

5 November 2024

## Level playing field measures critical for promotion of effective competition

2degrees, Electric Kiwi, Flick Electric, Octopus Energy and Pulse Energy (the Independent Electricity Retailers) welcome the Energy Competition Task Force's (the Task Force) investigation into level playing field measures. Our letter to the Task Force of 25 September (including Appendix 2) addresses matters directly relevant to this consultation and is part of our submission.

Our views, both individually and collectively, on measures to create a level playing field should be well known. A primary focus of our submissions has been on policy measures to promote stronger competition/remove barriers to competition and growth by new entrants/independent suppliers.

We consider that it would be useful for the Task Force to look at international precedent for competition policy/wholesale access regulation in electricity and other infrastructure sectors such as telecommunications. There is also NZ precedent including the lines-generation/retail separation requirements<sup>1</sup> and arms-length rules, non-discrimination and equivalence of input requirements<sup>2</sup> and wholesale access regulation in telecommunications, groceries<sup>3</sup> etc.

Measures to promote competition/create a level playing field are core and orthodox part of regulation in infrastructure sectors. The electricity sector doesn't necessarily need to come up with anything novel or untried.

### Options that should be considered

Any options that reduce market power will help create a more level playing field.

The suite of options the Independent Electricity Retailers have advocated for consideration and/or adoption include (along with examples of relevant submissions):

- There are a range of options including accounting, corporate and ownership separation of the large, incumbent gentailers;<sup>4,5</sup>

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<sup>1</sup> Part 6A of the Electricity Industry Participation Code requires corporate separation of generation/retail and distribution businesses and applies arms-length rules.

<sup>2</sup> <https://comcom.govt.nz/regulated-industries/telecommunications/regulated-services/equivalence-and-non-discrimination-guidance>

<sup>3</sup> The Grocery Supply Code of Conduct includes a detailed list of what acting in good faith means, including requirements not to act unreasonably or with ulterior motives, and not to put access seekers (suppliers) under duress.

The good faith requirements draw on employment law precedent which includes treating others fairly using common sense.

The good faith definition includes non-discrimination.

The non-discrimination requirements include avoiding "unreasonable discrimination or distinction between suppliers" and that access to the supermarket's shelf space is "without discrimination (including without discrimination in favour of the [supermarket's] private label products)". Basically, don't favour your own brand-products over 3rd party competitors.

<sup>4</sup> <https://www.ea.govt.nz/documents/1101/Independent-retailers-MDAG-100RE-issues-submission.pdf>

<https://www.mbie.govt.nz/dmsdocument/29168-independent-retailers-measures-for-transition-to-expanded-highly-renewable-electricity-system-submission-pdf>

[https://www.ea.govt.nz/documents/2300/Haast\\_Independent\\_Retailers\\_-\\_WMR2\\_-\\_2022\\_12\\_14\\_-\\_1382982.pdf](https://www.ea.govt.nz/documents/2300/Haast_Independent_Retailers_-_WMR2_-_2022_12_14_-_1382982.pdf)

<sup>5</sup> Letter from Matthew's Law to Electricity Authority, INDEPENDENT ELECTRICITY RETAILERS – REQUEST FOR URGENT ACTION IN WHOLESALE ELECTRICITY MARKET AND CORPORATE SEPARATION, 7 August 2024.

Letter from the Independent Electricity Retailers to the Energy Competition Task Force, Critical the Energy Competition Task Force works at pace, 25 September 2024, Appendix 2.

- Accounting rules, including separate financial reporting (not just gross margin disclosure) of the large incumbent gentailers' retail and wholesale businesses<sup>6</sup> and Internal Transfer Payment (ITP) disclosure, including ex ante disclosure of each of the ITPs the gentailers used for retail pricing purposes (not just for accounting purposes);<sup>7</sup>

An MBIE briefing noted that the Electricity Price Review recommended “the Electricity Authority require vertically integrated companies to report separately on the financial performance of their retail and generation operations using a common set of rules” and this was a “high priority” for the Government as it “will provide greater assurance the wholesale electricity market is performing well.”<sup>8</sup> This was not fully implemented but should be.

### **D3: Make generator-retailers release information about the profitability of their retailing activities**

The Electricity Authority should require vertically integrated companies to report separately on the financial performance of their retailing and generation/wholesale operations using a common (regulated) set of reporting rules. This is a longer-term initiative, to be completed within 12 to 18 months.

