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Problems in the wholesale market are harming competition and consumers

2degrees supports the introduction of non-discrimination obligations on Contact, Genesis, Mercury and Meridian (Gentailers) to engage with buyers of risk management contracts in good faith and a non-discriminatory manner.

As an independent electricity retailer, we are dependent on access to suitable risk management tools to manage spot price risk and to offer competitive services to our customers and other electricity consumers. Access to liquid and efficient short- and long-term products is essential to our engagement in the electricity market and our ability to compete.

Our submission outlines our concern that the non-discriminatory obligations the Electricity Authority is proposing will have limited application and will not achieve the intent "to ensure that the Gentailers cannot favour their own retail arms over other retailers."

We urge the Authority to substantially strengthen the proposed drafting of the non-discrimination obligations and consider corporate separation as a regulatory backstop in the event of non-compliance or the absence of any adequate improvements in the competitive landscape of the energy market following implementation of the non-discrimination obligations.

Getting access regulation right is one of the most important reforms the Authority can introduce to improve competition and the efficient operation of the electricity industry for the long-term benefit of consumers.

Our submission is broken down into 3 sections:

1. **There is clear evidence of competition problems**

   We consider there is clear evidence of competition problems in the electricity market that support the introduction of effective and robust non-discrimination obligations.

2. **2degrees preferred approach remains corporate separation**

   While 2degrees supports non-discrimination obligations as a necessary step, we continue to advocate for corporate separation as the better solution to deliver enduring, effective competition and consumer benefits.

In the absence of corporate separation, non-discrimination obligations must be clear, wide-ranging (i.e. not limited to price or uncommitted capacity), unambiguous and not left to be defined by those with market power. Where non-discrimination fails, corporate separation should be considered a regulatory backstop.

3. Non-Discrimination obligations must be expanded

In our view, the proposed drafting of the non-discrimination obligations are currently too narrow to be workably effective. By adopting restrictions to the non-discrimination obligations, we consider the Authority is departing from best practice and the established norms for non-discrimination obligations.

We consider the concept of "**uncommitted capacity**" to be unacceptable and tantamount to providing regulatory permission to the Gentailers to be able to discriminate and provide preferential treatment to their internal business unit. We are unclear if this is the Authority's intent, but we consider it to be of paramount importance to address this issue.

Opening comments and reflection on the telecommunications regulatory reform

We are ambitious for New Zealand and ambitious for 2degrees. We want to be in a truly competitive electricity market where we can offer innovative electricity services to all New Zealanders. Current market conditions and the limitations of the current non-discrimination proposal stifle this ambition.

Our views on the regulation required to address wholesale access problems is shaped by our experience (and success) in telecommunications.

While we can point to the telecommunications industry today as a success story, this wasn't always the case. Our experience is that the Telecommunications Act provides a cautionary lesson the Authority should be mindful of when considering what reforms should be adopted and how far regulation should go.

The initial iteration of the Telecommunications Act was fundamentally sound but substantial upgrades were subsequently required to fully address the competition problems in the telecommunications market and access to bottleneck Chorus (nee Telecom) services.

When it comes to regulating against market power, the Authority seems to prefer incrementalist and iterative interventions. It is important to be cognisant of the tension between short-term regulatory stability and medium to longer-term regulatory uncertainty. Leaving problems to grow and fester is not a successful formula for creating a regulatory environment that encourages the new entry and investment.

Despite raising these concerns with the Authority in response to the Level Playing Field options paper in May[1], it appears that Authority has adopted for an even weaker version of the non-discrimination obligations than original proposed, which in our view further risks the unintended consequences of failing to implement robust, effective and transformative regulatory change.

The Authority's focus should be on regulating the wholesale market not the retail market

2degrees highlights that the Authority is taking significant action to regulate the retail market through Daylight, EIEP14 files, retail price IDs, and retail bill consultations.

[1] 2degrees_Level Playing Field_Option Paper

We consider the Authority's should be focused on regulatory reform in the wholesale market with the objective of driving down the wholesale price i.e. the hedge price, as we consider this will have the most impact on consumers.

There is a real risk that by focusing on regulation in the retail market, as opposed to the wholesale market, the Authority is simply increasing the barriers to entry and the risk of independent retailer exit.

2degrees acknowledges the recent change on the Authority's position relating to super-peak products and that it now considers supply should be mandated. 2degrees considers that options such as virtual disaggregation and/or corporate separation would be complementary to the good faith/non-discrimination requirements and should be explored.

