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Electricity Authority
Level playing field
To: levelplayingfield@ea.govt.nz

Gallagher & Co Consults Limited, T/A Adonis Energy, welcomes the opportunity to engage with the Electricity Authority's (EA) proposal to level the playing field dated 14 October 2025. Over the years, a number of cases have been brought before the courts on anti-competitive behaviour from a range of industries and include issues that have been raised with improper conduct in the electricity market.

This has led to concerns towards anti-competitive conduct across all levels, and that risk is argued as significantly heightened by the vertical integration of gentailers, companies that are both major generators and retailers. A gentailer has both the incentive and the opportunity to favour its own retail arm over independent retailers, and while some argue this has not occurred, leaving the risk open creates uncertainty in the market, which in our view, as new gentailers come online, posses an unacceptable risk to consumers and market players. We would submit that there is a significant risk in leaving the legislative space unchecked, which may result as follows:

1. Incentive and Opportunity for Anti-Competitive Conduct

A gentailer's primary goal is to maximise its overall profit. It can achieve this by using its generation arm to give its retail arm a competitive advantage. This can be done by:

- Offering its retail arm internal hedge contracts at prices below what is offered to independent retailers.
- Ensuring its retail arm has guaranteed access to hedge contracts while limiting availability for competitors.
- Creating pricing structures in the wholesale market that disproportionately benefit its own generation and retail activities.

This conduct leverages a dominant position in the generation market to deter or eliminate competition in the retail market, a practice that competition law seeks to prevent.[1]

[1] *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* CP270/89, 23 November 1989 at 71; *Vector Limited v Transpower New Zealand Limited* CA32/99, 31 August 1999, at 4; *Electricity Corporation Limited v Geotherm Energy Limited* CA169/91, 4 October 1991, at 14.

Competition has provided guidance in this area, and arguments that just because it has not happened, do not alleviate the concerns for the future, and we agree with the EA that rules need to be put in place now for the development of the market and we suggest that we learn from the following issues that have developed in competition law to provide clear guidance for those involved.

Case	Industry	Guiding Principle
Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership [2016] NZCA 538 at 39.	Dairy	A dominant entity cannot justify offering less favourable terms to some suppliers as a penalty for perceived disloyalty or to placate other stakeholders. The discrimination must be based on legitimate commercial grounds directly related to the transaction.
Talleys Fisheries Ltd v Petersville Industries Ltd CP4/88, 4 March 1988 at 15; *Petersville Industries Ltd v Talley's Fisheries Ltd* CA156/88, 30 November 1988 at 14.	Food	A company controlling multiple brands may be considered engaged in anti-competitive behaviour by offering financial incentives to distributors and retailers to promote one brand over another, substituting products, and undercutting prices.
Vector Ltd v Transpower New Zealand Ltd CA32/99, 31 August 1999 at 4.	Electricity	A transmission monopolist was alleged to have used its dominance to impose pricing structures that deterred competition by disadvantaging embedded generation and favouring remotely located generators. The principle outlined that while prohibition and withholding may be acceptable in some circumstances, it is never justified where an anti-competitive constraint is the purpose.
Electricity Corporation Ltd v Geotherm Energy Ltd CA169/91, 4 October 1991.	Electricity	A dominant generator was alleged to have used its market power to exclude a competitor by contracting with supply authorities to prevent them from sourcing electricity elsewhere, among other tactics. Such behaviour was deemed to use a dominant position to exercise influence and was unacceptable; the court dismissed the application for strike out.

The principles summarised above show a clear intention by the courts to uphold regulations that prevent the form of behaviour that may lead to anti-competitive and influential behaviour on markets.

Applied to the electricity market, we agree with the EA that regulation to prevent such behaviour is necessary for the future of New Zealand's electricity market.

Proposed Non-Discriminatory Principles

The Need for Protection Against Discrimination

Discrimination in the Electricity Market context refers to a generator offering different terms, conditions, or prices for the supply of wholesale electricity or related financial instruments (like hedge contracts) to different buyers, without a justifiable commercial reason. Further, it refers to the risk of gentailers providing different terms to the owned and operated retailer of the gentailer.

Market Distortion and Inefficiency

When a generator with significant market power discriminates between buyers, it can distort the competitive landscape. And despite arguments from some gentailers, the risk for gentailers to favour certain retailers (internal or external) allows them to offer more competitive retail prices, not because of their own efficiency, but due to preferential treatment from the generator. This undermines the competitive process by creating an uneven playing field. Such conduct can lead to a reduction in overall supply or market participation over the long term, as disfavoured participants are forced to exit.

