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2 December 2025

Electricity Authority
WELLINGTON

By email only: levelplayingfield@ea.govt.nz

Feedback on Level Playing Field Code Consultation Proposal

Introduction

Electric Kiwi welcomes the opportunity to provide feedback on the Level Playing Field Code Consultation Proposal. Robust reform of the wholesale electricity market is critical to ensuring sustainable competition, innovation and fair outcomes for consumers.

We note the Authority's view that the proposed Non-Discrimination Obligations (NDOs) are a proportionate response to competition issues in the market. However, we are very concerned that the Authority has understated the extent and seriousness of the underlying problem. When the full extent of the competition problems is acknowledged, it is clear the proposed NDOs are neither proportionate nor adequate.

The Authority's proposed solution effectively relies on a market-driven outcome in a market characterised by entrenched market power. This is logically inconsistent: a market exhibiting such power is, by definition, unlikely to deliver competitive or efficient self-correction.

Furthermore, the NDOs as drafted are ambiguous and lack the necessary detail and prescription to provide genuine confidence to market participants. We are concerned that crucial details will be deferred to non-binding guidance, further reducing the practical impact of the obligations and potentially prioritising implementation speed over substance.

We believe significant strengthening and prescription within the Code itself is required if the Authority continues to pursue its proposed approach. However, even with substantial amendments and enhanced monitoring, we have grave concerns that the NDO framework alone will prove inadequate and will have little chance of achieving the stated objectives of a level playing field and robust competition. Ultimately, only a structural solution, such as corporate separation combined with non-discrimination obligations, will address the root cause and ensure enduring, effective competition.

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Problem definition

The underlying problem in the market is far more serious and persistent than the consultation paper suggests. The Authority's assertion that spot prices and (with the exception of super-peak) hedge prices are generally workably competitive is simply not supported by robust evidence. Market monitoring cannot reliably detect the exercise of market power in New Zealand's highly concentrated and vertically integrated electricity industry. This is a significant flaw in the problem definition underpinning the current proposals.

Electric Kiwi 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 about 2018. This is not a short-term outlier. These deteriorating trends have continued, and fast forward to 2025, have only gotten worse. Key market indicators show that the market share of independent retailers has stagnated or fallen since 2020, customer switching rates have declined significantly, and new entry and innovation from independents have slowed or been actively constrained, primarily by poor access to competitively priced hedge products and persistently high wholesale prices.

The Authority's own 2025 market participant survey further confirms these concerns, revealing a widespread lack of confidence among independent retailers and non-gentailer participants in the proper functioning of hedge markets. The survey highlights two recurring themes: (i) ongoing difficulty in accessing risk management mechanisms, and (ii) hedge products not being available at genuinely competitive prices. The Authority has itself recognised that these issues continue to undermine confidence and present a major barrier to entry and growth for independent players.

Added to this, there is already compelling prima facie evidence of anti-competitive margin squeeze behaviour, which we have previously documented in detail. The four large gentailers continue to extract monopoly profits in their wholesale businesses, while their retail arms increasingly operate at a loss. This is a textbook symptom of price and margin squeeze, confirming that the current design of the market allows and even incentivises anti-competitive conduct.

Claims that spot or hedge prices are workably competitive are not credible. Reporting and analysis currently do not provide reliable evidence for such claims. In fact, the Authority's own Wholesale Market Review (WMR) found that generators likely exercised market power during the review period - a finding that has been brushed aside rather than reconciled, even as spot prices continue to rise.

The intention of the proposals is to prevent gentailers favouring their own retail arms in the pricing and supply of risk management contracts. However, as currently drafted, they will not achieve this in practice. The central market power problem remains fundamentally unaddressed: unchecked wholesale market power will continue to result in inefficiently high spot and forward contract prices, undermining efficient retail competition and ultimately harming consumers. Improvement to market liquidity in hedge products, so essential for the viability of independent players, is simply not assured by these proposals.

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Corporate separation

To be effective, any regime must include, as a core component, corporate separation of gentailers' generation and retail businesses, together with robust arms-length and non-discrimination obligations. This approach represents the only robust solution to the persistent competition issues in New Zealand's wholesale electricity market and is recognised both domestically and internationally as best practice for addressing structural harms in concentrated utility sectors. Persistent market failures in New Zealand's electricity sector have been evident since at least 2009, and the OECD has recently twice recommended that New Zealand revisit structural separation as a remedy.[1]

Without corporate separation, vertically integrated gentailers with scale and extremely high levels of market concentration have ongoing incentives to restrict generation capacity to align with their own retail books - an outcome that suppresses independent competition and deters new investment.

By contrast, corporate separation, supplemented by arms-length rules, would require retail arms of gentailers to manage their market risk in the same way as truly independent retailers, ensuring risk management products are available to the market as a whole. This would drive more trading and price discovery, creating a deeper, more liquid hedge market that enables efficient entry and greater competition.