2degrees rejects EGANZ claims of the risks of 25% retail price increases and that vertical integration benefits electricity consumers if non-discrimination provisions are implemented.

1. There is clear evidence of competition problems in the electricity market:

a. Reduction of the independent retailers

2degrees and the Independent Electricity Retailers have documented in numerous submissions that on any reasonable or objective metric, retail competition has stalled or gone backwards since around 2018/the Pohokura Outages. This trend has continued through 2025 with retail competition statistics getting worse.

In 2degrees' view[2], the low and declining switching rates reflect barriers to competition and wider competition problems in the market. The decline in switching rates correlates with the exit of more than 30 independent retailers from the New Zealand electricity market since 2018.

Our recent voluntary super-peak product submission detailed a number of competition metrics, in addition to falling switching rates.

b. There is a lack of liquidity & persistent access problem

There has been persistent liquidity and access problems in hedge markets for many years. Our submission on the level playing field option paper documents long-standing difficulties for independent retailers in obtaining shaped hedges on economically sustainable terms.

These issues are, in our view, a product of the current market structure that is dominated by vertically integrated generators / retailers who have significant or substantial market power with control over flexible generation who are structurally incentivised to prefer internal allocation and price up external volumes.

Independent retailers comprise only 6% (prior to Meridian's acquisition of Flick) of the retail market by MWh volume.

2degrees has experienced a serious lack of ability to obtain long term hedging at workably competitive price that allows use to compete against the incumbent gentailers on a level playing field e. Lack of supply coupled with ongoing barriers (such as unreasonable credit requirements for substantial balance sheet support) has led to, in our view, persistent access problems and difficulty competing with the portfolio view of vertically integrated incumbent generators.

Similar experiences were noted in the IEGA's analysis of the Authority's PPA datasets that found no PPAs signed between gentailers and independent generators/retailers from May 2019 to September 2024 [3](with only two JV exceptions), underscoring limited access to flexible supply from Gentailers consistent with market dominance.

c. Evidence of Margin Squeeze exists

We fully support the Authority's conclusion that the framework for a margin squeeze does exist. In particular, in relation to the gentailer's market power over the supply of shaped hedges and firming, in combination with their vertical integration.

However, we do not agree with the Authority's conclusion that the margin squeeze analysis is not definitive[4], particularly given there is prima facie evidence of price/margin squeezes

2 As 2degrees, the independent electricity retailers and other market participants have been raising for a number of years now, including in response to the Authority's Risk Management Review/Level Playing Field work, 2degrees Level Playing Field Consultation submission May 2025.
[3] Appendix 1 of Microsoft Word - IEGA submission - ECTF level playing field measures 7 May25
[4] Page 30 of the Authority's Level Playing Field Consultation

with the gentailers extracting (increasing) profits from their wholesale businesses, and operating retail at (increasing) losses.

We continue to advocate the Authority undertake orthodox price squeeze/equivalence of Input testing to determine whether the incumbent gentailers are using high wholesale prices and vertical integration to impose price barriers to retail competition.[5]

We remain of the view that "The issues with the price and availability of hedge contracts and, where they exist, how they compare with alternative risk management options cannot sensibly by separated from questions about whether the available pricing results in price squeezes or other access price and end-user retail price relativities issues and concerns. These issues are not stand-alone and should not be treated as such."[6]

