1 December 2025

Non-discrimination rules are standard and orthodox parts of competition law

Pulse Energy supports introduction of requirements that Contact, Genesis, Mercury and Meridian act in good faith and provide hedge products on a non-discriminatory basis. In simple terms, Pulse considers that non-discrimination rules SHOULD preclude access providers from treating themselves or one or more access seekers more favourably in the provision of wholesale services than another access seeker.

Pulse welcomes that the Authority listened to our earlier submissions and has now expressly recognised vertical-integration is only a problem that could justify regulatory intervention when combined with market power.

Opening comments

Our Level Playing Field submission provided clear evidence problems in the wholesale market are adversely impacting downstream retail competition. We commented that this has become increasingly apparent since the Pohokura outage in 2018 with, by way of example, the fall-off in switching rates and retraction of independent retailers; followed by flatlining and deteriorating retail competition metrics.[1]

Good faith obligations, non-discrimination rules and economic replicability/imputation testing (which the Authority seems to have 'reversed engineered' as a Retail Price Consistency Assessment (RPCA)) are standard and orthodox components of competition law. The Authority can and should draw on both domestic and international precedent. The Authority does not need to 'reinvent the wheel'.

The more the Authority's non-discrimination regime is based on existing precedent the greater the regulatory certainty in terms of what the new rules mean and what needs to be done to comply with them.

The Non-Discrimination Obligations (NDOs)/RPCA proposed in the consultation are somewhat novel and bespoke. The NDOs also include large and excessive limitations on the requirement not to discriminate. The uncommitted capacity provisions actively permit discrimination. Pulse does not have confidence that, without material redrafting, the proposals could reasonably be expected to achieve the Authority's intent "to ensure that the [incumbent] gentailers cannot favour their own retail arms over other retailers".

[1] Refer to Appendix 1 for commentary on evidence that retail market competition has stalled or deteriorated.

Cross-submissions should be included as part of the minimum process requirements

Pulse considers that the Authority should include cross-submissions as part of the consultation process. The Authority's Consultation Charter now recognises "good practice" consultation includes "opportunities for people to cross-submit on the submissions of others where amendments are particularly complex, there is potential for large financial implications for consumers or industry participants, or the issue is likely to be contentious".

It is difficult to think of many consultations that satisfy these grounds more than the current consultation.

The Authority has detailed in response to a query, about why it isn't asking for cross-submissions, that it has undertaken extensive engagement including in person sessions, online meetings, and submissions on various consultations. These are simply what would be expected of any material consultation and are not substitutes for cross-submissions. Pulse considers that it is important stakeholders have an opportunity to review and comment on other parties' submissions.

Technical drafting consultation should be added

Pulse considers that it would be good regulatory practice for the Authority to undertake a technical drafting consultation before the Code amendments are finalised.

It is important to be transparent

Pulse welcomes that the Authority has drawn on existing precedent in developing the non-discrimination rules and good faith requirements. We welcome that the Authority has now provided some clarity around this in its response to queries but we think this should have been detailed, including explanations of the departures from existing precedent, as part of the consultation to help ensure transparency of the Authority's policy development and decision-making.

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The NDOs should apply to Contact, Genesis, Mercury and Meridian only

Regulation should be targeted at market failure only. It is appropriate that the proposed access regulation will apply to Contact, Genesis, Mercury and Meridian only on the basis that they have market power. Access regulation should help promote competition by restricting mis-use of market power.

Pulse welcomes that the Authority listened to our earlier submissions and has now expressly acknowledged vertical-integration is only a problem when combined with market power.

The Authority is correct to conclude that "Our concerns are focused on the combination of vertical integration and market power, which the gentailers maintain through their control of the flexible generation base. The four large gentailers are the main suppliers in both the retail and wholesale electricity markets." The Authority is also correct to conclude "Although Nova is a gentailer, which has flexibility with its gas-fired peakers, it does not raise the same market power concerns as the four large gentailers."

The questions the Authority has previously been asking about whether "vertical integration of smaller gentailers, such as Nova and Pulse, raise competition concerns" lacked any sound basis or merit.

This was a principal issue we raised in our Level Playing Field submission.[2] We commented that "It should be self-evident that vertical-integration isn't a problem in-of-it-self. If a supplier doesn't have market power, it cannot harm competition by being vertically-integrated."

The shift in the Authority's position will help provide regulatory certainty for other market participants that are vertically-integrated, or considering moving to a vertically-integrated business model, and may have been concerned they were at risk of potential future regulation.

The bespoke approach the Authority is proposing has problems [Q3-5, 13, 30 & 32]

Pulse supports reforms aimed at creating a more level playing field and increasing competition. In simple terms, Pulse considers that non-discrimination rules SHOULD preclude access providers from treating themselves or one or more access seekers more favourably in the provision of wholesale services than another access seeker.