Subsequent experience has demonstrated has validated the concern MBIE raised that profit disclosures are needed due to “ongoing questions about whether integrated generator-retailers are making excessive profits” is justified;<sup>9</sup>

- Price squeeze (subsidy-free) testing requirements;<sup>10</sup>
- Wholesale access rules – including arms-length rules,<sup>11</sup> non-discrimination and equivalence of inputs requirements;<sup>12</sup> and
- Hedge market reform, including access to flexibility products, standard mass market customer shaped hedge products and longer-term products etc.<sup>13</sup>

<sup>6</sup> [https://www.ea.govt.nz/documents/2593/Independent-retailers-submission-Internal-Transfer-Prices-and-segmented-profit\\_UdEkS62.pdf](https://www.ea.govt.nz/documents/2593/Independent-retailers-submission-Internal-Transfer-Prices-and-segmented-profit_UdEkS62.pdf)

<sup>7</sup> [https://www.ea.govt.nz/documents/2593/Independent-retailers-submission-Internal-Transfer-Prices-and-segmented-profit\\_UdEkS62.pdf](https://www.ea.govt.nz/documents/2593/Independent-retailers-submission-Internal-Transfer-Prices-and-segmented-profit_UdEkS62.pdf)

[https://www.ea.govt.nz/documents/4487/Independent\\_Retailers\\_email.pdf](https://www.ea.govt.nz/documents/4487/Independent_Retailers_email.pdf)

<sup>8</sup> Ministry of Business, Innovation and Employment, Electricity Price Review: Government Response to Final Report, 3 October 2019.

<sup>9</sup> Ministry of Business, Innovation and Employment, Electricity Price Review: Government Response to Final Report, 3 October 2019.

<sup>10</sup> [https://www.ea.govt.nz/documents/2593/Independent-retailers-submission-Internal-Transfer-Prices-and-segmented-profit\\_UdEkS62.pdf](https://www.ea.govt.nz/documents/2593/Independent-retailers-submission-Internal-Transfer-Prices-and-segmented-profit_UdEkS62.pdf)

<https://www.ea.govt.nz/documents/2601/Vocus-submission-Internal-Transfer-Prices-and-segmented-profitability-reporting.pdf>

<sup>11</sup> Letter from the Independent Electricity Retailers to the Energy Competition Task Force, Critical the Energy Competition Task Force works at pace, 25 September 2024, Appendix 2.

<sup>12</sup> [https://www.ea.govt.nz/documents/4669/Independent\\_Retailers\\_-\\_Peak\\_electricity\\_capacity\\_issues\\_-\\_2024\\_02\\_26.pdf](https://www.ea.govt.nz/documents/4669/Independent_Retailers_-_Peak_electricity_capacity_issues_-_2024_02_26.pdf)

[https://www.ea.govt.nz/documents/2273/2degrees\\_-\\_Electric-Kiwi\\_-\\_Flick\\_-\\_Haast-Energy-and-Pulse-Energy-1380054.pdf#page13](https://www.ea.govt.nz/documents/2273/2degrees_-_Electric-Kiwi_-_Flick_-_Haast-Energy-and-Pulse-Energy-1380054.pdf#page13)

[https://www.ea.govt.nz/documents/2273/2degrees\\_-\\_Electric-Kiwi\\_-\\_Flick\\_-\\_Haast-Energy-and-Pulse-Energy-1380054.pdf](https://www.ea.govt.nz/documents/2273/2degrees_-_Electric-Kiwi_-_Flick_-_Haast-Energy-and-Pulse-Energy-1380054.pdf)

<sup>13</sup> <https://www.ea.govt.nz/documents/1101/Independent-retailers-MDAG-100RE-issues-submission.pdf>

[https://www.ea.govt.nz/documents/2519/Haast\\_Independent\\_retailers\\_-\\_MDAG\\_submission\\_-\\_100RE\\_Options\\_-\\_2023\\_03\\_03\\_FINAL.pdf](https://www.ea.govt.nz/documents/2519/Haast_Independent_retailers_-_MDAG_submission_-_100RE_Options_-_2023_03_03_FINAL.pdf)

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<https://www.mbie.govt.nz/dmsdocument/29168-independent-retailers-measures-for-transition-to-expanded-highly-renewable-electricity-system-submission-pdf>

## Concluding remarks

There are clearly a number of options that should be considered and would be straightforward to implement. We would welcome the opportunity to discuss the detail we have already provided in written submissions.











We continue to hold the view it is important policy reform is proportionate to the problems that need to be addressed.

