrutiny of operational practices. Additionally management should be incentivised to comply with these principles and act in accordance with the obligations. This should have practical implications, for example management incentives for retail staff should not be tied to generation business outcomes; they should be limited to the performance of the business unit.

### **Principle 1: Fair and Non-Discriminatory Supply**

*A gentailer must not discriminate against buyers in favour of its own internal business units, or between buyers, for the supply of (and in relation to the price and non-price terms of) risk management contracts and purchase of energy. Any differentiation must be based on objective, transparent, and cost-based justifications that can be independently verified.*

### **Principle 2: Transparent Internal Trading and Pricing**

*A gentailer must establish and maintain an economically meaningful, auditable portfolio of internal trades and prices based on an observable benchmark (such as ASX or broker quote). These internal trades must be documented, disclosed as external hedges and available for regulatory review to demonstrate compliance with non-discrimination obligations. Ongoing internal trades must be disclosed to the market as external hedges are.*

### **Principle 3: Objective Credit Assessment**

*Credit terms and collateral arrangements must reflect an objective, proportionate, consistent, and transparent assessment of the risk of trading with a buyer. Standard instruments should*

*be used and a range of options should be available.*

**Principle 4: Equal Access to Commercial Information**

*A gentailer must ensure that any commercial information relating to risk management contracts and energy prices is made available to its internal business units and is simultaneously made available to any potential buyers.*

**Principle 5: Protection of Confidential Information**

*A gentailer must protect buyer confidential information and establish robust information barriers to prevent disclosure of this information to any internal business units that compete with the buyer.*

**Principle 6: Record-Keeping and Disclosure Requirements**

*A gentailer must establish, maintain, keep and disclose comprehensive records that demonstrate its compliance with these non-discrimination principles, including documentation of all negotiations, internal trades, pricing decisions, and supply arrangements.*

**Principle 7: Prohibition on cross subsidies**

*A gentailer must not engage in cross-subsidisation between its generation and retail business units or between different customer segments. All internal transactions must occur at fair market value, and cost allocations between business units must be transparent, consistent, and economically justified.*

**Principle 8: Obligation to trade in good faith**

*A gentailer must engage with other counterparties in good faith and in a timely and constructive manner. Gentailers must be able to demonstrate that they are conducting their business in compliance with this obligation.*

**Principle 10: Non discriminatory policy**

*A gentailer must have an internal policy that details operational practices in place to ensure trading of risk management products happens on a non discriminatory basis and in accordance with these principles. This policy must also ensure that Management is incentivised to comply with this policy. This policy must be approved and reviewed by the Gentailers board annually.*

**Appendix: Proposed monitoring**

<b>Principle</b>	<b>Data to Collect</b>	<b>EA Monitoring Activity</b>	<b>Potential Breaches / Concerns</b>
<b>1. Fair and Non-Discriminatory Supply</b>	<ul style="list-style-type: none"> <li>- All pricing and terms for risk management contracts (including PPAs)</li> <li>- Records of offers to internal vs external buyers</li> <li>- Justifications for any differentiation</li> </ul>	<ul style="list-style-type: none"> <li>- Compare internal vs external contract terms</li> <li>- Spot-check contract terms for consistency</li> <li>- Review justification documents for validity</li> <li>- Publish buy/ sell spread across all contract types</li> </ul>	<ul style="list-style-type: none"> <li>- More favourable terms to internal units without justification</li> <li>- Absence of documented rationale for differentiated treatment</li> <li>- Pattern of rejections to external buyers but not internal</li> <li>- A significant/increasing buy/sell spread</li> </ul>
<b>2. Transparent Internal Trading and Pricing</b>	<ul style="list-style-type: none"> <li>- Internal trade logs</li> <li>- Internal pricing models</li> <li>- Disclosures of trades as external hedges</li> </ul>	<ul style="list-style-type: none"> <li>- Verify internal trade data against market data</li> <li>- Check trade timestamps and audit trails</li> <li>- Review disclosures for timeliness and completeness</li> </ul>	<ul style="list-style-type: none"> <li>- Internal trades not reported as external hedges</li> <li>- Pricing not aligned with market trends</li> <li>- Missing audit trails or retroactive edits</li> </ul>