We do not have confidence that, without material redrafting, the NDO proposals would prevent discrimination that could harm competition and do not have confidence the NDOs would achieve the Authority's intent "to ensure that the [incumbent] gentailers cannot

[2] We were surprised the Authority did not acknowledge our submission on this point given (i) we engaged on the matter more substantially than any other submitter, and (ii) the Authority adopted our recommendations.

favour their own retail arms over other retailers in the availability or pricing of risk management contracts."[3]

The way the proposed NDOs/RPCA have been drafted is somewhat novel and bespoke.

The proposed NDOs also include large and excessive limitations on the requirement not to discriminate. Principle (2), for example, authorises discrimination by establishing that the incumbent gentailers can give preferential access to generation capacity for their own internal business units. It is only "uncommitted capacity" the gentailers don't need which has to be provided on a non-discriminatory basis. The NDOs also inappropriately permit discrimination that could harm competition if there is a "justifiable reason". The Authority should be clear discrimination that can harm competition cannot be justified.

The Authority has appropriately expressed concerned that "A narrow non-discrimination regime, focused on one category of hedge contracts, could leave opportunities for discriminatory behaviour for the remaining hedge products". The narrow regime the Authority is proposing would similarly leave very substantial opportunities for discriminatory behaviour that could harm competition.

Principle 1(2) is not a non-discrimination rule

Principle 1(2) actively permits discrimination. It is not a non-discrimination principle. Principle 1(2) would allow the incumbent gentailers to provide preferential treatment (discriminate in favour of) for their own retail/internal business units in relation to loosely prescribed 'committed' generation capacity.

Principle 1(2) should be deleted.

If Principle 1(2) is not deleted it should be substantially narrowed, consistent with draft Guideline B.9.h., such that the non-discrimination rules would "not … allow a gentailer to allocate future generation capacity to planned growth in its own retail internal business".

The Code drafting for 'committed' versus "uncommitted capacity" does not marry up with the consultation paper's description of the principle and the draft Guidelines.

The Code states that "uncommitted capacity" excludes "the amount of generation that could otherwise be used to back risk management contracts that the gentailer reasonably expects to use to supply electricity to its end customers".

The consultation claims the volume of electricity the gentailer reasonably expects to supply to their end customers "allow[s] for organic growth only" but there is nothing in the draft Code that would prohibit the amount the gentailer "reasonably expects to use" to be more than "organic growth".

[3] Refer to Appendix 2 for for a clause-by-clause commentary on the Authority's proposed NDOs.

The draft Code does not refer to “organic growth” but even if it did the common usage of the term would not be particularly onerous or restrictive for a gentailer.

Organic growth reflects a business’s expansion achieved through internal efforts like increasing sales and productivity, rather than external methods like mergers and acquisitions.

The consultation describes “organic customer growth” as “consistent with historic trends or reflecting whole of market changes” and states that “if a gentailer is actively acquiring, or seeking to acquire, net new retail customers, there will be a (rebuttable) presumption that it has uncommitted capacity available.” There is nothing in the common usage of the term “organic growth”, or in the draft Code, that corresponds with the consultation’s presumption.

It is highly plausible, for example, that each of the incumbent gentailers organic growth projections could, collectively, exceed the entire retail electricity market.

Meridian has clearly ramped up “efforts like increasing sales” which could be interpreted as “organic” i.e. Meridian has increased its retail customers by 138,000 since 2020 which it could say reflected the volume it reasonably expected to supply its end customers, of which 100,000 (excluding acquisition of Flick) could be described as organic growth.

The draft Guideline B.9 states that “the non-discrimination requirements … are not intended to … allow a gentailer to allocate future generation capacity to planned growth in its own retail internal business unit without testing market interest in that capacity.” Again, there is nothing in the Code drafting of Principle 1(2) which suggests capacity for planned growth would have to be tested in the market or what this would actually entail. The principle is permissive to the gentailers factoring in forecast customer growth in their determination of “generation … to supply electricity to its end customers”.

The incentive the draft Code creates is for each of the incumbent gentailers to set/pursue artificially aggressive retail customer growth rates as this would increase the capacity “the gentailer reasonably expects to use to supply electricity to its end customers” and would, accordingly, reduce the extent to which it was subject to non-discrimination rules for its generation capacity. If the gentailer consequently failed to meet its growth projections it could still be compliant with the draft Code requirements and will have successfully reduced its regulatory obligations.

Principle 1(2) provides a substantial regulatory loophole for the incumbent gentailers. Essentially it creates an artificial regulatory incentive to match generation and retail books as closely possible and to tighten existing vertical-integration.

It is notable that the consultation is also silent on what the Authority expects should happen if, consistent with what you would expect in workably competitive market outcomes, incumbent market shares decline e.g. does the Authority expect the gentailers will treat capacity that they currently need for their end-customers as “uncommitted capacity” if their

customer base is declining? And what does the Authority expect to happen if a gentailer's customer base fluctuates over time?