There has been a lot of emphasis on regulatory certainty creating an environment for investment, but certainty should not be confused with regulatory incrementalism. If underlying problems are not fully resolved and are allowed to fester and build it will result in increasing attention to deficiencies in the existing regulatory setting and increased uncertainty about whether existing settings will endure.<sup>14</sup>

Regulatory certainty is not beneficial or desirable if it is certainty of a poorly functioning market and continued bad outcomes for consumers.

Last year, the Authority acknowledged “We recognise that existing regulation needs to keep up with a system that is fundamentally changing and we no longer have the benefit of time or a steady environment in which to develop and implement incremental reform.”<sup>15</sup> The Authority has doubled down on this commentary, following up the comments recently, with statements that “the pace of traditional regulation wouldn’t deliver the energy security New Zealand needs” and “Tweaking at the margins was not going to give consumers the security, affordability and flexibility they needed”.<sup>16</sup> The Task Force process provides a platform to act on these words.

Yours faithfully,

<p>Emma-Kate Greer Chief Customer Officer</p>  	<p>Huia Burt Chief Executive Officer</p>  	<p>James Leslie Chief Financial Officer</p>  
<p>Margaret Cooney Chief Operating Officer</p>  	<p>Sharnie Warren Chief Executive</p>  	

<sup>14</sup> [https://www.ea.govt.nz/documents/4487/Independent\\_Retailers\\_email.pdf](https://www.ea.govt.nz/documents/4487/Independent_Retailers_email.pdf), “It could be helpful to clarify the Authority’s strategic direction [Q.5]”.

<sup>15</sup> Electricity Authority, Annual Report, 2022/23.

<sup>16</sup> Electricity Authority, Annual Report, 2023/24.

25 September 2024

Anna Kominik  
Chair  
Electricity Authority

Dr John Small  
Chair  
Commerce Commission

cc Sarah Gilles  
Electricity Authority

Paul Stocks  
Alistair Dixon  
Tamara Linnhoff  
Ministry of Business, Innovation and Employment

## Critical the Energy Competition Task Force works at pace

The Independent Electricity Retailers welcome the establishment of the Energy Competition Task Force (the Task Force) and look forward to working constructively to help ensure there is improved performance in the electricity market.

We support the focus on promoting a more competitive electricity market (“enabling new generators and independent retailers to enter, and better compete in the market”), addressing the related problems with the adequacy and timeliness of generation investment (“more and faster investment in new electricity generation”<sup>1</sup>) and on “put[ting] downward pressure on prices”.

New Zealand Inc can’t afford for competition in the electricity sector to continue to decline.<sup>2</sup> We agree the options detailed in package 1 should be progressed at pace.

We strongly encourage the Task Force to remain open to all options that could directly address the underlying problems and promote (retail and generation) competition; in particular, the option to explore corporate separation of gentailers should be under active consideration. We note this has been a live option for some time, and we recently submitted a proposal for a Code amendment for its enactment.<sup>3,4</sup>

### Backstop approach

Given the Taskforce has been established to help ensure competition is promoted as quickly and effectively as possible, we don't consider a ‘wait and see’/backstop approach would recognise the urgency of the problems the sector faces or that these issues have been developing for some time. This is illustrated by the recent announcements by large industrial users<sup>5</sup> and gentailer profit trends illustrated by the graph below. The high prices and gentailer profits show that there is a very

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<sup>1</sup> See Appendix 1 for evidence supporting the Task Force position.

