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To Members of the Competition Taskforce,

Level playing field measures - consultation paper

Octopus Energy welcomes the opportunity to provide feedback on the proposed level playing field measures. This submission is supported by expert advice from Link Economics, contributed as part of a joint submission with other Independent Retailers.

We are encouraged that the Authority has acknowledged the critical need to improve market confidence and address the risk of market power being used to harm competition. Focusing on competition and liquidity is essential for the long-term benefit of consumers. However, we must warn that the proposed Code changes will not deliver on this intention without the significant amendments detailed in our submission.

Currently, New Zealand is an international outlier due to the sustained disconnect between wholesale and retail pricing. The Authority has been reluctant to interrogate this thoroughly, despite repeated suggestions a vertical margin squeeze analysis has not been undertaken, this is good regulatory practice and would have supported the fact base for intervention. The regulatory response proposed is significantly watered down from what was recommended in the options paper. The rationale for this is contradictory and supporting analysis limited: the Authority appears to have accepted gentailer claims that high wholesale forward prices reflect scarcity while also accepting gentailer claims that low retail offers reflect a misforecast of lower wholesale costs. These dual arguments are incompatible: if scarcity is genuine, retail prices must reflect it.

While the current proposals are not our preferred, they can still improve confidence in the market and put downward pressure on prices, but only if our amendments are

adopted and the monitoring regime is rigorous. Crucially, the Authority must immediately investigate the forward market's "fast up, slow down" pricing behaviour over the last five years, which acts as a clear signal of market power.

The current drafting of the proposed Code amendment, specifically the definition of 'uncommitted capacity', risks fundamentally undermining the policy intent of the Non Discrimination Obligations (NDOs). As detailed in our response, this definition creates a critical loophole that allows gentailers to ring-fence the vast majority of their capacity as 'committed' to their own retail arms.

Allowing gentailers to insulate all capacity used for their own retail business and self-define the remainder is akin to letting them mark their own homework. It creates a regulatory shield for the very behaviour the Authority is trying to eliminate. This approach nullifies the non-discrimination requirement, legalises withholding, and prevents independent participants from securing the contracts necessary for sustainable entry. We believe the definition must be removed or significantly amended to ensure all capacity is genuinely contestable. Our recommendation is that gentailers Non Discrimination Policies identify how all risk management capacity is contestable over time.

We have proposed changes in the formula for the Retail Price Consistency Assessment bringing it into line with standard international practice for vertical margin squeeze tests. Conceptually, non-discrimination testing should focus on whether the price a gentailer charges for risk management contracts is higher than the price it implicitly charges itself. This should be 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.

It’s important to address concerns raised by gentailers about a retail price shock resulting from these amendments. This will only happen if these gentailers are exercising market power and not providing wholesale cover on the same basis to external parties. The implementation of these rules will coincide with expected downward shifts in market pricing; Independent analysts (and gentailers in their recent investor presentations) forecast lower market pricing, the forward market has been slow to reflect these but it should be adjusting downward.

As previously submitted to the Authority, we think NDOs would be most effective and easier to implement and monitor - if gentailers were required to operate their retail and generation businesses at arm's length in different legal entities. We think this should be an escalator action in the Code for firms that breach their NDOs.

The current implementation timeframe is optimistic. We would encourage the Authority to extend this by one or two months in order to give itself sufficient time to implement a clear and enforceable regime. We are also concerned that there is currently too much ambiguity or detail relegated to unenforceable guidelines. The Authority needs to be clear how it will monitor and enforce these arrangements

before attempting to implement them.

We look forward to discussing aspects of this submission further with you in the upcoming workshops. If you have any questions about this submission please contact me.

Yours sincerely,

Margaret Cooney

Q1. Do you have any comments on our additional analysis of data to inform the problem definition? Do you have any new evidence to add to any of the elements of the problem definition?
We are encouraged that the Authority has acknowledged the importance of providing confidence to independent market participants, however we're concerned that current proposals won't deliver on their stated intent.