Guidance on good faith should be elevated to the Code [Q31]

It is not obvious what the benefit would be better for mandatory grocery provisions to be adopted as voluntary electricity guidance rather than in the Code, or how this would be to the long-term benefit of consumers. We consider that the draft Guidelines should be included in the Code.

We also have the following observations and comments about the changes the Authority has made to the grocery good faith provisions:

- It is unclear why the requirement not to act "recklessly, or with ulterior motive" has been dropped. We do not feel that the Authority has provided any meaningful explanation, including in response to the question about this matter, or explained what the downside would be in providing this additional clarity about what good faith means.

- We support the requirement not to act "unfairly".

- It is unclear why the requirement that trading be "conducted without duress" has been dropped. Again, we do not feel the Authority has provided any meaningful explanation, including in response to the question about this matter, or explained what the downside would be in providing this additional clarity about what good faith means.

- It is unclear why the requirement for the access provider to recognise "the need for … certainty regarding the risks and costs of trading" has been dropped.

- It is unclear why obligations on access providers need to specify that the buyer acts reasonably.[4] The Authority is proposing to introduce regulation that applies to access providers with market power. There is no need to add regulation in relation to access seekers who do not have market power.

[4] Pulse is comfortable with the other changes that have been made:

- The requirement to provide information to the access seeker in a timely manner has been elevated to the more generalised requirement that "A gentailer must engage with buyers in good faith and in a timely and constructive manner".

- The requirements to respect confidentiality and to avoid unreasonable discrimination have been dealt with elsewhere in the non-discrimination rules.

- The specification that acting in good faith requires that "the supplier has acted in good faith" is circular and does not add anything.

Internal Transfer Price disclosure requirements should be reformed not repealed [Q24]

It does not follow that just because the Internal Transfer Price (ITP) Post Implementation Review (PIR), unsurprisingly, "did not find [ITP] information useful in its current form" [emphasis added] that they should be repealed.[5] The issues with the ITP regime were predictable and well telegraphed before the regime was implemented.

Pulse considers that the ITP disclosure requirements should be reformed by requiring disclosure of ITPs used for pricing purposes rather than ITPs used for accounting purposes.

ITP disclosure, if done right, would complement and support the NDOs rather than somehow "cause confusion".

In order to determine whether an incumbent gentailer has discriminated against buyers in favour of its own internal business units when pricing risk management contracts requires a comparison of the price(s) the incumbent provides risk management contracts to buyers with the ITP(s) that the incumbent provides to its own internal business units (retail business).

Disclosure of ITPs used for retail pricing purposes is needed for incumbent gentailers to provide "transparency on the link between their retail prices and the expected cost of supply." Absent, disclosure of ITPs it is not obvious how an incumbent gentailer could demonstrate this.

Similarly, one of the ways to check whether the RPCA has been satisfied and whether "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" is to test whether the incumbent gentailer's own internal business units (retail business) is able to operate profitably on the basis of its ITP(s).

Without disclosure of ITPs used for retail pricing purposes, the RCPAs won't be sufficient or provide the transparency required that "will give other retailers confidence to compete through assurance that a gentailer has not assumed an unjustifiably low cost of supply when setting its own prices compared to expected market prices, or otherwise inappropriately suppressed its retail margins to the detriment of downstream competitors."

OTC Code of Conduct needs to be rewritten to be effective [Q8]

As previously noted, we agree with Mercury that the Authority should mandate conduct expectations for the OTC market.

[5] Refer to Appendix 3 for a commentary on the ITP PIR.

The Authority's proposed escalation pathway would create regulatory uncertainty [Q21]

The approach the Authority is proposing to escalation strongly suggests a preference for minimising intervention over regulatory certainty.

We consider that the Authority should follow the course-change it has taken with mandating super-peak products and move to more prescriptive NDOs with less carve-outs. This would help provide regulatory certainty and would make incumbent gentailer obligations and compliance requirements clearer.

Pulse has not changed its view that a stronger, 'get it right first time', approach to regulatory intervention would have the benefit of more rapidly resolving long-standing competition issues and providing greater regulatory certainty going forward. Leaving open the risk that problems may grow, and fester is not a successful formula for creating a regulatory environment that encourages the new entry and investment the electricity industry needs.

Virtual disaggregation is not an alternative to non-discrimination rules [Q21]

The consultation states that "At this point we do not consider that it is useful to do a further iteration of the February outline of virtual disaggregation. That reflects … our preferred approach to enforcement and escalation from principles-based non-discrimination obligations".

Virtual disaggregation is not an alternative to non-discrimination rules and should not be treated as an escalation option.

Virtual disaggregation (a horizontal reform) and non-discrimination rules (a vertical reform) deal with different problems and are complementary rather than substitutes. Non-discrimination rules are aimed at mitigating abuses of market power in downstream markets, while virtual disaggregation is aimed at reducing market power. Virtual disaggregation helps mitigate excess pricing in the wholesale market due to market power. Non-discrimination rules cannot do that. The Authority's proposals won't address the level of wholesale market power, or its impact on spot and forward contract price levels.