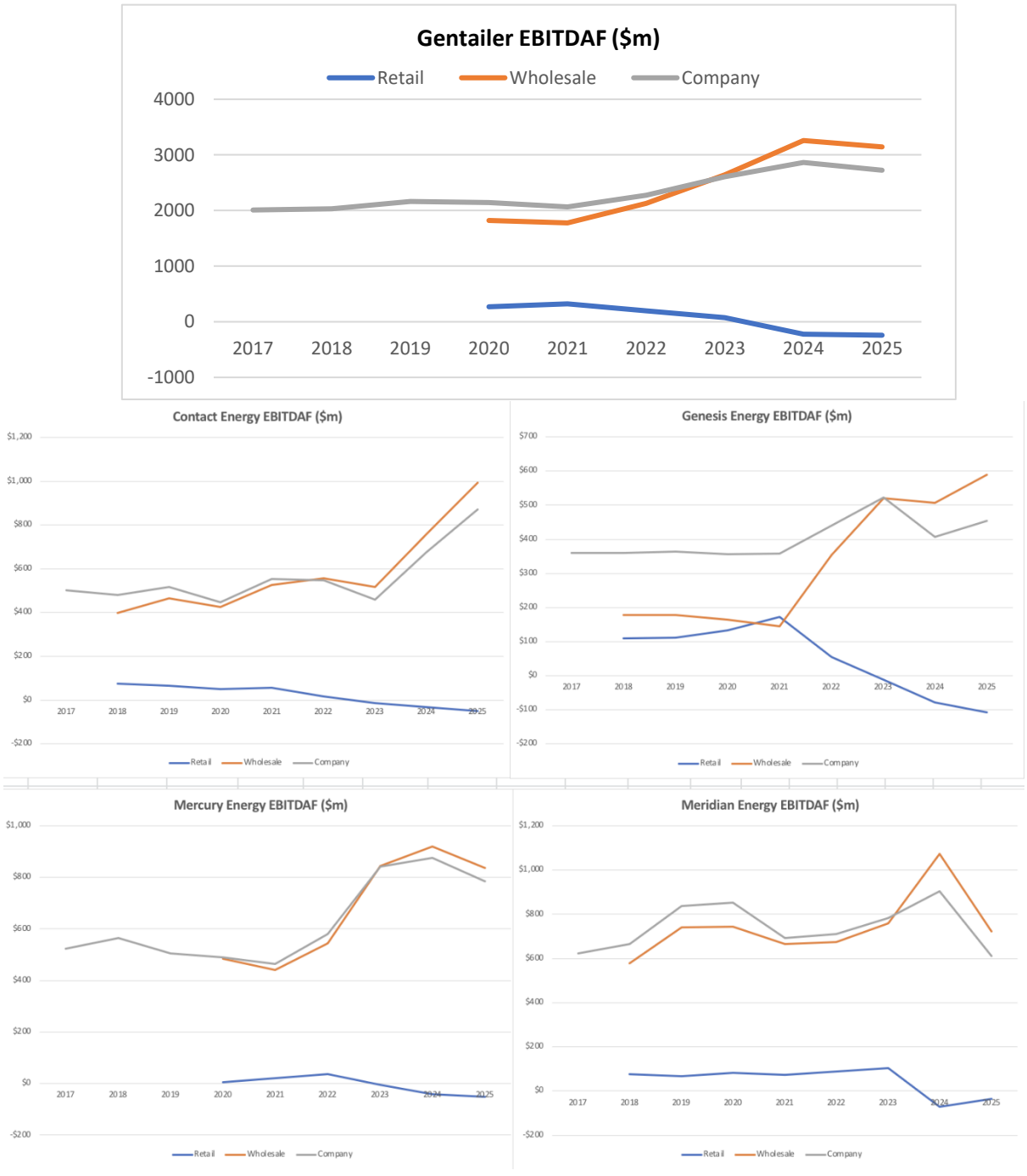
The Authority's analysis (at Figure 1) provides evidence of price squeezes, retail prices below wholesale costs. It is unclear why the Authority considers "There is no definitive evidence of a margin squeeze" given it has observed "retail price offers were below wholesale contract prices in 2023." Retail prices below wholesale prices are a black and white example of a margin squeeze.

The incumbent gentailers' Annual Reports also provide evidence of price squeezes (see Figure 1).

The incumbent gentailers have substantially grown their wholesale/company-wide profits while they are reporting larger and larger retail losses. All four reported retail losses in 2025, with Meridian the only gentailer to have reported a smaller loss in 2025 than previous years. While there is a lot of 'noise' in the gentailer financial disclosures[7] they provide clear (and growing) prima facie evidence of price/margin squeeze problems that warrants investigation.

[5] e.g. 2degrees, Electric Kiwi, Flick Electric, Octopus Energy and Pulse Energy (the Independent Electricity Retailers), Removing barriers to competition – the Risk Management Review, 6 March 2024.
[6] iBid.
[7] The Authority did not implement the Electricity Price Review recommendation for separate electricity retail/wholesale financial reporting and the gentailer segmented reports don't provide a pure electricity retail/wholesale split.

Figure 1: Summary of Incumbent Gentailers' Annual Reports:



Similarly, we do not fully support the Authority's conclusions derived from the analysis of Figure 4 of the consultation at page 29. In our view, this analysis does not adequately account for the limitations in the data inputs, such as it being based on baseline hedge prices only, no-winter pricing, and no-long term pricing. We also question why prices are higher for independents retailers than industrials when independent retailers have much greater demands than many industrials and are wholesale buyers. All these factors are likely to skew the results to look more favourable than the reality.