The New Zealand market stands out internationally as having a sustained disconnect between retail and wholesale prices. Over the course of the last 5 years there has been significant opportunity for the Authority to investigate the interplay between independent participants and gentailers more thoroughly and critically. We believe this is still an area where the Authority's work is lacking and monitoring needs to be improved to meet international standards. This has unfortunately impacted the robustness of data and analysis available to support this workstream.

We disagree with the paper's claim that there is "no definitive evidence" of a margin squeeze. This conclusion lacks a thorough assessment because the Authority relied on baseload ASX benchmarks. It also makes no reference to gentailer financial market disclosures that provide evidence of retail businesses losses.
A retail profile has shape, and the wholesale input costs used in your analysis must reflect the price of achieving this shape. Revising your margin squeeze analysis to account for shape will provide the definitive evidence currently missing. Additionally, the Authority should be clear in distinguishing between smoothing (which most retailers do) and prolonged discounting that damages competition. If gentailers are concerned about Government intervention because of high prices they should be focused on expanding supply and trading at a reasonable level rather than engaging in behaviour that distorts the market.

It is important to distinguish between efficiencies and discriminatory practices. Internal retail businesses of gentailers effectively operate a fixed price variable volume (FPVV) arrangement, shifting volume risk to the generation business to manage. This risk profile still has a cost and internal retail pricing should reflect this, otherwise the generation business is cross-subsidising the retail business. An FPVV contract is a product that can be traded, therefore FPVV arrangements should be priced at a premium to baseload products because of their risk profile. The cost that should be attributed to transacting this arrangement isn't significantly different whether it was an internal arrangement or external contract. Additionally, the Authority has identified big four gentailer inertia in making available time of use tariffs to the market as a reason for regulating retail prices. This market failure is linked to internal risk management practices where market risk is not accurately priced.

Furthermore, the Authority's position appears to lack coherence. On one hand, it accepts the gentailers' argument that elevated super-peak pricing is efficient and reflects scarcity. On the other, the Authority's position accepts the gentailers' contention that they "foresaw lower retail prices" to explain their low retail offers. Both retail pricing and forward trading require a view of forward prices. It is not possible to rely on both arguments to downplay the issue; if scarcity pricing is efficient, retail prices should reflect it.

Finally, we maintain that significant and long-standing issues associated with high levels of market concentration and market power persist. Specifically, there is a disconnect between ASX futures pricing and forward spot price projections (and gentailer price projections in recent investor presentations). We think the Authority needs to review its wholesale market monitoring and apply more scrutiny to gentailer trading.

Q2. Do you have any new evidence that is relevant to the choice of level playing field interventions to address the identified competition issues?
Yes. The market is not expanding; it is consolidating. Since the options paper, Flick Electric, Manawa Energy, and NZ Windfarms have exited independent status or the market entirely. Projects from developers like Helios and PGP have been acquired by gentailers rather than developed independently. This consolidation supports the contention that the current regulatory framework fails to enable independent entry and expansion.

Additionally, we have previously provided evidence from 2024 Powerswitch pricing where the implied wholesale energy costs for the Big Four gentailers were below $100/MWh. This data point demonstrates pricing far below available wholesale contract rates. We would like to see the Authority and Commerce Commission looking at contracting behaviour more closely.

Q3. Do you have any feedback on our proposed approach to implementing principles-based non-discrimination requirements, as set out in Chapter 5? If you disagree with elements, how would you improve them?

As previously submitted to the Authority we think Non Disclosure Obligations (NDOs) would be most effective, and easier to implement and monitor if gentailers were required to operate their retail and generation businesses at arm's length in different legal entities. We think this should be an escalator action in the Code for firms that breach NDOs.

While we support the intent (specifically the new "Good Faith" principle and requirements for directors sign off), the current drafting has been revised in a counterproductive manner.

The definitions of "committed" and "uncommitted" capacity undermine the proposal entirely. By allowing gentailers to categorise the vast majority of their capacity as "committed" (to their own retail arms), the non-discrimination obligation applies only to a negligible volume of energy.