Market power problems will continue to manifest in the form of elevated/inefficiently high spot and forward contract prices regardless of whether non-discrimination rules successfully address issues with the incumbent gentailers favouring their own retail businesses to the detriment of retail competition.

Meridian and former Electricity Authority chair, Dr Brent Layton, have put the issues of use of market power and economic withholding to maintain elevated wholesale prices in the

spotlight.[6] Meridian and Layton have detailed that Contact and Genesis have the ability and incentives (which requires significant or substantial market power) to limit access to their contingent storage by the wider market (economic withholding) in order to keep more thermal generation running and to keep wholesale prices artificially elevated. Meridian cites evidence of "Genesis' real-world behaviour".

It is reasonable to infer that if Contact and Genesis have market power such that they can artificially raise wholesale prices then the much larger Meridian, with large storage capacity, also has a high degree of market power and could do the same. The lack of thermal generation does not change this. Given Meridian's market position they are well placed to identify and understand such practices and market abuses.

We consider the Meridian/Layton evidence heightens the need for the Authority to revisit its Wholesale Market Review work and reconsider what needs to be done to manage wholesale market power, including through virtual disaggregation.

MDAG provided useful guidance and recommendations for virtual disaggregation e.g.:[7]

> 7.24 While ensuring adequacy of competition has been a broad motivation, we have given special consideration to one particular area of the wholesale market. Analysis in the Issues Paper and the Options Paper highlighted the potential for a thinning of competition in the provision of flexibility contracts covering periods of a week or longer. This is because a sizeable slice of this flexibility comes from fossil-fuelled generation, and this is expected to progressively shrink.
>
> 7.25 New sources of flexibility are likely to emerge over time – such as flexible demand sources, pumped hydro storage, or biofueled thermal operation. Nonetheless, a significant thinning of competition in the provision of longer duration flexibility products is possible because much of the existing physical capacity to back such products is held by parties with the major flexible hydro schemes. Analysis in the Options Paper showed that larger generators with substantial flexible hydro bases may well have greater means and incentive to exercise market power in the supply of flexibility products as thermal generation declines.
>
> 7.26 A thinning of competition for flexibility products could tear at the fabric of the broader market. That is because flexibility products provide a critical bridge to integrate intermittent supply into products suitable for retail consumers. Put simply, weaker competition for flexibility products could also undermine competition in the retail and new investment markets.
>
> 7.27 Although our analysis cannot be determinative because of uncertainties about the future, it highlights a risk that we think cannot be ignored. Our view is that the risk of declining competition for longer-duration flexibility contracts must be proactively managed – rather than adopting a 'wait and see' approach.

[6] Meridian, Security of Supply Forecasting and Information Policy Review, 4 November 2025.

Dr Brent Layton, Review of the Contingent Storage Release Boundaries, 27 October 2025.

[7] Price discovery in a renewables-based electricity system: Final Recommendations PAPER 2023

Price smoothing is not a benefit of vertical-integration [Q10]

The consultation details well the various benefits of vertical-integration and that different business models have different merits. A sign of a successful market is that different market participants will have different strategies and business models.

Care is needed though not to overstate the benefits of any particular business model.

The consultation states that "Submitters highlighted a number of benefits from vertical integration: … smooth price and volume volatility (MEUG, NZIER, Genesis, NERA)". Claims that vertical-integration enables consumers to benefit from "price smoothing" and to be insulated from elevated wholesale prices should be treated with caution.

Vertical-integration, in-of-itself, does not enable price smoothing. Price smoothing requires (i) market power, and that (ii) the market is not fully workably competitive.

To the extent retail customers are insulated from prolonged periods of high spot prices the quid pro quo (smoothing) is that retail prices will be higher than they otherwise would need to be, or would be efficient, when spot prices are low. If the electricity market was fully competitive high retail prices when spot prices are low would not be sustainable, as it would create an opportunity for other retailers to compete on the basis of low retail prices off the back of low spot prices, undercutting the incumbents.

In a workably competitive market, no firm has significant market power and consequently prices are not too much or for too long significantly above costs – the source of the "price smoothing" cannot be sustained.

The Authority has made similar comments noting that "If a retailer is smoothing prices and protecting consumers from higher-than-average wholesale prices, then they must also be recovering those losses by charging those consumers higher prices when wholesale prices are lower than average." The main difference is that the Authority euphemistically refers to "large balance sheets" whereas it is market power that enables price smoothing.

Concluding remarks

Pulse supports the application of non-discrimination rules to incumbent gentailer wholesale-retail activity and hedge products, enhanced (rather than repeal of) ITP disclosure requirements,[8] and increased monitoring of the conduct of the large, incumbent gentailers.

We support these changes being introduced as soon as practicable.

[8] The issues that are raised in the Internal Transfer Price and Retail Gross Margin post implementation review (PIR) were not new or unexpected. The Authority raised the main issues/shortcomings at the time it was consulting on the implementation of the ITP and retail gross margin disclosure regime but choose not to address them.