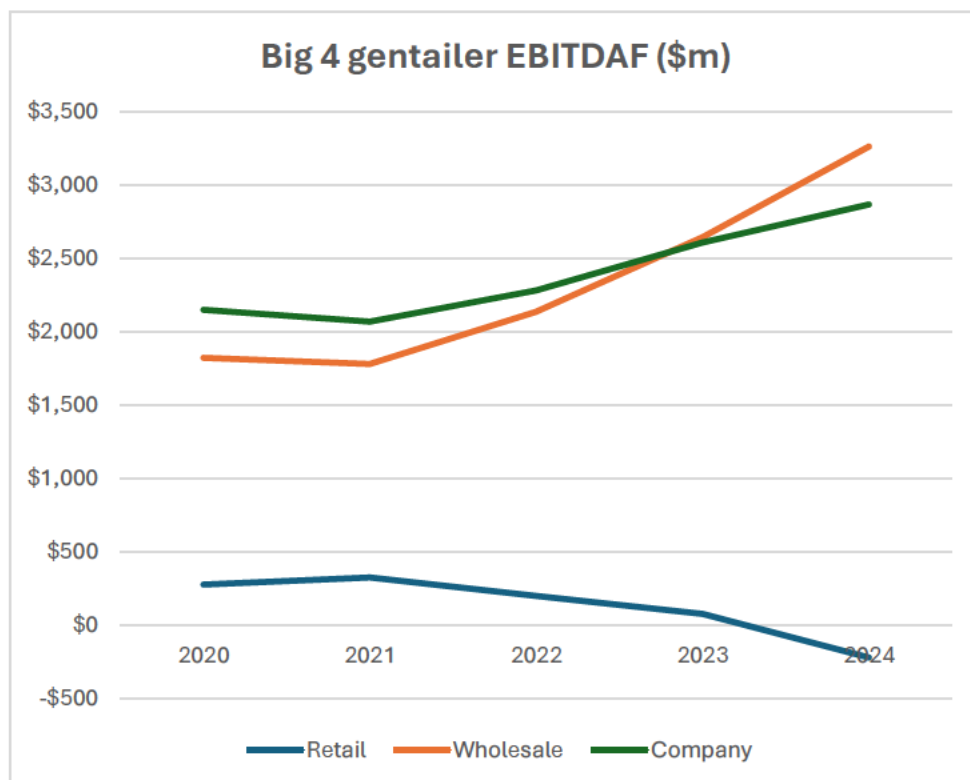
<sup>2</sup> The importance of facilitating and enabling a more competitive market is illustrated by Contact Energy’s proposed acquisition of Manawa. Regardless of whether the Commerce Commission determines it meets the “substantial lessening of competition” threshold for mergers and acquisitions in the Commerce Act it will result in a lessening of competition from an already fragile and weak state.

<sup>3</sup> Letter from Matthew’s Law to Electricity Authority, INDEPENDENT ELECTRICITY RETAILERS – REQUEST FOR URGENT ACTION IN WHOLESALE ELECTRICITY MARKET AND CORPORATE SEPARATION, 7 August 2024.

<sup>4</sup> See Appendix 2 for a discussion on corporate separation.

<sup>5</sup> e.g. <https://www.nzherald.co.nz/whanganui-chronicle/news/winstone-pulp-international-closes-operations-at-ruapehu-mills-hundreds-of-jobs-lost/G6ZKXD7SV5BAJG24V3ZJDPHZQ/>

tangible cost to consumers from lack of resolution, or continued delay in the resolution, of the ongoing competition problems in the electricity market.



There is a large asymmetric risk if the fundamental problems in the electricity market are not adequately addressed, or if there is further delay in addressing them. If a backstop approach is taken, it will be important there are clear triggers and timings set out for adoption of the backstop options to help ensure regulatory certainty for the sector.

### Working with the Task Force

We look forward to seeing the Task Force’s workplan and timeline for progressing the initiatives that have been outlined so far. It is critical the challenges facing the sector are dealt with in a timely manner.

We would also like to understand how existing initiatives such as the risk management review will fit into the broader suite of initiatives. As the Task Force is aware, we have raised substantive concerns about the risk management review and its project initiation document.<sup>6,7</sup>

### Related matters

Our letter of 7 August 2024 to the Electricity Authority, the meeting on 21 August 2024 with the Authority, and the Authority’s (Sarah Gilles) e-mail of 21 August 2024 directly relate to the matters the Task Force is addressing. It appears the Authority’s thinking has evolved since then, but for completeness we provide responses to the 21 August e-mail in the Appendices.<sup>8</sup>

<sup>6</sup> Independent retailers, Removing barriers to competition – the Risk Management Review, 6 March 2024.

<sup>7</sup> We did not consider that the Electricity Authority response to our 6 March letter addressed our substantive concerns: Electricity Authority, Re: Removing barriers to competition – the risk management review, 14 March 2024.

<sup>8</sup> See letter from Matthew’s Law to Electricity Authority, INDEPENDENT ELECTRICITY RETAILERS – REQUEST FOR URGENT ACTION IN WHOLESALE ELECTRICITY MARKET AND CORPORATE SEPARATION, 7 August 2024, and also letter from Matthew’s Law to Electricity Authority, Independent Electricity Retailers, 18 September 2024.