We refer the Authority to the report by Link Economic for further commentary on what the appropriate margin squeeze test should be and the proper analysis that ought to be undertaken by the Authority to establish whether a margin squeeze is apparent.

We would urge the Authority to conduct further analysis to explore whether evidence of the margin squeeze exists in the NZ energy market.

d. The hedge price (not the spot price) is the wholesale price.

In 2degrees' view, implementation of the non-disclosure obligations (including development of the retail price consistency assessment (RPCA)) must not incorrectly assume the spot price is the wholesale price or the expected cost of electricity.

As explained in the Link Economic report "*In order for the RPCA to assess whether or not the gentailer is discriminating against retailers in its pricing of risk management contracts, the prices of those contracts needs to appear explicitly in the definition of the RPCA....the RPCA would describe the gentailer's expected cost of electricity supply as including the risk-management prices that it charges to other retailers."*

Any assessment of retail price consistency cannot use the spot market or ASX as the observable benchmark for determining competitive hedge prices and must be based on an assessment the hedge price based on a benchmark portfolio of a prudent retailer.

e. Claims spot prices are workably competitive are not supported

The use of spot price as an assessment of the wholesale price is problematic and this is further exacerbated in the context of the Authority suggesting that the spot price is workably competitive. The 'foundation' of the Authority's downplaying of the size of the problem is that it is confident, based on market monitoring, that spot (and hedge, apart from super peak) prices are workably competitive. The Authority's own prior commentary, for example, details why this is invalid.

The Authority has not explained or reconciled how it found evidence, as part of its wholesale market review (WMR), that "generators may have been exercising market power during the review period", and since then spot prices have risen substantially, but now the Authority is saying "spot prices are competitive".

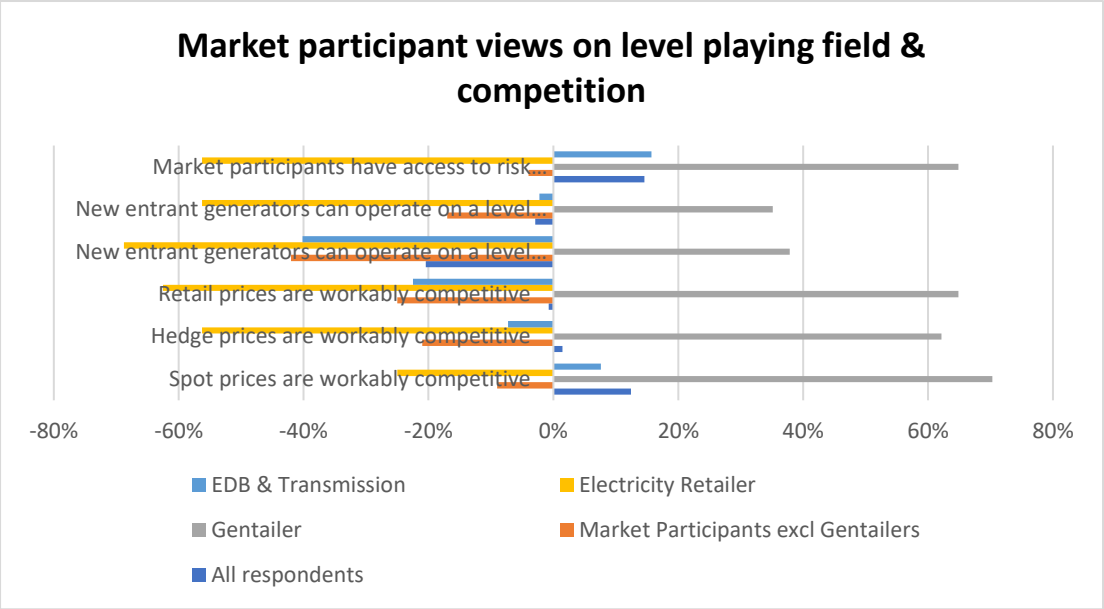
We do not accept that prices in the spot and OTC markets are competitive or that non-competitive prices could be limited to super-peak products[8] As Meridian has explained "When high [spot] prices result from market power, hedge prices will also reflect market power – the same rents are extracted, but in a different way."[9]

f. There continues to be a lack of confidence in the market

In the 2023 MDAG report, the group noted that one of the four key pillars of a well-functioning wholesale electricity market was "Public confidence". It is clear there is limited public confidence that the energy market is operating efficiently and will deliver on its promise of affordability or security of supply.