<b>3. Objective Credit Assessment</b>	<ul style="list-style-type: none"> <li>- Credit scoring policies</li> <li>- Counterparty risk assessments</li> <li>- Records of collateral requirements</li> </ul>	<ul style="list-style-type: none"> <li>- Sample credit assessments to check consistency</li> <li>- Review deviations from standard instruments</li> <li>- Assess transparency of risk-based decisions</li> </ul>	<ul style="list-style-type: none"> <li>- Discriminatory collateral demands</li> <li>- Lack of clear scoring models</li> <li>- Inconsistent treatment of counterparties with similar profiles</li> </ul>
<b>4. Equal Access to Commercial Information</b>	<ul style="list-style-type: none"> <li>- Timing logs of information releases</li> <li>- Internal communications to trading desks</li> <li>- External communication timestamps</li> </ul>	<ul style="list-style-type: none"> <li>- Monitor simultaneous release of commercial information</li> <li>- Audit access logs to sensitive data</li> <li>- Interview external buyers on information availability</li> </ul>	<ul style="list-style-type: none"> <li>- Internal units receiving information earlier than external buyers</li> <li>- Lack of controls over information release</li> <li>- Missing records of information sharing</li> </ul>
<b>5. Protection of Confidential Information</b>	<ul style="list-style-type: none"> <li>- Access control logs</li> <li>- Confidentiality policies</li> <li>- Incident logs / breach reports</li> </ul>	<ul style="list-style-type: none"> <li>- Test robustness of information barriers</li> <li>- Inspect logs of access to buyer data</li> <li>- Interview staff on confidentiality training</li> </ul>	<ul style="list-style-type: none"> <li>- Buyer information accessed by internal competitors</li> <li>- Weak or missing access controls</li> <li>- Lack of incident response or breach reporting</li> </ul>
<b>6. Record-Keeping and Disclosure Requirements</b>	<ul style="list-style-type: none"> <li>- Logs of negotiations, trades, and decisions</li> <li>- Versioned documentation</li> <li>- Compliance disclosures</li> </ul>	<ul style="list-style-type: none"> <li>- Audit completeness and accuracy of records</li> <li>- Cross-verify documentation with market activity</li> <li>- Confirm record retention policies are</li> </ul>	<ul style="list-style-type: none"> <li>- Missing or altered records</li> <li>- Inability to produce documents for specific trades</li> <li>- Delayed or incomplete disclosures</li> </ul>

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<b>7. Prohibition on Cross Subsidies</b>	<ul style="list-style-type: none"> <li>- Cost allocation methods</li> <li>- Internal transfer prices</li> <li>- Financial data by business unit (as per accounting separation rules)</li> </ul>	<ul style="list-style-type: none"> <li>- Analyse pricing of internal trades vs market rates</li> <li>- Review cost allocation for consistency</li> <li>- Audit internal financials</li> </ul>	<ul style="list-style-type: none"> <li>- Internal trades below market price</li> <li>- Shifting generation costs to retail units</li> <li>- Opaque or inconsistent cost allocation</li> </ul>
<b>8. Obligation to Trade in Good Faith</b>	<ul style="list-style-type: none"> <li>- Correspondence with counterparties</li> <li>- Logs of trade enquiries and responses</li> <li>- Complaint registers</li> </ul>	<ul style="list-style-type: none"> <li>- Review timelines and tone of engagement</li> <li>- Analyse patterns in trade rejections or delays</li> <li>- Conduct external stakeholder surveys</li> </ul>	<ul style="list-style-type: none"> <li>- Delayed responses or ignoring external parties</li> <li>- Hostile or obstructive communication</li> <li>- Repeat complaints of unfair treatment</li> </ul>
<b>10. Non-Discriminatory Policy</b>	<ul style="list-style-type: none"> <li>- Internal policy documents</li> <li>- Board review records</li> <li>- Incentive scheme details</li> </ul>	<ul style="list-style-type: none"> <li>- Check for existence and board sign-off</li> <li>- Evaluate how policy is operationalised</li> <li>- Interview staff on awareness and incentives</li> </ul>	<ul style="list-style-type: none"> <li>- Policy not reviewed or board-approved</li> <li>- Incentives that contradict non-discriminatory goals</li> <li>- Low staff awareness of the policy</li> </ul>



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