The e-mail dated 21 August 2024 stated:

*it would be useful to hear any further views you have on two points:*

- You raised concerns about the lack of investment in generation in New Zealand. This view seems to contrast with the uplift in committed and actively pursued generation projects shown in the Authority’s most recent [Generation Investment Survey](#) – see slides 12-14. We would welcome any comment you have on this and any additional information*
- Part of the rationale for your proposed Code change, introducing corporate separation and arms’-length rules, is that it will create incentives for generation businesses to expand capacity, and create a liquid market for hedge products. It would helpful if you could provide any specific examples of where similar corporate separation rules have led to these outcomes occurring in practice in other jurisdictions.*

Please don’t hesitate to contact us directly where we can be of any assistance and look forward to engaging with the work of the Task Force.

Yours faithfully,

<p>Emma-Kate Greer Chief Customer Officer [Redacted]</p> 	<p>Huia Burt Chief Executive Officer [Redacted]</p> 
<p>Pavan Vyas Chief Executive [Redacted]</p> 	<p>Margaret Cooney Chief Operating Officer [Redacted]</p> 

## Appendix 1: Generation investment adequacy

The Independent Electricity Retailers welcome that the Task Force will address the need to “encourage more and faster investment in new electricity generation ...”. This goes directly to the Authority’s questions in relation to our concerns about lack of investment in generation.

- *You raised concerns about the lack of investment in generation in New Zealand. This view seems to contrast with the uplift in committed and actively pursued generation projects shown in the Authority’s most recent [Generation Investment Survey](#) – see slides 12-14. We would welcome any comment you have on this and any additional information*

It is clear that to date there has not been sufficient investment in generation and infrastructure to keep up with demand, let alone forecast demand.

While increases in “generation pipeline” may present a promising narrative, this is not the same as actual investment, let alone output, given the relatively lower level of actually constructed generation investment and the uncertainty around how many projects will in fact proceed.<sup>9</sup>

There is an analogy between consented projects and restrictive covenants/land banking. The Commerce Commission has previously identified restrictive land covenants as impacting competition in the markets for residential building supplies, groceries and retail fuels, via its market studies into these sectors of the New Zealand economy. Purchasing, consenting but ultimately not building new generation assets on appropriate sites could have a similar impact on competition as restrictive land covenants.

### Investment in generation has not been sufficient

There has not been enough generation investment since the Authority was established for the Authority, market participants and other stakeholders to have reasonable confidence or surety new generation investment will be sufficient to keep up with demand growth and generation plant retirement/decommissioning.<sup>10</sup>

- The Meridian Chief Executive suggests “...what you can expect to see looking forward is a lot of emphasis on delivering that renewable development pipeline ... and the sector needs it to because the current wholesale prices that we’re seeing are not sustainable not particularly healthy so we do need further investment and we need it relatively quickly. I don’t think there’s a risk of overbuild at this point because we’re coming from we’re probably not at the run rate where we need to be right now.” [emphasis added]<sup>11</sup>

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<sup>9</sup> The level of actual generation investment/“committed” generation is very low relative to the “generation pipeline”. June 2024 EMI data shows that constructed generation since 2013 is just 6.35% of the amount of potential generation in the investment pipeline. June 2024 EMI data shows that only 4.33% (by capacity factor) of the generation ‘pipeline’ is “committed”/3.48% on a megawatts basis.

Electricity Authority new generation pipeline monitoring for 2013-2019 shows there were 22 consented generation projects in 2013 and in 2019, none were under construction, 9 were on hold and the status of the remaining 13 was unchanged.

<sup>10</sup> The Minister of Energy has commented that there has been a lack of investment in generation capacity over the past decade: "I think we haven't seen as much investment back into generation as we should have from the gentailers": <https://www.1news.co.nz/2024/08/25/simeon-brown-on-nzs-energy-crisis-Ing-imports-solar-power/#:~:text=The%20minister%20acknowledged%20there%20had,told%20Q%2BA's%20Jack%20Tame>

Similarly, the Associate Minister of Energy has expressed concern that “The gentailers have not invested in giving New Zealanders energy security by additional capacity” and, instead, “exploit scarcity”: <https://www.rnz.co.nz/news/national/525898/shane-jones-threatens-to-end-electricity-authority-if-it-doesn-t-man-up>