Finally, while the Authority has indicated that it considers corporate separation would likely require primary legislation, the independent electricity retailers have previously provided the Authority with an independent legal opinion confirming that such separation could be implemented under the existing Electricity Industry Participation Code.[2]

The Authority's continued efforts to manage the wholesale electricity market through detailed and complex regulation on a project-by-project basis will be expensive, difficult to implement and monitor, administratively burdensome, and is ultimately unlikely to be effective. Such reliance on intensive regulatory oversight is widely recognised as less effective and less efficient than structural remedies.[3]

Key concerns with the Code change as drafted

The Code change as currently drafted is too narrow and ambiguous to be effective. Limiting the NDOs to "uncommitted capacity" risks leaving most gentailer capacity outside the scope. Too much of the detail is left to non-binding future guidance, rather than being set in the Code itself, creating uncertainty and

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[1] OECD *Economic Outlook, Volume 2024 Issue 2, No 116* (December 2024) and *OECD Economic Survey–New Zealand(May 2024), pp. 65 and 76.*

[2] See, for example, Jenny Cooper KC, opinion dated 2 May 2025 (attached as Appendix B to the Independent Electricity Retailers' Feedback on Level Playing Field measures to the Authority dated 7 May 2025),which concludes that corporate separation could be implemented under the existing Electricity Industry Participation Code, drawing on established provisions for electricity distributors.

[3] Indeed, ineffective and expensive regulatory burdens are highlighted as a key reason for considering separation measures. See OECD *Structural separation in regulated industries - Report on implementing the OECD Recommendation* (2016), at p.9; see also EC Art 17 Inquiry into European gas and Electricity sectors Final Report at 55.

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weakening enforceability. Combined with broad loopholes such as the "objectively justifiable" exception, and a weak Retail Price Consistency Assessment (**RPCA**) test (mainly due to the lack of clarity on the benchmark cost of supply that the test relies on), unless significant improvements are made, the Code as drafted will have limited chance at achieving the Authority's objectives for competition, liquidity, or a level playing field.

Concerns with "uncommitted capacity"

The NDOs should apply to the supply of all of a gentailer's capacity, not just to their so-called "uncommitted" capacity. Limiting the obligations in this way is unorthodox and not consistent with established approaches in other regulated sectors in New Zealand or internationally. For example, non-discrimination obligations in both the grocery sector[4] and telecommunications sector[5] apply to the full supply of products or services, without any carve-out for self supply/ "committed" or otherwise unavailable capacity. Similarly, international regimes such as the UK's electricity generator licence conditions apply non-discrimination obligations broadly to all relevant capacity, in order to effectively promote competition.[6]

Allowing gentailers to limit the NDOs to supply of "uncommitted capacity" only would enable them to classify most of their capacity as "committed," essentially circumventing the non-discrimination requirements. In practice, this could mean that some gentailers may simply adopt the position that they are consistently "short generation" for their own retail arms, so that all or nearly all of their capacity is "committed" for internal use. This would enable them to argue that they are unable to provide any risk management products to independent retailers or generators, because nothing is available. The reforms would therefore be rendered ineffectual, as the rules would end up applying to only a small and likely insignificant portion of capacity. Such an approach would neither improve liquidity nor ensure fair access to risk management products. Instead, it would create a loophole, making refusal to supply difficult to challenge and stifling competition and investment by independent generators and retailers.

Concerns with "Objectively Justifiable" reasons

NDO Principle 1 allows discrimination if the gentailer can claim it is "objectively justifiable." We are very concerned this standard is too broad and, without clear boundaries, risks becoming a major loophole. In its current form, this exception could be used to rationalise discriminatory or anti-competitive conduct, undermining the purpose of the non-discrimination obligations.

Concerns with the benchmark price in the RPCA test

Electric Kiwi supports the intent of the RPCA test and agrees that a forward-looking, standardised assessment is a far more meaningful indicator of whether retail prices are supported by a reasonable cost of energy than the current ITP/Gross Margin framework, which has been hampered by long reporting lags, retrospective distortions, and inconsistent methodologies across gentailers. The RPCA's residual

[4] Grocery Industry Competition Act, s25
[5] Telecommunications Act 2001, s69XA
[6] UK Electricity Generation Standard Licence Condition C1 ("prohibition of discrimination in the sale of electricity and related products/services")

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price calculation is simple as it already aligns with how a number of gentailers already assess whether an offer is economically sustainable.

However, the value of the RPCA test depends heavily on the use of standardised inputs - particularly the benchmark cost of energy, which is the critical comparator to the RPCA residual. Without clear prescription from the Authority, there is a substantial risk that gentailers will adopt bespoke or opaque approaches that undermine comparability and reduce confidence in the results. We therefore strongly support the RPCA as the basis for assessing consistency between retail prices and expected supply costs, but consider it essential that the benchmark price and associated calculation rules are fully standardised and governed by the Authority to ensure uniformity, transparency, and genuine even-handedness.

To give the RPCA real force and ensure it delivers on its intended purpose, this standardisation must begin with how the benchmark price is constructed.