In addition, the Authority's market participant surveys provide clear evidence "independent retailers [and market participants other than gentailers] lack confidence in the effective operation of hedge markets", including that: (i) there are problems with access to risk management mechanisms, and (ii) hedge products are not available at workably competitive prices. This is illustrated, for example, by the following:

[8] We agree the Authority cannot conclude the prices for super-peak hedge contracts are competitive. We agree "The market for this type of hedge contract is neither deep nor liquid …"
[9] Meridian, Draft Decision regarding alleged UTS on 26 March 2011 - Cross Submission, 19 May 2011.


Market participant views on level playing field & competition
Market participants have access to risk...
New entrant generators can operate on a level...
New entrant generators can operate on a level...
Retail prices are workably competitive
Hedge prices are workably competitive
Spot prices are workably competitive
-80%
-60%
-40%
-20%
0%
20%
40%
60%
80%
EDB & Transmission
Electricity Retailer
Gentailer
Market Participants excl Gentailers
All respondents

2. Our preference remains for corporate separation

We remain of the view that the most appropriate regulatory intervention to meet the statutory objectives of the Authority is corporate separation.

Corporate separation embeds non-discrimination principles in a clear, enforceable framework, making compliance easier and reducing regulatory complexity. It promotes competition and investment by ensuring equal terms for all retailers and improving hedge market liquidity. It has been recognised internationally as best practice and in our view has proven feasible and successful in the Telecommunications sector.

Our initial concerns relating to non-discrimination obligations remain valid, in particular, that non-discrimination obligations are complex to draft and enforce (as illustrated in section 3 below), are often subject to loopholes and vague definitions, do not address information asymmetries and are unlikely to address affordability of supply or increase liquidity in the market.

We accept that the Authority's proposal to adopt good faith conduct and non-discrimination requirements will help mitigate against the harm market power in the wholesale market can cause in the retail market however, non-discrimination obligation alone do not address the underlying market power problem.

2degrees considers that options such as corporate separation would be complementary to the good faith/non-discrimination requirements. At a minimum corporate separation should be clearly sign-posted by the Authority as an escalation option or regulatory backstop if non-discrimination principles are not adhered to or if competition does not improve.

3. Non-Discrimination Principles should be expanded

We welcome the Authority's acknowledgement that access to risk management/hedge products is important to help "*ensure retailers and major industrial users against wholesale electricity price volatility*" including *"super-peak hedge contracts*".

2degrees supports the Authority's intent *"to ensure that the gentailers cannot favour their own retail arms over other retailers"* however we are concerned that the current drafting of the non-discrimination principles may permit discrimination to continue to occur in the retail electricity market.

Adopting a narrow non-discrimination regime, focused on pricing of and access to buyers of hedge contracts (to the exclusion of a Gentailer's internal business unit), could leave opportunities for discriminatory behaviour.

As risk management contracts are essential wholesale inputs for the provision of retail electricity, non-discrimination principles should apply equally to all types of risk management contracts; both on price and other non-price terms and apply equally to all participants.

By simplifying the obligation to one that applies equally to all buyers the Authority has a greater chance of preventing market distortion and mitigating structural risk (without the need for corporate separation, noting that corporate separation should be a regulatory backstop in the event of non-compliance).

By ensuring fairer competition and preventing a gentailers favouring their own retail arms the Authority can limit the Gentailer's ability to offer better pricing, preferential hedging, or early access to generation capacity to its internal business units, to the disadvantage of other market participants.

Balancing the supply and demand sides of the hedge market should result in hedge price equilibrium, that in our view, ought to be lower than the current hedge price.

i. Issues with the proposed drafting of non-discrimination

In our view the proposed 'limits' on the non-discrimination rules are far more substantive than is appropriate.

We consider the Authority should adopt broad non-discrimination obligations that closely mirror those adopted under primary legislation in sectors with similar market power issue[10].