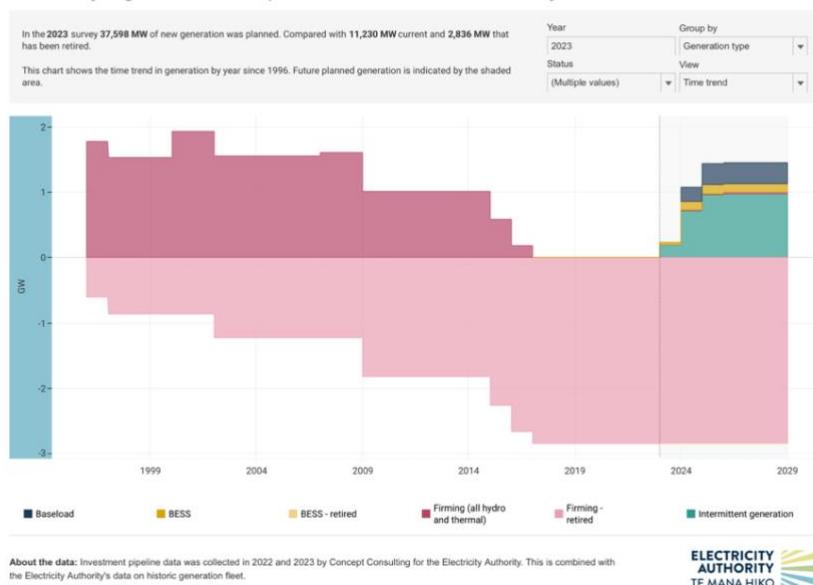
<sup>11</sup> <https://www.meridianenergy.co.nz/about-us/investors/reports/investor-presentations>



- Transpower has commented that “there is an increasingly tight supply-demand balance to meet current energy needs” and “Investment in flexible capacity and resources has not kept pace with demand, a situation that became clear during the last two winters. The tightness of supply-side capacity to meet demand also means it has become increasingly difficult for Transpower and generators to take the planned maintenance outages that are essential to the longer-term reliability of the electricity system.”<sup>12</sup>
- Since 2009 new generation has not kept up with retired/decommissioned generation. From 2022 most new generation is intermittent, replacing previous (thermal) base-load.<sup>13</sup>

## Investment pipeline

A summary of generation and responses to the 2023 investment survey



- Transpower has warned that not all generation that is consented is commissioned and there is a risk supply margins may not be sufficient to meet demand from 2025. According to Transpower “International experience is typically that only around 20% of proposed projects are ultimately developed.”<sup>14</sup>

## The Independent Electricity Retailers share the concerns the Electricity Authority has raised

The Electricity Authority commented during its wholesale market review that “The total quantity of definitely committed investment projects is not enough to replace existing thermal generation.”<sup>15</sup>

More recently, in late August, as part of proposals to improve visibility of generation investment, the Authority has commented that “Since 2021 forward prices have been consistently above LCOE, which more broadly signals a lag in market participants acting on price signals due to impediments to investment, as discussed in the 2022 investment survey.”<sup>16</sup>

<sup>12</sup> Transpower, Transpower’s submission to the MBIE consultation – Advancing New Zealand’s energy transition, 7 November 2023.

<sup>13</sup> <https://public.tableau.com/app/profile/electricity.authority/viz/Investmentpipeline/Investmentpipeline>

<sup>14</sup> Transpower, submission to MBIE, Transpower submission on the Electricity Demand and Generation Scenarios (EDGS), 6 June 2023.

<sup>15</sup> Electricity Authority, MARKET MONITORING REVIEW OF STRUCTURE, CONDUCT AND PERFORMANCE IN THE WHOLESALE ELECTRICITY MARKET SINCE THE POHOKURA OUTAGE IN 2018, information paper, undated/published October 2021.

<sup>16</sup> Electricity Authority, Improving visibility of generation investment: clause 2.16 information notices Consultation paper, 21 August 2024.



The Authority went on to say that the “Electricity Networks Aotearoa ... summarised this well” referencing their concerns that:<sup>17</sup>

“Futures of wholesale electricity prices have been elevated and highly volatile over the past five years with prices today close to twice what they were in 2017. A key concern is the disconnect between wholesale price futures and the long run marginal cost (LRMC) of generation. This disconnect indicates a failure of the market to function effectively. If it was working properly the futures prices above LRMC of generation would spur a material increase in generation investment which in turn would lead to a decline in wholesale prices.

“The consequences of the market failing to deliver additional generation capacity has manifested itself in elevated risk of generation shortfalls at peak times and unduly high prices to industrial, commercial, and residential consumers at time when general inflation is at the highest level for a generation.”

Similarly, Concept Consulting, in reports for the Electricity Authority, acknowledge concerns that the four largest don’t have sufficient incentives to invest in generation may be valid. In 2022, Concept Consulting commented:

“The four largest generators have significantly lifted their development efforts in recent years –with major committed projects underway and more potential developments under consideration. While these factors should reduce wholesale price pressures, it is unclear whether major suppliers’ investment pace is being tempered by cannibalization concerns.