We believe that it is absolutely critical that the benchmark price against which the RPCA is calculated must be robustly and transparently determined, using a clearly articulated and publicly available methodology. This methodology must be grounded in generally available market instruments and observable market prices to truly reflect the costs of hedging for an independent retailer prudently managing wholesale electricity price risk.

We urge the Authority to look to well-established international examples for guidance on benchmarking methodologies for wholesale electricity hedging prices. For instance, Ofgem in the UK, as well as the Australian Energy Regulator (AER) and Essential Services Commission (ESC) in Australia, have developed clear, market-based approaches to calculating benchmark price. Adopting similarly rigorous and transparent standards in New Zealand will assist in achieving the objectives of the RPCA test.

Also for the RPCA to operate credibly, it is essential that the Authority not only defines the benchmark but also audits gentailers' RPCA calculations regularly to prevent gaming, ensure uniform application, and maintain trust in the reporting framework.

Fall back recommendations

Our firm view is that only a regime involving both corporate separation and broad non-discrimination obligations applying to **all** of a gentailer's capacity can create a genuine level playing field and fully protect competition.

However, if the Authority does not pursue corporate separation at this time and despite our strong concerns proceeds with the regime as currently proposed (including with NDOs applying only to the supply of "uncommitted capacity" and the RCPA as the test for non-discriminatory pricing), then, at a minimum, we strongly recommend the following changes and clarifications be adopted to minimise ambiguity and loopholes. This list is by no means exhaustive, but in the limited time available for this consultation, we have sought to suggest some key improvements.

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Key details should be codified

As a general comment, we wish to make the point that while it may be tempting to defer many details to non-binding guidance developed later in order to meet implementation timeframes, we are concerned that this approach risks weakening the intended protections. Important principles and requirements should be set out directly in the Code itself, rather than left to non-binding guidance.

Uncommitted capacity

In the event that the Authority retains the concept "uncommitted capacity" (which we absolutely do not support), then, at the very least, the following changes to the definition should be made:

- We are concerned that using "forecast" in the definition of uncommitted capacity is not sufficiently objective and could lead to inconsistent calculations across gentailers. To ensure transparency and comparability, the wording should instead reference observable, factual, or pre-determined values, or tie the calculation to a clear, prescriptive formula set out in the Code.

- Uncommitted capacity should be calculated less only the volume of generation already allocated to serve existing risk management contracts genuinely entered into with third party buyers

- There should be no carve-out for the amount of generation used to supply electricity to a gentailer's own end customers. Allowing a carve-out for generation allocated to a gentailer's own end customers fundamentally undermines the stated intent of the Code changes: to prevent gentailers from favouring their retail arms in the availability or pricing of risk management contracts. By allowing gentailers to automatically prioritise their own retail supply without market testing effectively preserves and entrenches a system of preferential internal allocation. This entrenches the very discrimination that the reforms are meant to eliminate, perpetuating barriers to entry and competitive harm for independent retailers.

- Contracts a gentailer transacts as a result of their market making obligations on exchange-traded instruments should not be included in the calculation of uncommitted capacity. Market-making on exchange-traded instruments should be treated distinctly because it is a separate business within a gentailer's business. It is not a core activity of the gentailer as a generator or retailer.

- Any risk management products that a gentailer acquires from a third party or another gentailer (for example, additional Huntly firming options) should increase, not reduce, the gentailer's uncommitted capacity available to offer to potential buyers. In other words, these products should offset and enhance the pool of uncommitted capacity.

If, contrary to our very strong recommendation, the Authority insists on providing a carve-out for a gentailer's own end customer supply, then at the very least, the carve-out must be strictly limited. Committed capacity should not include any organic growth from existing customers (eg from heightened demand due to electric vehicles owned by existing customers), growth from acquiring new customers, replacement of lost customers due to churn, or any other form of inorganic expansion. This approach

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prevents gentailers from treating customer churn as organic growth and from inflating their committed capacity beyond genuine, net increases in demand from the existing customer base.

We note the question from Contact Energy and the published response from the Authority[7] regarding whether uncommitted capacity can or should be defined with reference to each gentailer's own internal risk management models or policies. We firmly disagree with an approach that would allow gentailers to self-determine their uncommitted capacity on this basis.

Allowing each gentailer to rely on its own internal risk models or policies to define "uncommitted capacity" would defeat the purpose of a level playing field. Each gentailer's policies, models, and risk appetites differ, resulting in highly inconsistent and non-comparable outcomes for capacity that should be subject to common regulatory expectations. The regime's effectiveness requires that the definition and calculation of uncommitted capacity be prescriptive, transparent, and uniform across all gentailers, not left to bespoke, internal, or subjective approaches.

In our view, management of contracted positions and associated risk is a function of wholesale portfolio management, and this should be treated distinctly from the quantification of uncommitted capacity. If a gentailer's risk appetite or model requires it to acquire additional risk management cover, it is entirely appropriate and expected that the gentailer does so through the market, acquiring contracts on the same non-discriminatory terms as any other participants.