The law recognises that buyer-side conduct, such as coordination or preferential treatment, can be as harmful as seller-side cartels, even if a direct reduction in supply is not immediately apparent. It reduces the profitability and incentive for disfavoured participants to remain in or enter the market.[2]

Barriers to Entry and Reduced Consumer Choice

Discrimination acts as a significant barrier to entry for new and independent retailers. If these retailers cannot secure wholesale electricity supply or hedge contracts on terms comparable to the incumbent players, they cannot compete effectively. This stifles innovation and ultimately limits consumer choice. The history of the electricity industry's reform highlights the persistent challenges in facilitating genuine retail competition and making it easier for customers to switch suppliers.[3]

[2] *Commerce Commission v Ronovation Limited* [2019] NZHC 2303 - The High Court imposed a $400,000 penalty on Ronovation for Commerce Act breaches, involving a buyer-side cartel via Priority Rules that suppressed member competition in Auckland residential property acquisitions from 2011-2018.
[3] *Commerce Commission v Bay of Plenty Electricity Limited* CIV-2001-485-917 (HC) 13 December 2007 - The High Court dismissed Commerce Commission claims that BOPE's refusal to lease electricity meters breached s 36 (misuse of market power) and s 27 (anti-competitive arrangements). Applying the counterfactual test, the

Preventing Gentailer Favouritism

The risk of anti-competitive conduct is significantly heightened by the vertical integration of gentailers, companies that are both major generators and retailers. A gentailer has both the incentive and the opportunity to favour its own retail arm over independent retailers as identified by the EA.

A gentailer's primary goal is to maximise its overall profit. It can achieve this by using its generation arm to give its retail arm a competitive advantage. This can be done by:

- Offering its retail arm internal hedge contracts at prices below what is offered to independent retailers.
- Ensuring its retail arm has guaranteed access to hedge contracts while limiting availability for competitors.
- Creating pricing structures in the wholesale market that disproportionately benefit its own generation and retail activities.
- This conduct leverages a dominant position in the generation market to deter or eliminate competition in the retail market, a practice that competition law seeks to prevent

And while gentailers have argued that this is misconceived, the risk to the consumer from gentailers is ever-increasing with more offshore influences entering the New Zealand market and shareholding arrangements. Therefore, as identified by the EA, regulation is needed to prevent inappropriate positions occurring despite the promises of current operators.

Therefore, we argue that the reforms proposed are both necessary and timely with the ever increasing need for more operators to create generation competition.

Review of Principles and proposed amendments

The proposed operation of Principle 1

Based on a review of the underlying legal principles, the proposed clause is a sound starting point. However, it can be refined to enhance its clarity, precision, and enforceability. The goal is to create a provision that is unambiguous for market participants and robust enough to withstand legal challenge.

court found no s 36 breach as meter acquisition costs were economically equivalent under competition, and the no-leasing policy did not raise rivals' costs or create barriers to entry.

Therefore, we argue that for the market to provide such certainty, the proposed changes should be extended to include all generation offers, not just hedge contracts, but spot pricing also. This is because the spot market can be used in an inappropriate way through manipulation, with influence on price fluctuation through generator dominance. While a minor risk, there is still a risk that hedge contracts may be backdated, favouring the retail arm of a gentailer. It is clear that the EA has considered something towards this line in the proposal for good faith actors. However, the market is aware that good faith is not always provided, and we suggest principle one be extended to include all forms of gentailer price propositions, in this way certainty is created for all future contractual and spot market pricing terms.

Proposed change to Principle 1:

> **Principle 1(a) be amended as follows:**
>
> (1) A gentailer must not, without an objectively justifiable commercial reason, discriminate between buyers in relation to the terms for the supply of electricity or related risk management products.

We propose the above change for the following reasons, as it provides greater certainty by explicitly defining the scope of the obligation and what does (and does not) constitute a justifiable reason. This structure is preferable for introduction into the Electricity Industry Participation Code, as it reduces ambiguity and the potential for disputes over interpretation:

> **The Meaning of "Objectively Justifiable Reason"**
> Case law, particularly from the Fonterra litigation, provides significant guidance on what constitutes a justifiable reason for differential treatment. These principles are directly applicable to a non-discrimination obligation for gentailers and informs the key changes we propose.
>
> Key principles from *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* include:
>
> - No Penalty for Competition: Offering less favourable terms to penalise a party for perceived disloyalty or for dealing with a competitor is not a justifiable reason.