“Such concerns can arise due to the depressing impact a new project may have on revenue from existing generation in an incumbent developer’s portfolio. If a cannibalization effect applies, an incumbent supplier can be better off by delaying or foregoing investment, even though the project is economic it is own right.

“... based on underlying incentives, the concern appears valid and likely merits closer monitoring.”<sup>18</sup>

In 2023 Concept Consulting’s comments about investment were more positive than the previous year, but it retained the view that there could be valid concerns that the 4 largest generators are under-investing:

“While the four largest generators have significantly lifted their development efforts in recent years – with major committed projects underway and more potential developments under consideration, some independents suggested that it was hard to attract interest from major generators, even with apparently attractive projects/power purchase offers – possibly due to cannibalization concerns.”<sup>19</sup>

### **Market participants other than gentailers DO NOT consider that current market settings facilitate timely investment**

The Electricity Authority market participant surveys show that all market participant categories other than gentailers consider that the current market settings in both the wholesale market and the hedge market DO NOT facilitate timely investment.

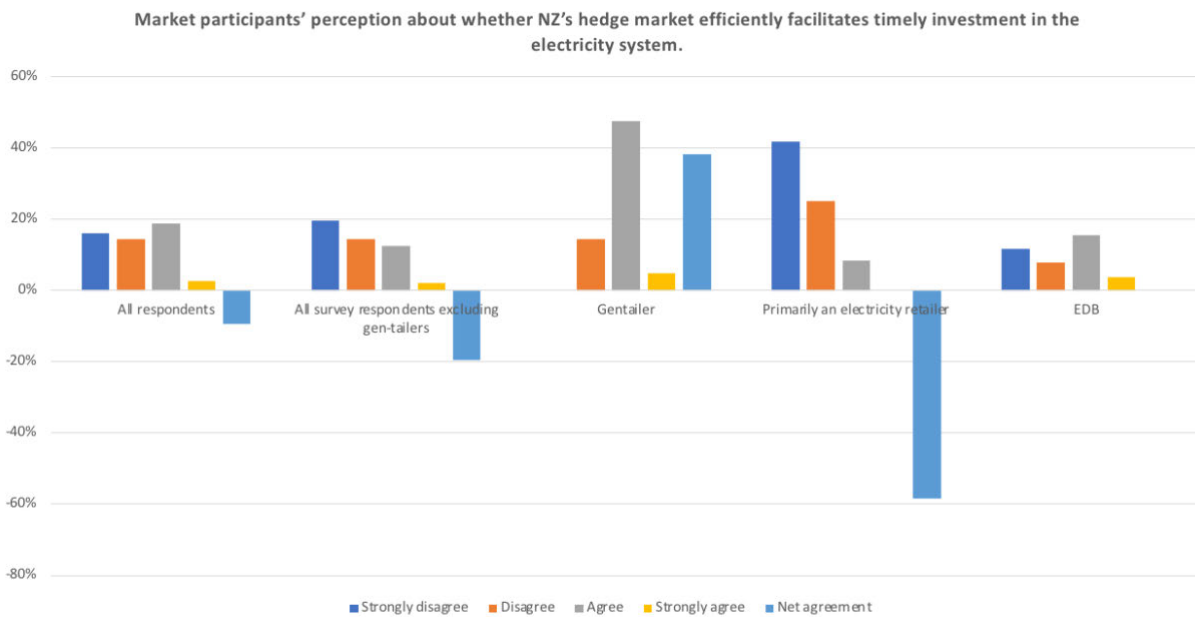
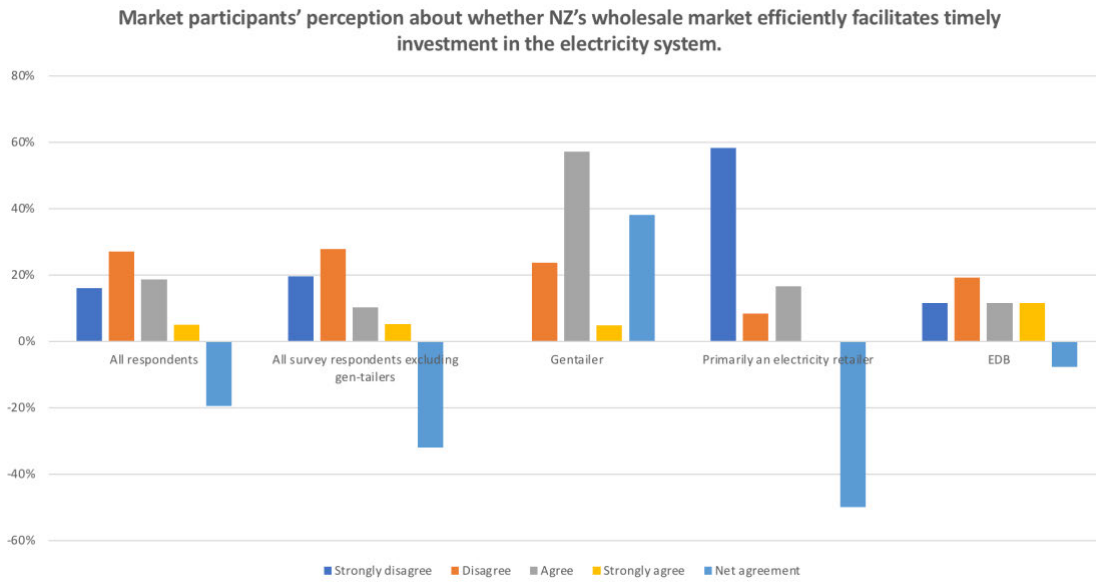
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<sup>17</sup> Electricity Networks Aotearoa, Briefing to Incoming Energy Minister, November 2023.