"Objectively Justifiable" reasons

We are concerned that "objectively justifiable reasons" will become a broad, all-purpose loophole that allows discrimination to be rationalised on subjective or expansive grounds. To prevent this, any "objectively justifiable reason" should be permitted only to the extent that it does not lessen, and is unlikely to lessen, competition. This would align the carve-out with the targeted approach in the Grocery Industry Competition Act and Telecommunications Act. This limitation should be clearly stated in the Code and reflected in the Authority's guidance, which should also provide specific examples of the rare circumstances in which such reasons would apply - including clear instances of what does and does not constitute an "objectively justifiable" reason for differential treatment which does not harm competition.

We also note that under the Level Playing Field Options Paper, "objectively justifiable reasons" was limited only to cost-based justification (whereas that further limitation is no longer present in the test). We believe this boundary remains appropriate, provided it is also subject to the strict test that any such reason does not lessen, and is unlikely to lessen, competition.

Retail Price Consistency Assessment (RPCA)

The Code and supporting guidance should require greater transparency and granularity in RPCA reporting. While publication under 13.236W (Public Reporting) of an overall, brand-level RPCA summary may be appropriate, it is essential that the actual RPCA results reported to the Authority under 13.236T

[7]See: https://www.ea.govt.nz/documents/8619/2510_Stakeholder_QA_LPF_EA_responses_to_written_questions.pdf

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(Annual reporting) and 13.236U (Interim report) include detailed breakdowns by:

- Retail brand,
- Customer segment (e.g. residential, small business and commercial and industrial),
- Customer type (new versus existing customers), and
- Location/network area.

This granular level for the RPCA assessment is consistent with the approach outlined in the consultation paper[8] and needs to flow through into the Code wording and guidance. Relying solely on a single, brand-level assessment risks masking anti-competitive behaviour or aggressive pricing strategies that target particular customer segments, regions, or types, for example, offering loss-leading rates to new customers in a specific location. Such masking would undermine the fundamental policy objective of fair competition and transparency.

The annual report required under clause 13.236T which must be certified by at least two directors of the gentailer should include a requirement to certify, at the brand level and for each combination of brand, segment, customer type, and location/network, whether the RPCA has been passed or failed. Where the RPCA has not been passed for a particular group, explanations for the failure and the actions taken or proposed in response should be provided.

The Authority indicates in the consultation paper that the RPCA is intended to assess whether hedge pricing enables profitable retail margins for an efficient retailer. However, the lack of a clear definition for both the benchmark price and its associated methodology leaves the RPCA open to interpretation, potentially enabling gentailers to justify long-term retail price suppression as an objectively justifiable commercial strategy and thus undermining the promotion of fair competition.

As highlighted by Link Economics in their report[9], the Code does not define a gentailer's expected cost of electricity supply or clearly link the RPCA to the actual prices of risk management contracts, meaning the RPCA could instead be interpreted as comparing retail revenues with internal generation costs - sidestepping the prices offered to competitors. We consider it essential that this issue is addressed directly in the Code to ensure the RPCA provides a meaningful non-discrimination test.

Construct a transparent, reproducible and well-governed hedge benchmark price for the RPCA

A clearly specified benchmark hedge price prevents vertically integrated gentailers from asserting opaque hedging costs to justify deviations from the RPCA, while giving independent retailers a defensible, verifiable standard upon which to assess the instruments and prices they are being offered. The approach should be formulaic and reproducible, with inputs, weights and allowances set out in public documentation and updated to reflect market conditions on a regular timetable. Below we outline the approach taken by Ofgem and the AER which could both be considered by the Authority.

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[8] (see, for example, pages 66–68 and references to "weighted average retail prices per MWh by brand and key segment (offers for new customers, and prices for existing customers)")

[9] See joint submission from independent Electricity Retailers (2degrees, Electric Kiwi, Octopus Energy and Pulse Energy) on the Level Playing Field Code Consultation Proposal dated 2 December 2025 attaching the Link Economics report.

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Ofgem: For the Default Tariff Cap in the UK, Ofgem constructs a weighted portfolio of season-base and season-peak products reflecting a representative domestic demand profile. Prices are purely market-observed; no supplier-specific estimates are used, and it explicitly adds on shaping, imbalance and risk allowances and transaction costs. It applies a "6-2-12" semi-annual approach where forward prices are averaged over a defined six-month observation window, with a two-month lag before delivery, to construct a 12-month cost for the period being hedged.

AER: For the Default Market Offer in the AER jurisdictions, the AER constructs a virtual progressive hedging policy for a prudent retailer with an explicit hedge product suite of base swaps (covering off-peak energy), peak swaps (covering peak periods) and $300/MWh cap contracts (covering extreme price risk). Contract volumes and observation windows are prescribed and contract prices are taken from observable traded data. The portfolio construction uses representative load profiles by region and incorporates published transmission loss factors and market fees. Once the portfolio is constructed, the AER uses a stochastic settlement model to produce a probability-weighted wholesale energy cost component to reflect true hedging outcomes for a prudent retailer.