The Independent Electricity Retailer submissions – independently and jointly – highlighted that these issues were simply a problem with the way the Authority had designed the disclosure requirements, e.g. allowing disclosure of accounting ITPs rather than ITPs used for actual retail pricing, and not fully implementing the Electricity Price Review recommendation for full financial separation of incumbent gentailer retail and wholesale businesses. Refer, for example, to: Independent_Retailers_email.pdf and https://www.ea.govt.nz/documents/2593/Independent-retailers-submission-Internal-Transfer-Prices-and-segmented-profit_UdEkS62.pdf.

We consider that the Authority's proposed NDOs need substantial overhaul/replacement if they are going to be effective in limiting the incumbent gentailers' ability to discriminate in favour of their own internal business units, and if they are going to be effective at promoting an effective, workably competitive market. The Authority should explicitly draw on existing New Zealand and international precedent rather than trying to 'reinvent the wheel' with bespoke and novel rules.

As the Authority's level playing field proposals stand, we do not have confidence there will be reliable access to hedge products, and we do not have confidence the incumbent gentailers won't discriminate in favour of their own internal business units or harm competition.

Yours sincerely,

Sharnie Warren
Chief Executive

Appendix 1: Substantial competition problems in the electricity retail market [Q1]

Our Level Playing Field submission provided clear evidence problems in the wholesale market are adversely impacting downstream retail competition. We commented this has become increasingly apparent since the Pohokura outage in 2018 with, by way of example, the fall-off in switching rates and growth of independent retailers; followed by flatlining or deteriorating retail competition metrics.

We also noted the joint independent retailer submission to the Authority on 2024/25 appropriations provided evidence competition has either stalled or gone backwards.[9]

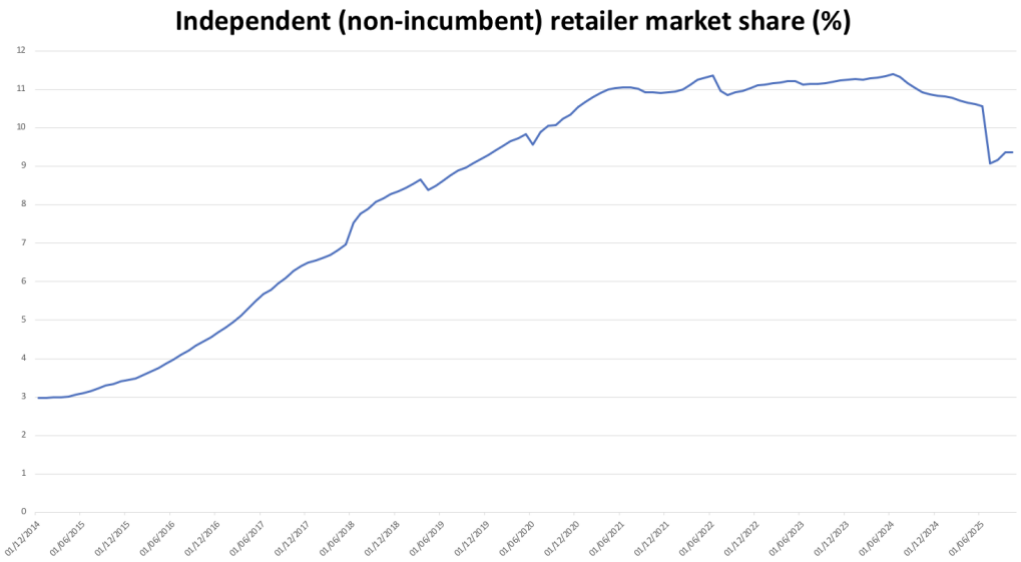
We have updated our evidence below for the convenience of the Authority.

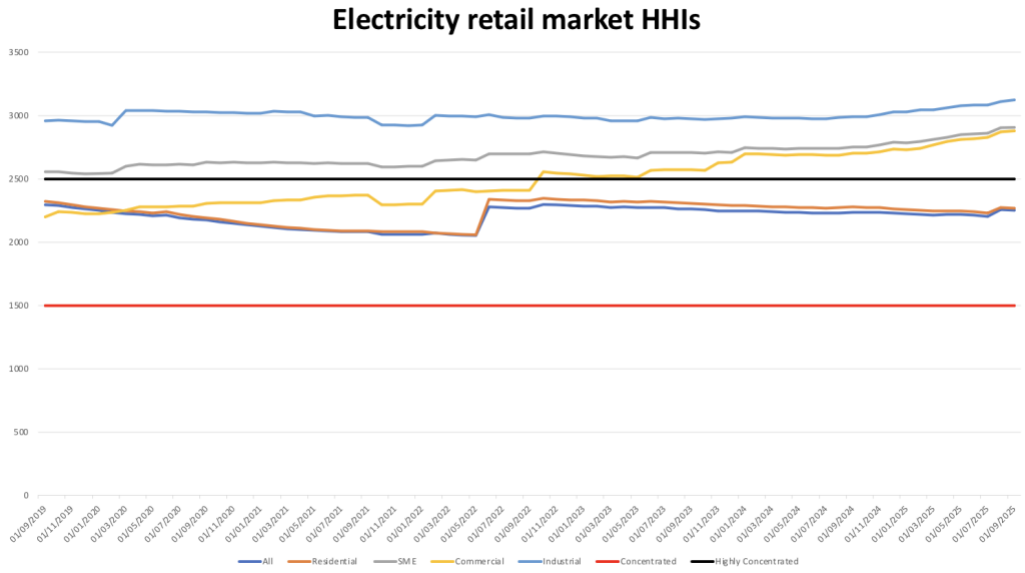
The switching rate graphic shows that switching (on a 12-month rolling average) peaked at 10.54% in 2012, and residential switching has declined from a peak of 8.58% in 2018 (based on a 12-month rolling average) to around 6% since 2021.[10]