This creates a "regulatory justification for refusal to supply". It will be exceptionally challenging for the Authority or participants to contest a gentailer's assertion of their "reasonable expectations" for internal use. This will stifle independent generation by blocking sleeving/firming deals and prevent independent retailers from securing the contracts needed to grow.

Instead we recommend that the committed/ uncommitted capacity distinction is removed and NDOs should apply to all capacity. We think gentailers should define how all capacity is contestable over time in their Non Discrimination policy. For the avoidance of doubt, an indefinite FPVV arrangement with the internal retail business should not be allowed.

There will be a need for the Authority to define and monitor the total capacity for risk management products for each gentailer. This will ensure that there isn't effectively a withholding of capacity as a way of circumventing these rules. It should take into account the volume effectively traded internally to the retail portfolio and the volume traded externally as well as shifts in their generation portfolio.

Q4. Do you agree that substituting an RPCA test for a requirement to develop an internal hedge portfolio will be more effective at ensuring non-discriminatory pricing than the proposals in the LPF Options paper? Why or why not?

Ultimately we still think gentailers need to be economically valuing their portfolio. This should already be happening as part of good management practice and as an internal control to prevent anticompetitive conduct.

We propose changes to the Code that will bring the RPCA in line with best practice for determining vertical prices squeezes. Instead of the current proposal for the RCPA to be an assessment of the difference between the gentailer's expected cost of electricity supply and the gentailer's retail prices it should be a test of whether the wholesale cost enables an efficient entrant. This should be an assessment of the gentailers retail price minus retail costs with the remainder being the internal wholesale cost. If the internal wholesale cost is less than the benchmark cost it is a failure of the test. The benchmark cost should factor in ASX and OTC trading by the gentailer of products that would make up a prudent retail risk management portfolio. The RPCA should include the costs of shape; peak, and super-peak products, and not just baseload, reflecting the true cost of supplying a retail load profile, as discussed in our response to Q1.

The definition of obligations must be explicitly stated within the code. Too many details are currently relegated to the accompanying guidelines, which lack legal enforceability. We have recommended drafting changes below.

It is important that consequences of the 'fail' of the RPCA are clear. If there is not an acceptable reason for the failure then:

1. there should be a fine for breaching the code, and
2. there should be an obligation to amend pricing, and
3. the firm in question should be required to implement internal legal separation and arms length operating arrangements.

We suggest the Electricity Authority allocate additional time to ensure the robustness of this work if necessary. A delay in implementation of one or two months to achieve this would be a prudent measure if it's needed to more clearly define arrangements, this would provide more certainty to all parties..

There are regulatory examples in Australia and the UK for retail price benchmarks and prudent portfolios which the Electricity Authority should draw on for developing an appropriate regime.

There is also a need for a Generation Price Consistency Assessment or benchmarked transparent reporting of the sale of risk management products to independent generators.

Q5. Is our proposal around "uncommitted capacity" workable? What suggestions do you have for improving it?

No. This is the most critical deficiency in the current proposal. By defining the obligation to supply as applying only to "uncommitted capacity," and allowing gentailers to define "committed" as including their own internal retail needs, the Authority has proposed creating a regulatory loophole that legalises withholding. This loophole would guarantee that independent retailers and generators remain structurally dependent on the gentailers' discretion, preserving their market power.

A gentailer can simply claim all capacity is "committed" to their retail arm, negating the NDO entirely. The definition must be amended so that all capacity is contestable on a non-discriminatory basis.

We recommend that the committed/uncommitted capacity distinction is removed and NDOs should apply to all capacity. We think gentailers should define how all capacity is contestable overtime in their non discrimination policy. For the avoidance

of doubt, an indefinite FPVV arrangement with the internal retail business should not be allowed.