This list is non-exhaustive, and there are likely other international examples which the Authority could consider, as well as input from the industry. The common qualities of any robust benchmark should be market-based inputs, defined hedging instruments and volumes, reproducibility, explicit treatment of residual risk and clear governance processes including timetables and mechanisms to refresh the benchmark over time.

Retain and Strengthen Internal Transfer Price Reporting for Gentailers

We oppose the proposal to remove ITP reporting for gentailers. Instead, this requirement should be retained and strengthened.

It does not follow that simply because the ITP Post Implementation Review (PIR), unsurprisingly, "did not find [ITP] information useful in its current form" that these requirements should be repealed. The shortcomings of the ITP regime were both predictable and well signposted prior to its implementation. The problems with ITP reporting arise from the way the regime was designed - not because ITP disclosures lack inherent value.

ITP reporting provides a mechanism for visibility over historic financial flows between generation and retail arms. While the RPCA is forward-looking, relying on internal assumptions and models, ITP data can be independently audited.

Relying solely on RPCA is risky - commercial sensitivity may mean key information is not reported publicly, reducing independent oversight. By contrast, ITP reporting increases transparency by making more data publicly available, allowing a broader range of stakeholders to examine and question the numbers. This greater scrutiny acts as an extra safeguard against cross-subsidisation and anti-competitive conduct by gentailers.

We recommend not only continuing ITP reporting for gentailers, but also standardising it across all gentailers, tightening audit requirements, and improving transparency.

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Further recommendations

We make the following further recommendations:

13.236P(5) Obligation to trade in good faith:

- Electric Kiwi supports the inclusion of a good faith obligation (Principle 2), but we are concerned that, as currently drafted, this obligation is weak and overly reliant on non-binding guidance. The Authority's draft guidance contains some helpful content, but crucial protections remain absent from the Code itself.

- While the current draft Code requires gentailers to engage in good faith "in relation to the supply of risk management contracts," this language is ambiguous and does not clearly require good faith to be demonstrated at every stage - such as receiving, considering, responding to, and making decisions about buyer requests. The Code should be amended to state explicitly that the good faith obligation applies to all supply decisions and all buyer requests for risk management contracts, ensuring robust protection for buyers from the initial contact through to the final decision.

- Unlike the approach taken in the Grocery Industry Competition Act and its implementing Code, the current draft Code lacks explicit requirements that gentailers refrain from acting recklessly, with ulterior motive, or under duress. The Grocery Supply Code sets a higher and clearer standard by explicitly prohibiting conduct that is arbitrary, capricious, unreasonable, reckless, or undertaken with ulterior motives, and by requiring that dealings occur without duress. This framework provides suppliers with much stronger protection against unfair practices.

- We recommend the clause we amended to :
    - Clearly state that gentailers must not act recklessly, with ulterior motive, or under duress in their dealings with buyers of risk management products.

    - Include a non-exhaustive but meaningful list (within the Code itself) of the matters to be considered in assessing good faith, such as honesty, responsiveness, not acting arbitrarily or unreasonably, not retaliating for complaints, maintaining confidentiality, and treating buyers without unreasonable discrimination, as set out in the grocery sector.

    - Ensure that the obligation to trade in good faith applies at every stage of the supply process, not just procedurally (eg responding within certain timelines), but substantively - requiring transparency, fairness, and genuine engagement in negotiations.

- **13.236P(6) Objective credit assessments:**

  The proposed principle is overly ambiguous, which risks entrenching the status quo rather than improving access to risk management products. As drafted, it is open to wide differences in interpretation between gentailers and over time.

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Terms such as “reasonable”, “consistent” and “transparent” are inherently subjective and are not anchored to any clear standard or benchmark. Different gentailers could adopt materially different interpretations while claiming compliance, and those interpretations could drift over time as market conditions change. This reduces the practical enforceability of the provision.

The proposal does not require gentailers to use any common minimum set of risk factors, documentation standards, or disclosure of their credit frameworks. As a result, the regulator will find it difficult to assess whether observed differences reflect genuine risk or simply differing (and potentially strategic) interpretations of the rule.

Without clearer parameters, dominant gentailers could continue to apply very conservative or opaque credit methodologies to particular classes of buyers, and justify higher collateral or a refusal to deal on the basis of an internal view of what is “reasonable”. This creates significant scope for strategic behaviour that may hinder entry and expansion by independent retailers and other smaller buyers, contrary to the stated policy intent.

The rule does not require gentailers to maintain stable, documented frameworks, nor does it specify how changes to those frameworks should be managed or communicated. This means that even if practices are initially improved, they can deteriorate or diverge over time without triggering any obvious breach, so long as each gentailer can assert that its current approach remains “reasonable” in its own terms.