Aggregate independent and new entrant retail market share plateaued at about 11% between 2021 and 2024, and over the last 12-months has dropped to around 9% the lowest it has been for 5 years.

Market concentration measures have either flatlined or deteriorated since the Pohokura outages.

[9] See also, by way of example, Haast Independent Retailers - WMR2 - 2022 12 14 - 1382982.pdf.
[10] Pulse Energy, Competition should be the driver for innovation and choice, 26 March 2025, available at: https://www.ea.govt.nz/documents/6813/R_Pulse_Energy_2A2B2C_submission_2025.pdf.


Independent (non-incumbent) retailer market share (%)


Electricity retail market HHIs
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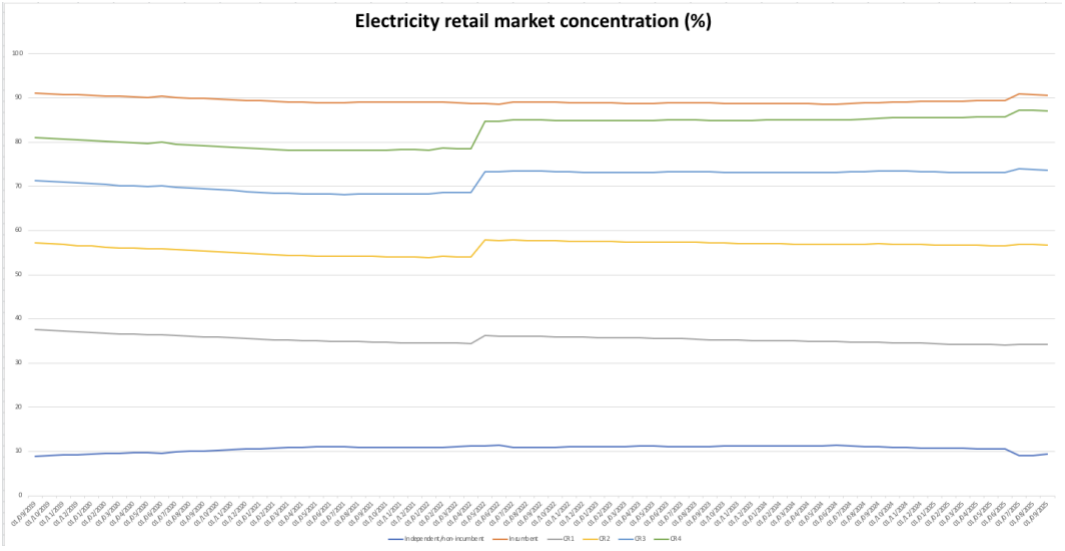
SME
Commercial
Industrial
Concentrated
Highly Concentrated


Electricity retail market concentration (%)

Appendix 2: Clause by clause commentary on the draft NDOs [Q3-5, 13, 30, 31 & 32]

Clause	Proposed NDO drafting	Pulse commentary
	buyer, for the purposes of subpart 5, subpart 5C, and subpart 7 of Part 13, means— …	Pulse supports that the definition includes financial intermediaries and not just retailers under the NDOs.[11]
1(1)	A gentailer must not discriminate … for the supply of risk management contracts …	The underlying problem is that a vertically-integrated access provider with market power can harm competition in downstream and related markets, including by discriminating in favour of its own internal business units/against 3rd party retailers. As we previously submitted, the supply of risk management contracts should be seen as an example only of the ways that competition could be harmed. Regulation targeted solely at addressing this one example won't necessarily be sufficient or proportionate. We are also concerned application of non-discrimination rules to risk management contracts only could create grey areas and uncertainty about what is discrimination in relation to risk management contracts versus broader discrimination in favour of the internal business units. The non-discrimination rules should cover any preferential treatment of the incumbent gentailers' own internal businesses not just risk management contracts.
1(1)	A gentailer must not discriminate <u>between buyers</u> for the supply of risk management contracts …	Principle 1(1) would allow each incumbent gentailer to discriminate "in favour of its own internal business units" in the supply of risk management contracts. We do not feel that the Authority has provided any meaningful explanation for this gap in the non-discrimination requirements. This is contrary to the "intent" of the proposals "to ensure that the

[11] The joint 2degrees, Electric Kiwi, Flick Electric, and Pulse submission, Financial Transmission Rights – Successful product for managing risk, 30 June 2022, provides our views on the value of financial intermediary participation.