- No Collateral Purpose: A reason is unlikely to be justifiable if the discrimination is used to achieve a collateral purpose unconnected to the commercial judgment of the particular transaction in question.
- Economic Basis Required: Different terms must be justified by genuine economic or commercial considerations. In Fonterra, it was accepted that the differential terms imposed were not justified by economic considerations.
- Placating Others is Not a Justification: The desire to placate existing shareholders or customers who may resent a competitor being treated favourably is not a valid commercial justification for discrimination.

Applying these principles, an "objectively justifiable reason" for a gentailer to offer different terms would need to be based on legitimate commercial factors related to the specific transaction, such as differences in:

- Volume or duration of the contract.
- The creditworthiness of the counterparty.
- The timing and nature of the supply.
- Other material differences in the circumstances of the supply that have a direct and rational connection to the terms offered.

Applying this to principle 1 allows clarity for the decision makers when considering the gentailers' actions, as well as for the disadvantaged retailer, when applying for assistance to confirm a breach has occurred, and not just a dissatisfaction with the contract offered.

In summary the following Key Changes for the wording are applied:

1 *"Objectively justifiable commercial reason"*: Adds the word "commercial" to clarify that the reason must be grounded in legitimate business and economic factors, aligning with the principles from Fonterra.

2 *"in relation to the terms for the supply of electricity"*: Replaces the ambiguous "risk management contracts " with a broader and clearer phrase that captures all aspects of the supply arrangement.

3 *"or related risk management products"*: Replaces "contracts" with "products," which is common industry terminology for financial instruments like hedges and spot pricing.

We argue that the proposed changes then create a positive obligation as follows:

Greater certainty through clear obligations that come from the case law:

(1) Non-discrimination obligation: A gentailer must not offer or supply electricity or related risk management products to a buyer on terms that are materially less favourable than the terms on which the gentailer offers or supplies such products to other buyers, unless the difference in terms is based on an objectively justifiable commercial reason.

(2) Application For the purpose of subclause (1): "other buyers" includes any associated person of the gentailer, including its own retail business.

(3) Objectively justifiable commercial reason: A commercial reason is objectively justifiable only if it is based on legitimate and material differences in the circumstances of the supply, which may include differences relating to

a. the volume, duration, or timing of the supply;
b. the creditworthiness of the buyer; or
c. other factors that materially affect the cost or risk of the transaction for the gentailer.

(4) Unjustifiable reasons: For the avoidance of doubt, a reason is not an objectively justifiable commercial reason if its dominant purpose is to

a. prevent, restrict, or deter competition in any market in which electricity is traded; or
b. penalise, disadvantage, or discipline a buyer because that buyer is, or is perceived to be, a competitor to the gentailer or an associated person of the gentailer.

A Positive Obligation to act in good faith:

1 Framed around not offering "materially less favourable" terms, providing a clearer standard.

2 Includes Internal Transactions: Greater Certainty Subclause (2) explicitly clarifies that the comparison includes the gentailer's own retail arm, directly addressing the favouritism issue.

3 Defines Justifiable Reasons: Greater Certainty Subclause (3) provides a non-exhaustive list of valid reasons, guiding compliance.

4 Defines Unjustifiable Reasons: Greater Certainty Subclause (4) explicitly incorporates the principles from the Fonterra cases and competition law, prohibiting discrimination for an anti-competitive purpose.

Our reasoning with the Greater Certainty subclauses shows that the proposed amendments create a positive aspect to the industry for acting in good faith and working towards a stronger competitive electricity market.

I will now turn to Pinciple 1(a)and 1(3) which provides for both clauses to correctly target discrimination in favour of a gentailer's "own internal business units" and apply the correct legal standard of an "objectively justifiable reason", but create gaps and we propose that their effectiveness can be significantly improved.

Principle 1(2) and 1(3)

Discrimination re: **supply of uncommitted capacity**

The term "uncommitted capacity" may be too narrow and could create loopholes related to other forms of generation supply.

Discrimination re: **pricing of risk management contracts**

Focusing only on "pricing" is too restrictive. Discrimination can occur in non-price terms (e.g., credit, volume, tenor, access).

The two clauses address separate but deeply interconnected aspects of the wholesale electricity market being physical supply and financial risk management. We propose that they should be combined into a single, overarching obligation to prevent gentailers from finding loopholes by discriminating in an area not explicitly covered.

Furthermore, we argue that the scope of the prohibited conduct should be broadened:

- Instead of "supply of uncommitted capacity," the rule should apply to the supply of electricity more generally.
- Instead of just the "pricing" of risk management contracts, the rule should apply to all terms and conditions for the supply of electricity and related risk management products. This ensures that discrimination through non-price factors is also captured.