The proposal does not require a minimum level of disclosure to the regulator or to buyers (for example, publication of high-level credit policies, reporting of collateral metrics, or documentation of key assumptions). Without these, it will be difficult to test whether the rule is being applied in a way that genuinely supports competition and access to risk management products.

To address these concerns, we recommend that the proposed Code wording be strengthened to:

- define “reasonable, consistent and transparent” by reference to objective, documented criteria and observable risk factors;
- require gentailers to maintain and publish a high-level description of their credit and collateral frameworks, including the main factors considered and how they are applied to different buyer categories;
- require similar buyers and commercial and industrial customers in similar circumstances to be treated on similar terms, with any material deviations documented and justifiable by reference to a clearly identified difference in risk; and
- require justifications around credit related decisions to be provided to buyers.
- provide for regular reporting and/or review by the regulator to ensure that practices do not diverge or drift in a way that undermines the policy intent.

Absent changes along these lines, we are concerned that the proposed obligation will be largely symbolic, delivering limited practical improvement in access to risk management products for smaller or independent buyers.

- **13.236P(7) Equal access to commercial information:** While we support the principle that a

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gentailer must make any commercial information relating to risk management contracts available to external buyers at the same time as its internal business units, the current guidance provides little clarity on how this will operate in practice. Without a defined and effective process, buyers could be left unaware of new information or forced to repeatedly contact gentailers to check for updates. We recommend the Authority issue explicit, practical guidance requiring gentailers to proactively and consistently share relevant information with all buyers, eliminating any ambiguity about the process and ensuring real-time, even-handed access in practice.

- **13.236P(8) Protection of confidential information:** The Authority should adopt a stronger, best-practice approach to the protection of confidential information, drawing on the provisions found in clause 25 of the Grocery Industry Competition Regulations 2023. Specifically, the rule should state: "The gentailer must not use that information other than for a purpose for which it was disclosed and may only disclose the confidential information or make it available or accessible to employees or agents of the gentailer who need to have that information in connection with that purpose." In addition, we consider that the qualifier "that may compete with the buyer" creates an unnecessary test for whether the principle has been complied with and should be deleted; confidential information should not be shared with or used by any of the incumbent gentailer's internal business units, regardless of whether they compete with the buyer.

- **13.236Q Non-discrimination policy:** The non-discrimination policy should set out the gentailer's high-level commitments and operational practices for complying with Part 5C of the proposed Code, including specifically, among other things:
    - Bidding for uncommitted capacity in competition with other buyers (for example, using open RFP processes, information barriers/walls, or independent oversight to ensure transparent and non-preferential treatment).
    - Ensuring equal access to commercial information as required under clause 13.236P(7) (such as describing the controls and protocols for the simultaneous release of risk management contract information to internal and external buyers).
    - The systems and internal controls in place to protect buyer confidential information, including robust information barriers/walls, audit trails, and regular independent audits to prevent misuse by internal business units.
    - Defining a clear, transparent procedure for buyers to raise concerns or complaints about discriminatory treatment, and the process for resolving such disputes.
    - Requiring annual board review and approval of the policy.

- **13.236R Implementation plan:** The implementation plan should then set out, in detail, the specific procedures, governance arrangements, training, controls, and ongoing monitoring that will give practical effect to the gentailer's non-discrimination policy under 13.236Q and compliance with Part 5C: This should include specifically, among other things:
    - The step-by-step process for bidding uncommitted capacity alongside external buyers in a manner that is verifiably fair and non-discriminatory.
    - The systems and timing for providing commercial information in accordance with the non-discrimination policy, including any technical or audit mechanisms to guarantee compliance.
    - The scope and frequency of staff, management, and director training programs, including

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measures for evaluating and improving their effectiveness.
- Processes for ongoing self-assessment, internal and (where applicable) external auditing of compliance, as well as regular reporting and prompt breach notification to both the Authority and affected buyers.
- How records will be maintained and made available to demonstrate compliance with each element of the non-discrimination policy and the broader Part 5C Code requirements.
- Procedures for the receipt, investigation, resolution, and reporting of buyer complaints and disputes.

- **13.236S Record-Keeping Requirements:** Records should, at a minimum:
  - Cover both total risk management capacity and uncommitted capacity, tracked monthly on a rolling three-year forward basis. Records relating to uncommitted capacity should be based on observable, factual, or pre-determined values, or tied to a clear, prescriptive formula set out in the Code, rather than subjective forecasts (see comments above)
  - Include all material methodologies, data, and key assumptions used in preparing these records, with all underlying calculations and workings documented so they can be audited.
  - Document any changes to methods, data, assumptions, or calculations over time, including reasons for such changes.
  - For any forecasts of expected monthly electricity supply, ensure supporting detail and traceability back to methodologies, data, assumptions, and any subsequent changes.
  - Credit-related decisions in relation to individual buyers.