2degrees recommends the Authority redraft Non-discrimination Principle 1(1) as follows:

> *A gentailer must not, in relation to the supply of **risk management contracts,** treat any buyer differently or, where the gentailer supplies itself with a service (that has the same or similar effect as a **risk management contract)** it must not treat itself (including its internal business units or any interconnected bodies corporates) differently from any other buyer, except and only to the extent that a particular difference in treatment is objectively justifiable and does not lessen or harm, and is unlikely to lessen or harm, competition in the electricity retail market.*

[10] Under the Telecommunications Act; non-discrimination means, in relation to the supply of a relevant service, that Chorus must not treat access seekers differently or, where Chorus supplies itself with a relevant service, must not treat itself differently from other access seekers, except to the extent that a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market. Under the Grocery Industry Competition Act; non-discrimination means, in relation to the wholesale supply of groceries and any ancillary services, that the regulated grocery retailer must not treat any wholesale customer differently from how it treats itself or its associated persons or any other wholesale customer, except to the extent that a particular difference in treatment is objectively justifiable and does not lessen, and is unlikely to lessen, competition in any grocery market

We consider Principle 1 apply both to “access of risk management contracts”, and “price and non-price terms”.

Furthermore, any “objectively justifiable” exclusion to the non-discrimination obligations should be strictly limited to those circumstances that do not harm or lessen or are unlikely to harm or lessen competition in the electricity retail market.

By adopting this revised definition, Principle 1(2), 1(3) and 1(4) are unnecessary.

ii. Uncommitted capacity principle should be removed

Further to the above, we do not consider that non-discrimination provisions should be limited to **“uncommitted capacity**”.

In fact, we consider such a limitation to be inconsistent with the Authority’s own intent and purpose as defined in the draft subpart 13.236O. To enable a gentailer’s to continue to prefer their own internal business units over other buyers will not meet the purpose of “ensuring even-handed supply of risk management contracts” and/or result in “competitive pricing of risk management contracts.”

2degrees is also concerned that this pro-discrimination clause would permit more discriminatory behaviour/limit access to capacity more than the Authority intends. For example, there is nothing in the drafting of the clause that would preclude a gentailer from basing its calculation of “uncommitted capacity” on aggressive retail growth assumptions. The consultation paper is incorrect where it states, “the proposal does prevent a gentailer from allocating future generation capacity to planned growth in its own retail internal business unit without testing market interest in that capacity.”

While we acknowledge the challenges highlighted by other submitters in relation to the creation of an “economically meaningful” hedge position we do not consider this to be a reasonable justification to permit a gentailer to positively discriminate in favour of its internal business units.

We consider the gentailers must be able to clearly demonstrate, through means prescribed by the Authority and co-designed by industry, what the effective wholesale price and non-price terms that gentailer supplied to its own internal business unit. This assessment must be able to demonstrate that the supply and pricing of risk management contracts both internally and externally has been done so on a non-discriminatory basis and at a fair price in regard to separate retail and wholesale markets.

In contrast with proposed principle 1(4) of 13.236P, if an *economically meaningful* hedge position is too challenging or complex to adopt, alternatively, the Authority could establish an *“as efficient as”* risk management strategy benchmark that mirrors that of a non-integrated or independent retailer to be used by the gentailers to assist in determining their own internal business units’ risk management needs in order to establish that non-discrimination has been adhered to. A common committed hedge position could be limited to the churn profile of the existing customer base.

iii. If the Authority retains the concept of “Uncommitted Capacity” it must be severely limited

Were the Authority to retain principle 2 we strongly urge that uncommitted capacity excludes limb (a) of the definition: *“(a) the amount of generation that could otherwise be used to back risk management contract that the gentailer reasonably expects to use to supply electricity to its end customers.”*

2degrees would also question the vagueness of the proposed calculation for uncommitted capacity meaning *"a gentailer's expected gross forecast ability to offer risk management contracts less*…." definitions such as these are highly subjective, and likely to be inconsistently adopted or applied, rendering their effectiveness low.

iv. Principle 1(4) illustrates the complexity, subjectivity and challenges of the current non-discrimination obligation drafting

In our initial submission to the Authority on the proposed level playing field option papers, we highlighted the complexity with drafting and implementing non-discrimination obligations. The point is well illustrated by the proposed "for the avoidance of doubt" drafting at Principle 1(4).

While well intentioned, we are concerned that there is significant opportunity for the principle to be misunderstood and inconsistently applied. We must avoid vague, highly subjective definitions and terms.

By way of illustration, we consider that with the current draft of Principle 1(4) there is a possibility that a gentailers could supply risk management contracts to buyers at the same price as own internal business units (being compliant with Principle 1(3)) but in doing so, the (i) price of the risk management contract, and/or (ii) the supply (volume) made available (as per Principle 1(2)); and/or (iii) the gentailer's retail pricing may be such that a "buyer that supplies electricity to end users at retail" could be "prevented from operating profitably."