If the committed/uncommitted concept is retained, it should only be used to phase in these new regulatory arrangements. Accordingly we would suggest:

- It should only be 60% of capacity required to cover the gentailer's retail book, and this volume should reduce by 20% per year over a 4 year period from which time the distinction should no longer be available and all volumes should be considered uncommitted.
- It should not cover organic growth. As a matter of principle, all firms in the market should be encouraged to expand supply and not squat on existing capacity.
- Total capacity and committed capacity should be determined objectively by the Authority, as gentailers are incentivised to overestimate to their own advantage.

Q6. Do you have any further evidence, particularly relating to costs or incentives, about the impact of applying NDOs to all risk management contracts rather than just super-peak hedges?

We strongly support applying NDOs to all risk management contracts. Restricting obligations to super-peak only would simply displace discriminatory behaviour into other products (e.g., peak or baseload).
Universal non discrimination obligations (assuming removal of 'uncommitted' concept) will provide more confidence to independent entrants that entry and expansion are sustainable if they are an efficient operator.

Q7. Should large users be included as buyers under the NDOs? If so, is a carve out needed for risk management contracts approved under the MLC regime?

Yes, large users should be included because they represent a significant portion of total demand and liquidity in the OTC contract market. We do not see a valid reason for an MLC carve-out; if a contract is large enough to move the market, it is even more critical that it is subject to non-discrimination principles to prevent sweetheart deals that distort the wider market.

Q8. Should the OTC Electricity Market Working Group be reconvened to assess whether any amendments might be made to the voluntary OTC Code of Conduct to reflect the proposed non-discrimination regime?

Voluntary codes have proven insufficient and failed to instill the necessary market

confidence to encourage entry and expansion by independent parties. The OTC Code should be mandatory and binding. While reconvening the group is fine, it should not delay the implementation of binding Code amendments.

Q9. Should investment in new flexible generation assets be carved out from the proposed NDOs? Why or why not?

No. Carving out new investment creates a two-tier market and encourages gaming. If the market is working efficiently, selling new capacity at a fair market price to an independent retailer should be just as attractive as selling it to an internal retail arm. The argument that NDOs "chill investment" is a threat used by incumbents to maintain market power. It's also inconsistent with their investment thesis which are typically communicated to the market as responding to demand growth. New investments are often matched with a PPA or long term industrial load agreement.

Q10. What impact do you think the revised NDOs will have on retail prices and/or incentives to invest in generation?

If implemented without the "uncommitted capacity" loophole, NDOs will increase competition, leading to sharper retail pricing and innovation.

It will also improve the prospects for independent generators looking to secure firming which will support the expansion of supply and introduce more downward pressure on price.

Q11. Do you agree that by providing transparency on margins, the RPCA would materially improve stakeholders' confidence?

Transparency is helpful, but only if the inputs are rigorous. If gentailers can manipulate the "expected cost of supply" inputs, the RPCA becomes a box-ticking exercise. To improve confidence, the inputs must be based on observable market rates (ASX/OTC), not internal models. The resulting assessments should be subject to independent audits to validate their integrity. Please refer to responses above and the Link Economics submission.

Q12. What impact do you think the RPCA will have on retail prices and incentives to invest in generation?

It should discourage a margin squeeze. This ensures sustainable competition. Increased competition will increase downward pressure on prices and stimulate more innovation.

Based on market forecasts by gentailers and independent analysts 'peak prices'

should have passed and forward prices should be falling. Provided independent retailers can access risk management cover with falling forward prices the energy component of bills should be falling. This is where the changes around ‘uncommitted capacity’ are relevant - if access is improved these benefits will flow to consumers.

If prices rise, gentailers are exercising market power. The Authority should interrogate why forward prices have been slow to respond and ensure an appropriate regulatory response.

Q13. How could the proposed approach to the RPCA be improved?

Please refer to the submission from Link Economics.

Conceptually, non-discrimination testing should focus on whether the price a gentailer charges for risk management contracts is higher than the price it implicitly charges itself. Therefore, a more relevant test would be a "margin squeeze" calculation: determining if the cost of a prudent hedge portfolio is less than or equal to the retail price minus network and retailing costs. Under this approach, the RPCA would assess whether the hedged price of electricity, based on a "benchmark portfolio of a prudent retailer", fits within the net retail margin. To implement this, the Authority would need to define this benchmark portfolio and specify that the "expected cost of retailing" includes operating costs, depreciation, and a return on capital.