- **13.236T Annual reporting:** The annual report which is to be certified by two directors should be expanded to include:

  - **RCPA:** As noted above, the gentailer should confirm at the brand level and for each brand and for each combination of brand, segment, customer type, and location/network area, whether the gentailer has passed or failed the RPCA. Where the gentailer has not passed the RPCA for any combination, the certification must include an explanation for the failure and a description of the actions the gentailer has taken or proposes to take to address it**.**

  - **Hedge benchmark price for the RPCA**: We have suggested above that the Authority should prescribe a hedge benchmark price for the RPCA which is publicly available. Assuming such a benchmark available, the gentailer should explicitly demonstrate how the methodology has been followed and to explain any deviations from it.

  - **Credit:** A gentailer should be required to report on how the gentailer met the individual Reasonableness, Consistency and Transparency requirements proposed under 13.236P(6) in respect of each Buyer during the period.

  - **Breaches**: The current drafting requires a gentailer to certify in its annual report that it has complied with the non-discrimination principles during the relevant financial year, except for breaches already reported under clause 13.236X. However, clause 13.236X

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requires the reporting of any breach of subpart 5C as a whole, which is broader than just the non-discrimination principles set out in clause 13.236P. To provide a complete and accurate picture of compliance - and given the additional rigour and accountability provided by director certification of the annual report - a gentailer should be required to certify that it has complied with all the provisions of subpart 5C (not just those relating to the non-discrimination principles).

- **13.236W Public reporting:** To support transparency and accountability, and to prevent unjustified withholding of information, we recommend the following enhancements to the publication and redaction requirements:
    - Make it clear that the full annual report and interim report (and the RPCA assessments) must be published, except for those parts properly and specifically redacted for commercial sensitivity. As noted above, we think at a minimum public reporting of the overall, brand-level RPCA summary should be required (with only pass/fail test results for RPCA assessments at the granular level (ie each for each combination of brand, segment, customer type, and location/network) required to be publicly reported.
    - Replace the subjective “reasonably considers is commercially sensitive” with a more objective standard, such as “can demonstrate, on reasonable grounds, that the information is commercially sensitive and not already publicly available.”
    - Require gentailers to provide a clear explanation for each redaction, identifying the specific harm that would result from publication.
    - Make clear that redactions should be kept to the absolute minimum necessary to protect legitimate commercial interests.
    - Give the Authority the explicit right to review and, where appropriate, overturn or require justification for any redactions made by gentailers.

Mandatory independent audit

Consistent with other material aspects of the Code, to strengthen transparency and accountability, the Code should include a requirement for independent external audits of the records gentailers’ are required to keep under 13.236P and an expanded 13.236S, NDO compliance reports (interim and annual reports, including RCPA assessments).

Monitoring and enforcement

- **Robust Monitoring and Enforcement:** The NDO regime should be supported by comprehensive, proactive monitoring and strong enforcement by the Authority. The Authority should be adequately resourced to undertake real-time surveillance, regular audits, robust data analysis, and to investigate and act decisively against breaches in order to quickly detect potential issues and spot patterns of discriminatory behaviour.

- **Triggers for formal investigation:** We suggest that the Code specifies that when an RPCA result indicates a potential case of discrimination, this should trigger the Authority to review whether there are specific circumstances that reasonably explain the outcome, taking into account any explanation provided by the gentailer. Furthermore, we recommend that the Code

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provides an explicit rule such that if RPCA results indicate potential discrimination in multiple periods (eg more than two failures within a three-year timeframe) this would automatically trigger a joint investigation by the Authority and the Commerce Commission. Such explicit triggers are essential to ensure that potential issues are identified early, enforcement responses are appropriate, and persistent non-compliance is effectively deterred.

- **NDO breaches must be treated as the most egregious violations under the Code:** The guidance should explicitly state that the Authority considers that breaches of NDOs are among the most serious and egregious violations of the Code, and should automatically attract the highest available penalties and liabilities. Significant financial penalties should be automatically and proportionately applied to any breach of the NDOs. These penalties should be complemented by further consequences such as restrictions on future hedge transactions and reputational measures, including public disclosure of breaches. With the Government's new Energy Package proposing significantly higher maximum penalties, stronger enforcement tools, and potential criminal liability, it is vital that the regime signals clearly to gentailers that NDO breaches will attract the full range of available sanctions, both now and as enforcement options expand.

- **Corporate separation as an enforcement option for offending gentailers:** Where a gentailer commits serious or repeated breaches of the NDOs - including persistent RPCA test failures - corporate separation of the offending gentailer should be available to the Authority as an escalation measure. This would ensure meaningful consequences for ongoing non-compliance and further strengthen the regime's credibility and deterrence.

- **Enable third-party reporting of breaches:** In addition to self-reporting of breaches by gentailers, the Authority's guidance should make it clear that any party can report actual potential or actual NDO breaches and are encouraged to do so.

Corporate separation should be ready as back-stop measure

Work should progress in parallel to ensure that corporate separation is fully developed and ready as a back-stop option, applicable to all four gentailers. This measure would provide the Authority with a credible and effective mechanism to deploy if it becomes clear that the NDO regime as a whole has failed to achieve its objectives of promoting even-handed supply, market liquidity, competitive pricing, and a genuine level playing field.