We also question the likelihood of this principle being helpful to buyers seeking to enforce compliance with the non-discrimination obligations, given that this principle has multiple limbs and is a highly subjective test that fails to acknowledge the information asymmetry between the buyers and the gentailers. As we understand it, in order to rely on principle 1(4), a buyer would need to establish:

1. That there has been a supply (which is not guaranteed given the current proposed drafting of Principle 1(3));
2. That the buyer is "as efficient as" the gentailer with regard to operating cost as the gentailer's own retail internal business units (despite this information being unlikely to be publicly available); and
3. That the buyer has adopted a reasonable risk management approach; and that
4. The buyer was not operating profitably (despite there being no definition of what constitutes profitably).

In short, we consider it highly unlikely to be useful in practice.

v. Duty of Good faith.

Principle 1(4) should define "good faith" based on clause 6 of the Grocery Industry Competition Regulations 2023. We do not consider it is appropriate to leave the interpretation of good faith to the "guidance" note for this section and propose that the Code is updated to include a definition of good faith that is aligned to this statutory definition.

vi. Retail Price Consistency Assessment

We support the proposal to use a Retail Price Consistency Assessment (RPCA) to test whether for gentailers are discriminating in favour of their own retail business units in the pricing of risk management products.

2degrees considers that the proposed RPCA attempts to apply this test in a convoluted manner.

Instead of asking whether the gentailer's retail business could operate at a profit if its wholesale costs were the same as a 3rd party or independent retailer, the RPCA asks whether a 3rd party or independent retailer could operate at a profit if it had the same operating costs as the gentailer's retail business, based on the gentailer's pricing of risk management contracts.

A problem with the proposed RPCA is that one (or more) of the incumbent gentailers could supply risk management contracts to buyers at the same price as own internal business units (compliant with Principle 1(3)) but the (i) price of the risk management contract; and/or (ii) the supply (volume) made available (as per Principle 1(2)); and/or (iii) the gentailer's retail pricing may be such that a "buyer that supplies electricity to end users at retail" could be "prevented from operating profitably."

The proposed RPCA only recognises the relationship between the "pricing of risk management contracts" and a 3rd party retailer being "prevented from operating profitably" and not that the 3rd party retailer could be prevented from operating profitability due to supply (volume) and/or the gentailer's retail pricing and wholesale-retail price margin(s).

Furthermore, we are generally concerned, as noted above, that there is a risk that the RPCA proposal is trying to establish that the "cost of supply" for the purposes of the RPCA is to be informed by the spot price and the short-term nature of the ASX. We consider this fundamentally flawed and not reflective of "spot" and "hedge" being separate markets. We refer you to Link Economics report commissioned by the Independent Retailers for details on the RPCA that we support.

As noted by Link Economics, in order for the RPCA to assess whether or not the gentailer is discriminating against retailers in its pricing of risk management contracts, the prices of those contracts need to appear explicitly in the definition of the RPCA.

We support an updated definition of RPCA that means:

1. *an assessment of the difference between a gentailer's retail prices and that gentailer's expected cost of electricity supply if its retail business unit had to buy risk management contracts from its generation business unit on the same price terms that it charges to third parties.*

As noted above, this would require the gentailer to establish a wholesale price for supply to its internal business units. We recommend that this is based on a benchmark portfolio of risk management contracts as adopted by an "as efficient as" or prudent retailer.

Link Economic also proposed an alternative definition that we consider is not mutually exclusive and could also be adopted. We strongly encourage the Authority to ensure that there is transparency of disclosure of all the relevant inputs that are necessary for determining the wholesale price.

We welcome the opportunity to discuss and refine the scope of the RPCA at the Authority's workshop in December 2025.

vii. Annual reporting, Monitoring and Enforcement:

As per our earlier submission, 2degrees considers strong monitoring, reporting, and enforcement are essential and that the non-discrimination obligations will only be effective if they are accompanied by robust monitoring, reporting, and enforcement by the Authority.

We are concerned that the proposal does not include any consideration or direction relating to enforcement or consequences for a failure to comply with the principles. This should be addressed and explicit in the Code. Meaningful penalties for non-compliance are necessary to ensure that the rules have real impact, and the cost of enforcement will be significant for the Authority.