The key expected cost of electricity supply inputs/ internal hedge cost must be strictly based on observable market rates (ASX/OTC) reflecting the true cost of acquiring a portfolio of shaped, multi-duration products (including peak and super-peak).

It requires independent auditing and a standardised methodology that cannot be varied by directors' "reasonable expectations." The consequences of an RPCA failure must be transparent and defined in the Code.

Q14. How often should gentailers make and disclose their assessment?

The assessment should be done when annual price changes are made and immediately disclosed. Otherwise 6 monthly.

Q15. Would it be sufficient for the Authority to provide gentailers with guidance on the methodology for the RPCA or should it be prescribed in the Code?

It must be prescribed in the Code. Guidance is too easily ignored or interpreted

loosely. Given the history of the ITP regime, the EA needs to ensure that there is a transparent and replicable methodology and that they are clear up front what is a pass or fail. Prescribing the RPCA methodology in the Code provides the necessary legal certainty for directors to be fully accountable for the inputs and resulting assessment. We have provided suggested amendments.

Q16. If you do not support the RPCA approach, what would you propose instead?

We think that operational separation would make this easier to implement and monitor. At the very least, this should be adopted as a consequence for any gentailer that fails the RPCA test.

Q17. Is the proposed implementation timeline achievable?

We think that more time may be required (1-2 months) to develop more fulsome code amendments for the RCPA. However we think the NDOs should come into effect immediately.

Q18. Should the Authority consider adding or removing any particular steps?

As discussed above.

Q19. Does the proposed approach to implementation provide the right balance?

We believe incorporating reporting requirements into the retail audit program may reduce the compliance burden on the Authority. As discussed above, improving the clarity of obligations in the code will make it easier to implement. The core requirements for the RPCA and the definition of capacity must be prescribed in the Code to ensure the regime is immediately enforceable. The volume of capacity should be linked to historic trading activity and generation portfolio size.

The proposed Director Certifications are a useful tool to increase transparency and accountability, provided the obligations they are certifying compliance with are legally explicit.

Q20. Do you support the revised approach of incrementally creating more specification for NDOs or the RPCA as required?

We are concerned this approach is too vague. The Authority should have clear rules upfront. As in Q19, the core requirements for the RPCA and the definition of capacity must be prescribed in the Code to ensure the regime is immediately enforceable and not able to be gamed.

Q21. What are your views on the proposed approach to the escalation pathway?

We don't support the watered down approach, as there isn't any real escalation pathway proposed.The Authority should include a clear roadmap to legal separation and arms length trading if these NDOs fail to deliver liquidity and fair pricing. This would provide the regulatory threat necessary to incentivise compliance. As discussed above we also think this should be a consequence for individual firms that breach the rules.
In addition measures from the MDAG work program regarding contracts market monitoring and access that should be progressed. We still support the development of virtual disaggregation as a back stop measure to be advanced now.

Q22. Do you have any feedback on the way that the NDOs will affect buyers seeking firming for PPAs?

The NDOs must explicitly cover the purchase of energy (e.g., buy-side discrimination) and the supply of firming products. Independent generators are currently blocked from market entry because they cannot secure firming from gentailers. The "uncommitted capacity" loophole allows gentailers to refuse firming to independents by claiming their flex is "committed" to their own retail load. This blocks new renewable generation. Removing this loophole and ensuring NDOs are universal would support independent generator bargaining power and expansion.

Q23. Would it be useful to convene a co-design group to consider a range of flexibility products?

Yes, but there have been a few co-design efforts already. It's critical that incumbent interests don't hamper this and that any prospective group's membership is balanced. It is also important that the group's mandate includes not just product design, but also ensuring non-discriminatory access to those products.