Process: Cross-submissions and Technical Drafting Consultation

We urge the Authority to adhere to the good consultation practice set out in its updated Consultation Charter. Where proposed changes could have large financial implications for consumers or industry participants, or where issues are likely to be contentious, there should be a formal opportunity for cross-submissions on others' responses.

Finally, before finalising any Code amendments, we support the Authority conducting a full technical drafting consultation to ensure clarity, workability, and legal robustness.

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Implementation Timeframe

Timely action is critical to address the significant issues affecting competitive dynamics and consumer outcomes in the electricity market. However, while speed is desirable, it must not come at the expense of getting the Code amendments right. The complexity and seriousness of the problems under consideration require careful and considered development to ensure it genuinely delivers on its objectives.

We also note a practical concern with the proposed timeline (see consultation page 7). The current timetable sets 1 July 2026 as both the commencement date for the NDO regime and the required publication date for gentailer NDO implementation plans. If this is truly the commencement of mandatory compliance, then the value of "implementation plans" at this stage is questionable, as implementation should, by definition, already be complete. The Authority should clarify the purpose of these plans at commencement, and if the intent is genuine compliance from that date, ensure that all necessary systems, training, and processes are fully operational ahead of the go-live.

Regulatory Statement and final observations

We are highly concerned that recent public statements[10] made by gentailers indicate that introduction of the level playing field measures could require them to increase retail prices. The intent of the proposed principles is not to require that gentailers raise retail prices if the RPCA test is failed. Instead, it should shine a light on the underlying price assumptions used to construct retail pricing for their retail arms, and ensure that contract pricing fairly reflects the underlying wholesale costs that makes retailing a viable business model, whether as part of a vertically integrated business model or not.

To fulfill their legal and governance obligations, directors and officers of vertically integrated businesses should consistently be making value-based decisions on volume allocated to different sales channels i.e. either through internal channels or to third parties. This means that they should consistently be taking a view as to what volumes and prices they could achieve in the contract market by selling to third parties, and assessing this against the value they can achieve through their internal sales channels.

That approach is commercially rational in terms of value maximisation unless the incentive exists to withhold those offers from third parties in order to exercise market power in the downstream retail market through (constructively) withholding supply. We do not believe there is a reasonable defence from the gentailers to say that they don't form a highly sophisticated internal forecast of hedge volumes and prices for their own retail books which is benchmarked against the volumes, structures and prices that could be achieved in the contract market (OTC and ASX).

Similarly, from a governance and shareholder value perspective, vertically integrated businesses should not, on a sustained and long-term basis, cross-subsidise losses in one arm of the business through sustained profits in another. The actions of gentailers to suppress retail price rises over the past six years do not correlate with the best interests of their shareholders, unless those sustained retail losses create additional value through driving out competition in the downstream market and enabling greater retail

[10] See for example, Meridian 2025 Investor Day presentation, page 32, 20th November 2025.

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margins to be captured in the future.

Critically, by artificially suppressing retail prices in this way, gentailers are also dampening the market price signals that are necessary to support and incentivise efficient investment in new generation. When price signals do not reflect the true state of supply and demand, this undermines investment certainty for new entrants and risks stalling the development of much-needed generation capacity

Gentailers may contend that they are delivering additional value for their customers through retail price stability. Sustained long term retail losses are acceptable to the individual businesses because this may result in greater market share and hence shareholder value; but these actions are still to the detriment of consumers in the future because a) this dampens market signals for efficient generation investment that increases supply to displace more expensive existing generation and b) near-term retail price stability is being valued above strong competition to deliver long-term efficient retail pricing.

The purpose of the level playing field measures should be to provide a transparent and reliable framework for comparability such that gentailers are operating in a manner consistent with a vertically integrated business that does not have market power. Favouring the sale of volume to your retail arm at the same price that a third party would pay (even when adjusted for credit risk), when your retail arm is not a viable standalone business, indicates that the contracts are being priced too high, not that retail prices are too low.

The Authority's primary focus should be on ensuring benefits flow through to consumers, and it should not be concerned with potential impacts on already highly profitable gentailers. Any costs imposed by these measures are more than justified if they promote fairer competition and result in lower prices and more options for consumers. This is consistent with the long-term interests of consumers and the overall purpose of the regulatory regime.

Conclusion

In summary, we remain seriously concerned that the Authority's proposed Code changes as currently drafted, fall well short of what is required to restore competition, improve hedge product access, and prevent discrimination by incumbent gentailers. Without an overhaul, these proposals risk perpetuating the current environment, where vertically integrated gentailers can favour their own retail arms to the detriment of independent retailers and end consumers. We urge the Authority to take this opportunity for decisive reform and set the foundations for a more dynamic, innovative, and consumer-focused electricity market.

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Yours sincerely

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