As outlined in 2degrees' initial response to the level playing field options paper in May we continue to recommend that any non-discriminatory regime includes:

- Independent audits of gentailers' compliance should be conducted at the business unit level (generation and retail), not just at the group level to verify whether or not the gentailer has met the non-discrimination principles.
- There should be a clear, accessible third-party compliance mechanism so independent retailers can raise concerns about suspected discriminatory conduct (e.g., withheld volumes, delayed offers, internal-only products) and have confidence these will be investigated fairly and promptly.
- Automatic penalties for non-compliance should be introduced, including financial penalties, restrictions on future hedge transactions, and reputational consequences (such as publication of breaches).
- Public transparency is critical: The RPCA, the RPCA result and its methodology must be publicly available to give industry participants confidence in compliance and allow for earlier detection of issues.

We recognise and support the Authority's approach to a director's certification regime.

viii. Cross-submissions and technical drafting consultation

The Authority should follow the guidance in its updated Consultation Charter that "good practice consultation … includes … opportunities for people to cross-submit on the submissions of others where … there is potential for large financial implications for consumers or industry participants, or the issue is likely to be contentious."[11]

The Authority should also undertake a technical drafting consultation before it finalises the Code amendments.

Concluding remarks

We agree with the Authority that "there are credible concerns that gentailers have the ability and incentive to individually influence the price or supply of hedge contracts and may be doing so in a manner that has competition implications." We also agree "access to, and pricing of shaped hedges still indicate there is a material risk of harm to competition (and so to consumers, including industrial consumers)" and there is "an ongoing risk that gentailers have opportunities to use market power in a manner that would harm competition".

2degrees was heartened by the Authority's change on views about super-peak products and that it now considers supply should be mandated.

We similarly consider that the NDOs need to be broadened to capture all incumbent gentailer wholesale-retail activity, and the limitations on the application of the NDOs need to be substantially narrowed, in order for the electricity industry to achieve the improvements to retail competition the Authority is seeking.

Appendix A proposed re-drafting of the Draft Code Subpart 5C

Comments on the Review:

General Comments on the proposed draft of Subpart 5C – Non-Discrimination Obligations

1. Obligations vs Principles:

   Subpart 5C – is entitled non-discrimination *"obligations"* – whereas the remainder of the draft refers to the non-discrimination *"principles"*. The use of terminology is vital and by labelling a provision as a 'principle' rather than an 'obligation' diminishes its authority and risks fostering a lack of seriousness towards compliance. There should be no question that adherence to these obligations is mandatory and necessary for promoting competition in the market and ensuring even-handed supply of risk management contracts[12] (proposed clause 13.236O).

2. Updated Non-discrimination Principle 1(1) as follows:

   A gentailer must not, in relation to the supply of **risk management contracts,** treat any buyer differently or, where the gentailer supplies itself with a service (that has the same or similar effect as a **risk management contract)** it must not treat itself (including its internal business units or any interconnected bodies corporates) differently from any other buyer, except and only to the extent that a particular difference in treatment is objectively justifiable and does not lessen or harm, and is unlikely to lessen or harm, competition in the electricity retail market.

3. Definition of buyer.

   a. For the purpose of subpart 5C of Part 13, a buyer:
      i. Includes a person that has indicated to a gentailer a desire to obtain risk management contracts from a gentailer; and
      ii. **includes** a gentailer's own internal business unit.

4. Definition of "good faith":

   Obligation to deal with buyers in good faith
   (1) A gentailer must at all times deal with buyers in good faith.
   (2) In determining whether the gentailer has acted in good faith in dealing with a buyer, the following may be taken into account:
   (a) whether the gentailer has acted honestly:
   (b) whether the gentailer has co-operated to achieve the purposes of 13.236O (including to promote competition for the long-term benefit of consumers by ensuring even-handed supply and competitive pricing of risk management contract):
   (c) whether the gentailer has not acted arbitrarily, capriciously, unreasonably, recklessly, or with ulterior motives:
   (d) whether the gentailer has not acted in a way that constitutes retaliation against the buyer for past complaints and disputes:
   (e) whether the gentailer's trading relationship with the buyer has been conducted without duress:
   (f) whether the gentailer's trading relationship with the buyer has been conducted in recognition of the need for provision of information to the buyer in a timely manner:

[12] Proposed drafting of Part 13, Subpart 5C- Non-Discrimination Obligations 13.236O.

(g) whether the gentailer has observed confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the buyer.
(3) Subclause (2) does not limit subclause (1).

5. Definition of RPCA:

Retail price consistency assessment means an assessment of the difference between a gentailer's retail prices and that gentailer's expected cost of electricity supply if its retail business unit had to buy risk management contracts from its generation business unit on the same price terms that it charges to third parties.