Clause	Proposed NDO drafting	Pulse commentary
		gentailers cannot favour their own retail arms over other retailers in the availability or pricing of risk management contracts." Non-discrimination rules should preclude access providers from treating themselves or one or more access seekers more favourably than another access seeker.
1(1), (2) & (3)	… without an objectively justifiable reason.	The "objectively justifiable reason" limitation on the non-discrimination rule is too permissive. The more orthodox approach would be to only apply the exemption where there is an "objectively justifiable reason" AND the departure from the non-discrimination rule would not harm competition. No justification has been provided for this gap in the non-discrimination requirements.
1(2)	A gentailer must not discriminate against buyers in favour of its own internal business units for the supply of uncommitted capacity …	Principle 1(2) would allow each incumbent gentailer to discriminate "between buyers". We do not feel that the Authority has provided any meaningful explanation for this gap in the non-discrimination requirements. Non-discrimination rules should preclude access providers from treating themselves or one or more access seekers more favourably than another access seeker.
1(2)	A gentailer must not discriminate against buyers in favour of its own internal business units for the supply of uncommitted capacity	Pulse considers that principle 1(2) should be deleted. Non-discrimination rules should apply to all capacity not just loosely defined "uncommitted capacity".[12] If Principle 1(2) is not deleted it should be substantially narrowed, consistent with draft Guideline B.9.h., such that the non-discrimination rules would "not … allow a gentailer to allocate future generation capacity to planned growth in its own retail internal business". The Code drafting for 'committed' versus "uncommitted capacity" does not marry up with the consultation paper's description of the principle and the draft Guidelines.

[12] If the Authority retains provisions in relation to "uncommitted capacity" it should be a requirement for the incumbent gentailers to disclose their committed/uncommitted capacity, including the methodologies used to determine total capacity and the split between committed and uncommitted.

Clause	Proposed NDO drafting	Pulse commentary
		Principle 1(2) allows rather than excludes discrimination. Incumbent gentailers would be allowed to discriminate in favour of/provide preferential treatment to their own internal business units in relation to generation capacity, limiting the non-discrimination rule to capacity the incumbent doesn't need/want. The proposal would also raise questions about the interpretation of committed versus "uncommitted capacity". The non-prescriptive nature of the principle is permissive to the gentailers claiming they reasonably expect to need most or all the "generation that could otherwise be used to back risk management contracts … to use to supply electricity to its end customers". The consultation claims "the proposal does prevent a gentailer from allocating future generation capacity to planned growth in its own retail internal business unit without testing market interest in that capacity". Pulse considers that this claim is incorrect. There is nothing in the definition of uncommitted capacity's reference to "the amount of generation ... the gentailer reasonably expects to use to supply electricity to its end customers" that would necessarily excludes planned retail growth or supply to future/new end-customers.
1(3)	A gentailer must not discriminate <u>against buyers in favour of its own internal business</u> units when pricing risk management contracts	Principle 1(3) would allow each incumbent gentailer to discriminate "between buyers". We do not feel that the Authority has provided any meaningful explanation for this gap in the non-discrimination requirements. Non-discrimination rules should preclude access providers from treating themselves <u>or one or more access seekers</u> more favourably than another access seeker.
1(4)	For the avoidance of doubt, subclause (3) requires pricing of risk management contracts	Principle 1(4) is not a "For the avoidance of doubt" clause.

Clause	Proposed NDO drafting	Pulse commentary
	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.	An incumbent gentailer could comply with principle 1(3) by offering risk management contracts at the same price as it (implicitly or notionally) offers the contracts to its own internal business, while those prices (and/or the incumbent gentailer's retail tariffs) may be such that principle 1(4) is violated and neither its own internal business or a "buyer that supplies electricity to end users at retail" could operate profitably. Pulse considers that a simpler and clearer way to specify the RPCA would be to test whether the incumbent gentailer's own internal retail business could operate at a profit if its access to risk management contracts (including in relation to pricing) was the same as it provides to buyers that supply electricity to end users at retail.
2(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.	Pulse considers that the draft Guidance should be elevated to the Code. It is not obvious to Pulse what the benefit would be for mandatory grocery provisions to be adopted as voluntary electricity guidance rather than in the Code, or how this would be to the long-term benefit of consumers. We consider that the Guidelines should be included in the Code. We also have the following observations and comments about the changes the Authority has made to the grocery good faith provisions: • It is unclear why the requirement not to act "recklessly, or with ulterior motive" has been dropped or what the downside would be of increasing the clarity of the good faith requirements by including this wording. • We support the requirement not to act "unfairly". • It is unclear why the requirement that trading be "conducted without duress" has been dropped or what the downside would be of increasing the clarity of the good faith requirements by including this wording.