Q24. Do you support the proposal to revoke the ITP requirements for gentailers? What are your views on retaining the RGM reporting requirements for independent retailers?

We think the ITP should be retained or incorporated into the RCPA. The implied internal wholesale cost should be a component of the RPCA.

Q25. Do you agree with the objectives of the proposed amendment?

Yes, we agree with the objectives (promoting competition, liquidity, and confidence).

Q26. Do you agree the benefits of the proposed amendment outweigh its costs?

In order to achieve the benefits and prevent adverse impacts for consumers we think the Authority needs to remove the 'uncommitted' definition and include more detail on the RCPA in the Code.

Q27. Do you agree the proposed amendment is preferable to the other options?

No. We believe legal separation and arms length arrangement combined with mandatory market making (spreads and duration) would be superior options to achieve the statutory objective. The current proposal is a diluted "middle ground" that risks being ineffective due to drafting loopholes. We have recommended improvements to this. If they are adopted in full the proposal would be beneficial for consumers.

Q28. Do you agree the Authority's proposed amendment complies with section 32(1) of the Act?

Yes, in principle, with changes as proposed.

Q30. Do you have any comments on the drafting of the proposed Code amendments?

Uncommitted Capacity

We recommend the removal of the concept of uncommitted capacity or significant changes to the definition for reasons discussed above. If it is maintained, the scope of the definition should be broadened and gentailers' reasonable expectations should be replaced with an objective test of expected contract capacity.

uncommitted capacity means a reasonable expectation of its ability to offer **risk management contracts** in future periods, calculated as a **gentailer's** expected gross supply, less any existing **risk management contracts** entered into with **buyers.**

Non discrimination obligation principles

We strongly recommend that the definition of "objectively justifiable" be explicitly linked to competition outcomes.

Currently, Principle 1 (clauses 1, 2, and 3) allows discrimination if there is an "objectively justifiable reason." Without a "no detriment to competition" rider, this creates a loophole where a gentailer could justify discriminatory conduct. Wherever the phrase "without an objectively justifiable reason" appears in Clause 13.236P

(Non-discrimination principles), it must be amended to read:

> *"without a reason that is objectively justifiable* ***and does not lessen, and is unlikely to lessen, competition in any electricity market****."*

This phrasing aligns with Section 88 of the Grocery Industry Competition Act 2023, which explicitly pairs "objectively justifiable" with a requirement that the conduct "does not lessen, and is unlikely to lessen, competition". This is a standard regulatory safeguard in New Zealand to ensure that a dominant firm's "efficiency" defence cannot be used to foreclose competitors.

The principles should also be amended so that all supply and risk management arrangements are subject to non discriminatory obligations. As discussed above, the definition of 'Uncommitted Capacity' should be removed or significantly changed in scope.

Subpart 5C—Non-Discrimination Obligations

13.236O Purpose of this subpart

The purpose of this subpart is to promote competition in, and the efficient operation of, the electricity industry for the long-term benefit of consumers by requiring **gentailers** to supply **risk management contracts** to **buyers** on a non-discriminatory basis to—

(a) ensure even-handed supply of **risk management contracts;**

(b) support the liquidity and competitive pricing of **risk management contracts**; and

(c) facilitate investment in the electricity industry.

Non-discrimination principles

13.236P Non-discrimination principles

The non-discrimination principles are as follows:

Non-discrimination principle 1

Non-discriminatory supply

(1) A **gentailer** must not discriminate between **buyers** for the supply of **risk management contracts** without a reason that is objectively justifiable and does not lessen, and is unlikely to lessen, competition in any electricity market..

(2) A **gentailer** must not discriminate against **buyers** in favour of its own **internal business units** for the supply of **risk management contracts**without a reason that is objectively justifiable and does not lessen, and is unlikely to lessen, competition in any electricity market .

(3) A **gentailer** must not discriminate against **buyers** in favour of its own **internal business units** when pricing **risk management contracts** without a reason that is objectively justifiable and does not lessen, and is unlikely to lessen, competition in any electricity market.