We argue that this approach creates a more comprehensive prohibition that is harder to circumvent. The law regarding restrictive trade practices often takes a broad view to capture the substance of the conduct rather than just its form, and thus provides greater certainty and clarity ot the market participants for expected behaviour.

Therefore, we propose that these clauses be amended to ensure certainty and avoid ambiguity, with key terms made more precise as follows:

> "Internal business units": This phrase is colloquial. A more legally robust term would be "associated person", “related company”, “relevant interest” or "interconnected body corporate", which are terms used in legislation such as the Commerce Act 1986 and Companies Act 1993 to capture the full extent of a corporate group.

This prevents a gentailer from arguing that a transaction with a subsidiary or related company is not technically with an "internal business unit".

> "Discriminate": The concept of discrimination is well understood in law but can be stated more precisely to create a clearer test. For example, the obligation could be framed as a prohibition on offering terms that are "materially less favourable" than those offered to others, including the gentailer's own retail arm.
>
> Define "Objectively Justifiable Reason" This is the most critical adjustment required. Leaving this phrase undefined creates significant uncertainty and invites disputes over its interpretation. The meaning should be clarified directly within the rule, drawing on established legal precedent. Case law, particularly from the Fonterra litigation, provides clear guidance on what does not constitute a justifiable reason, and the discussion above regarding Principle 1(1) may offer insights into a workable definition for this clause.

Examples can be found in case law that show the following are not justified excuses:

> Collateral Anti-Competitive Purpose: A reason is not justifiable if its purpose is to discipline or penalise a buyer for being a competitor. Using market power for a purpose unconnected to the direct commercial merits of the transaction is improper.
>
> Placating Other Parties: A desire to placate existing shareholders or customers who may resent a competitor receiving favourable terms is not a valid commercial justification for discrimination.
>
> Lack of Economic Basis: The differential treatment must be based on genuine economic or commercial factors; it cannot be a penalty imposed for "disloyalty".

We argue that these clauses should be properly amended to make sur ethe objective being sought can be properly achieved. We suggest that such amendment must:

1. Provide a non-exhaustive list of what may constitute a justifiable reason (e.g., material differences in credit risk, volume, contract duration).
2. State explicitly what is not a justifiable reason, incorporating the principles above.

This structure provides certainty to both gentailers and independent retailers, promoting compliance and reducing the need for costly litigation to interpret the rule.[4] Therefore, we propose the following amendment to the rules:

> **Proposed Rewritten Clause (Incorporating Adjustments)**
> The following revision combines clauses (2) and (3) and incorporates the recommended adjustments for scope, clarity, and justification.
>
> (2) *Non-discrimination obligation*: A gentailer must not, without an objectively justifiable commercial reason, offer or supply electricity or related risk management products to a buyer on terms and conditions that are materially less favourable than the terms and

[4] *Allied Concrete Limited v Jeffrey Philip Meltzer and Lloyd James Hayward as liquidators of Window Holdings Limited (in liquidation), Fences and Kerbs Limited V Peter Esmond Farrell and Simon Paul Rogan as liquidators of Contract Engineering Limited In Liquidation* [2015] NZSC 7.

conditions on which the gentailer offers or supplies such products to any associated person, including its own retail business.

(3) *Objectively justifiable commercial reason*: For the purposes of subclause (1), a commercial reason is objectively justifiable only if it is based on legitimate and material differences in the circumstances of the supply between the buyer and the associated person, which may include differences relating to

a. the volume, duration, or timing of the supply;
b. the creditworthiness of the counterparty; or
c. other factors that materially and rationally affect the cost or risk of the transaction for the gentailer.

(4) Unjustifiable reasons For the avoidance of doubt, a reason is not an objectively justifiable commercial reason if its dominant purpose is to

a. prevent, restrict, or deter competition in any market; or
b. disadvantage a buyer because that buyer is a competitor of the gentailer or any of its associated persons.

This proposed amendment to clauses 3 and 4 provides a clear, comprehensive, and legally robust rule that directly addresses the intended policy outcome of creating a level playing field in the wholesale electricity market. We propose that clause the current Principle 1(4) be moved to (5). Furthermore, the above amendments then align with the proposed principles in Principles 2, 3, 4, and 5 and create greater certainty and clarity for the record keeping proposed in Principle 6.

Conclusion

We confirm that the EA's approach to levelling the playing field is both timely and important for New Zealands Electricity future. However, we propose some important amendments to the principles proposed, as there is a risk for uncertainty for participants, and risk of regulatory escape with the current wording proposed. Therefore, we have submitted proposed amendments for the market to consider to create certainty and clarity that creates a workable competitive market for all participants.

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