Clause	Proposed NDO drafting	Pulse commentary
		• It is unclear why the requirement for the access provider to recognise "the need for … certainty regarding the risks and costs of trading" has been dropped or what the downside would be of increasing the clarity of the good faith requirements by including this wording. • It is unclear why obligations on access providers needs to specify that the buyer acts reasonably. There is no need to add regulation in relation to access seekers who do not have market power.
3(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.	Pulse considers that Principle 3(6) should be supported by a requirement that justification be provided (including any reliance on data or advice or opinion) for the different treatment. This would align with the provisions in the Human Rights Act allowing different treatment in the provision of insurance (section 48) etc.
4(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.	Principle 4(7) would only limit non-discrimination to information sharing narrowly to "commercial information relating to risk management contracts". It might not be a breach of the non-discrimination rules for the internal retail business to have access to or be involved in wholesale business decisions which could impact the value of hedge products. This would also raise questions about what is "commercial information" and what commercial information relates to risk management contracts.
5(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.	Pulse considers that the Authority should draw more on the Confidential Information provisions in clause 25 of the Grocery Industry Competition Regulations 2023; in particular, the clause should explicitly provide that "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."

Clause	Proposed NDO drafting	Pulse commentary
		Pulse also considers “that may compete with the buyer” creates an unnecessary test for whether the principle has been complied with or not and should be deleted. Confidential information should not be shared or used by the incumbent gentailer’s internal business units regardless of whether they compete with the buyer.

Appendix 3: The ITP Post Implementation Review did not raise any new issues

The issues raised in the Internal Transfer Price and Retail Gross Margin post implementation review (PIR) weren't new or unexpected. The Authority raised the main issues/shortcomings at the time it was consulting on the implementation of the ITP and retail gross margin disclosure regime but choose not to address them.

The Independent Electricity Retailer submissions – independently and jointly – highlighted that these issues were simply a problem with the way the Authority had designed the disclosure requirements, e.g. allowing disclosure of accounting ITPs rather than ITPs used for actual retail pricing, and not fully implementing the Electricity Price Review recommendation for full financial separation of incumbent gentailer retail and wholesale businesses:[13]

> We agree with the Authority, to the extent ITPs used for accounting practices differ from the wholesale input cost used for retail pricing, "ITPs are not a particularly strong mechanism for mitigating potential anti-competitive practices by generator-retailers". The Authority's analysis shows incumbent vertically-integrated suppliers are effectively running two sets of books with two sets of Internal Transfer Prices; one for accounting purposes and one for retail pricing purposes.
>
> Our interest is (obviously) in the Internal Transfer Prices used for retail pricing purposes.

Contact Energy has a different perspective on ITPs to the Authority

Contact has made a number of comments about its ITPs which differ from the position the Authority has posited. It appears that Contact's commentary is based on disclosure of ITPs used for retail pricing purposes. Incumbent gentailers should be required to adopt Contact's approach.

29.2 It would mark a complete departure from Contact's prior market conduct if it were not to offer contracts to the market, including to independent retailers. Contact's input pricing to its retail business is equivalent to its pricing to contractual counterparties and fully transparent to the market through the published Internal Transfer Price (**ITP**) and its methodology. The Transaction will not change this. Retail market shares will be determined, as they are today, by retail competition and innovation. If Contact has compelling offers in the retail market it will gain customers, but it faces robust competition from other gentailers and independent retailers in doing

Contact's approach to pricing to its retail arm

29.7 The Code requires public disclosure of retail ITP, the ITP methodologies used and retailer gross margins. This enables the EA to understand and monitor pricing practices used by integrated generator retailers. Contact's ITP sets the price that Contact's wholesale business sells to Contact's retail business. For the wholesale business unit, the retail ITP provides a fixed price hedge for a portion of Contact's generation. For the customer business unit, the ITP provides fixed price certainty for electricity costs for its retailing business.

29.8 Contact has an internal standard operating procedure to calculate its retail ITP using a 'Retail Transfer Price Model'. It uses this model to determine a transfer price that its generation arm would hypothetically sell to its retail arm if the retail and generation arms were acting as two independent entities. The model takes the ASX settlement prices at Otahuhu and Benmore for the three years preceding the start date of the financial year or month being analysed before being adjusted for the shape and therefore price effect of a retail customer. To avoid short term effects and to offer improved price stability to its retail business, all linear hedging is completed six months from the period in question.

29.9 This approach motivates Contact to be indifferent to supply of contracted sales to third parties or its retail arm. It ensures no preference is given to its retail arm that could distort competition.

[13] e.g. https://www.ea.govt.nz/documents/2593/Independent-retailers-submission-Internal-Transfer-Prices-and-segmented-profit_UdEkS62.pdf