(4) For the avoidance of doubt, subclause (3) requires pricing of **risk management contracts** in such a way as to ensure that any **buyer** that supplies **electricity** to end users at retail, that is as efficient with regard to operating costs as the **gentailer's** own retail **internal business unit**, and adopts a reasonable risk management approach, is not prevented from operating profitably.

This phrasing aligns with the Good Faith provisions of the Grocery Industry Competition Act 2023. Alignment may be useful for interpretative precedent.

Non-discrimination principle 2

Obligation to trade in good faith

(5) A **gentailer** must engage with **buyers** in good faith and in a timely and constructive manner in relation to the supply of **risk management contracts**.
(1)The Gentailer must at all times deal with buyers in good faith.
(2)The Gentailer must ensure that their grocery supply agreements do not contain a provision that limits or excludes the obligation to act in good faith but, if it does, the provision does not limit that obligation.
(3) 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 the relevant grocery supply agreement (including being responsive and communicative with the buyer):
(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—
(i) certainty regarding the risks and costs of trading, particularly in relation to production, delivery, and payment; and
(ii) provision of information to the buyer in a timely manner:
(g) whether the Gentailer has observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the buyer:
(h) whether the Gentailer has avoided unreasonable discrimination or distinction between buyers:
(i) whether, in dealing with the Gentailer, the buyer has acted in good faith.

Non-discrimination principle 3
Objective credit assessments
(6) A **gentailer's** credit terms and collateral arrangements relating to the supply of **risk management contracts** to **buyers** must reflect a reasonable, consistent and transparent assessment of the risk of trading with a **buyer**.
Non-discrimination principle 4
Equal access to commercial information
(7) A **gentailer** must ensure that any **commercial information** relating to **risk management contracts** made available to its **internal business units** that compete with **buyers** is also made available to **buyers** at the same time.
Non-discrimination principle 5
Protection of confidential information
(8) A **gentailer** must protect **buyer confidential information** and establish robust processes to prevent disclosure of **buyer confidential information** to, and use of **buyer confidential information** by, any of the **gentailer's internal business units** that may compete with the **buyer**.
Non-discrimination principle 6
Record keeping
(9) A **gentailer** must establish, maintain and keep records that demonstrate its compliance with these **non-discrimination principles**."

Retail Price Consistency Assessments

As discussed earlier it's important that there is enough detail in the code to enforce this regime.

A.4. Interpretation
(1) In this Code, unless the context otherwise requires,—
.....

retail price consistency assessment an assessment of whether the **hedged price of electricity** is less than or equal to a gentailer's retail price minus network charges minus the gentailer's expected cost of retailing.

hedged price of electricity is the price per MWh that the gentailer would pay if it purchased risk-management contracts from its generation business unit using the **Benchmark portfolio of a prudent retailer**

Benchmark portfolio of a prudent retailer as defined by the Authority at the time.

13.236V Retail price consistency assessments
(1) A **gentailer** must undertake a **retail price consistency assessment**:
(a) for each of its retail brands it must identify costs and pricing for each retail segment by network area for new and existing customers ; and
(b) on the coming into force of this subpart and every six months thereafter (following the end of the first and second half of the **gentailer's financial year**).
(2) A **gentailer's retail price consistency assessment** must be provided to the **Authority**—
(a) by 1 July 2026, in respect of the initial **retail price consistency assessment** referred to in subclause (1)(a);
(b) together with the interim report referred to in clause 13.236U(1), in respect of a **retail price consistency assessment** undertaken at the end of the first six-month period following this subpart coming into force (as required by clause 13.236U(2));
(c) together with the annual report referred to in clause 13.236T(1), in respect of a **retail price consistency assessment** undertaken for the second half of the **gentailer's financial year** (as required by clause 13.236T(2)(g));
(d) otherwise, within 20 working days after the end of the relevant half of the **gentailer's financial year**.
(4) The Authority must publish guidance on the recommended methodology for undertaking **retail price consistency assessments**.
(5) Each time a **gentailer** provides a **retail price consistency assessment** to the **Authority**, it must include a clear and full explanation of its approach, including (without limitation):
(a) areas in which, and reasons why, it has departed from the methodology published by the **Authority** referred to in subclause (4); and
(b) the underlying data on retail prices and wholesale costs.

Q31. Do you have any comments on the draft guidance?

We provide comments in relation to the guidelines below:
B.3 The clause references scale efficiencies. We recommend this is removed so that it doesn't become a loophole for discrimination. If it is to be retained then any scale efficiencies need to be justified on the basis of cost that is realised by the generation business unit.

B.5 of the draft guidance is insufficient and must be strengthened. Current draft paragraph B.5 defines "objectively justifiable" merely as an "evidence-based approach that is reasonable, consistent and transparent". This is too low a bar. A strategy to withhold hedges to drive up retail prices could be "consistent and evidence-based" (from a profit-maximising perspective) but is deeply harmful to consumers. The paragraph should be amended as follows:

> *"For the avoidance of doubt, a reason is not objectively justifiable if it has the purpose, effect, or likely effect of substantially lessening competition in a market."*

We also note the Commerce Commission's 'Equivalence and Non-discrimination' guidance (2020) for telecommunications, which explicitly treats "Objective justification" and "No harm to competition" as paired concepts. The Authority should adopt this established best practice.

B6. As discussed earlier, we do not support the inclusion of the 'committed'/ 'uncommitted' capacity distinction and are firmly of the view that all gentailers' generation capacity should be contestable and traded on a non discriminatory basis. Effectively writing an FPVV contract on an indefinite basis to cover their existing internal retail book load is discriminatory. Gentailers should be required to show that all volumes are market tested over a reasonable period of time. A methodology for this should be a requirement of the Non Discrimination Policy.

If the 'uncommitted'/ 'committed' concept is retained it needs to be significantly narrowed. Suggestions include:

- It should only cover 60% of capacity required to cover the gentailer's retail book and this should reduce by 20% per year over a 4 year period from which time the distinction should no longer be available.
- It should not cover organic growth. As a matter of principle, all firms in the market should be encouraged to expand supply and not squat on existing capacity.
- It should be determined objectively by the Authority as gentailers are incentivised to overestimate to their own advantage.

B10- 12. Please refer to the Link Economics submission. This provides more detailed suggestions on how cost methodologies should be determined.

Assuming amendments to the code as suggested above. The Authority should define what a benchmark portfolio of a prudent retailer is. As mentioned above, there are international examples of prudent hedging strategies that should be

considered.

The guidelines should also provide guidance on the hedged price of electricity that the gentailer pays. This must be a function of the prices that have been charged to third parties.

The guidelines should also use the Reasonably Efficient Operator concept for defining retail costs. Without accounting separation rules it is too easy for significant operational costs (e.g Marketing and IT systems) to be smeared across the integrated business when they should be attributed to the retail business alone.

B18. This section should include clear guidance that multiple standard credit arrangements will be in place. It should also be clear that the level of credit assessment and criteria be linked to the credit arrangements that will be put in place. We've found a high degree of inconsistency in this area.

Q32. Is any further guidance needed to help clarify what constitutes an "objectively justifiable" reason for discrimination?

Yes. As discussed above, this should include qualification that an objectively justifiable reason must not lessen, and is unlikely to lessen, competition in any electricity market.

The guidance must explicitly state that "commercial advantage" is not a justification. We need specific examples of what is not objectively justifiable. For instance, the guidance should state:

> *"Preserving downstream retail market share, or withholding capacity to induce a competitor's exit, are not objectively justifiable reasons."*

If a gentailer refuses to supply an independent retailer on credit terms that are "objectively justifiable" based on their internal risk model, but the *effect* is to block a viable competitor from the market (detriment to competition), the refusal should be deemed a breach. The "detriment to competition" test ensures the NDOs focus on market outcomes, not just internal process boxes.