<sup>18</sup> Concept Consulting, Generation investment survey 2022, July 2022.

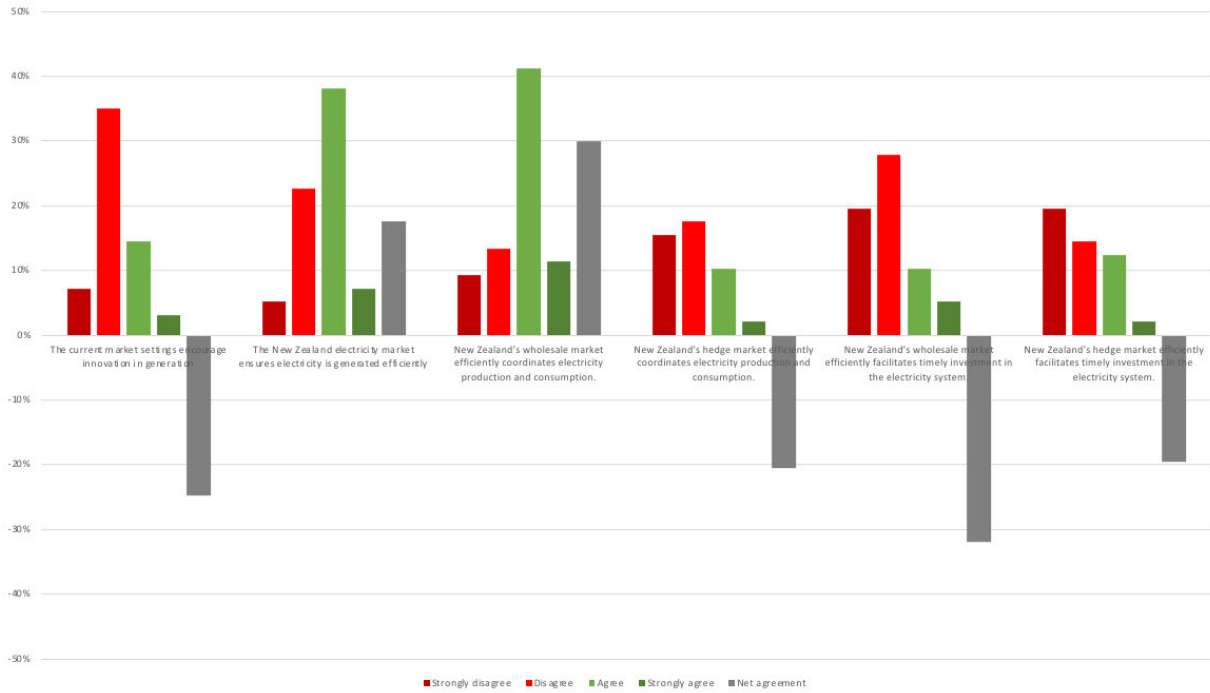
<sup>19</sup> Concept Consulting, Generation investment survey 2023 update, undated.

Net agreement<sup>20</sup> amongst all respondents that the wholesale [hedge] market efficiently facilitates timely investment is -32% [-20%].

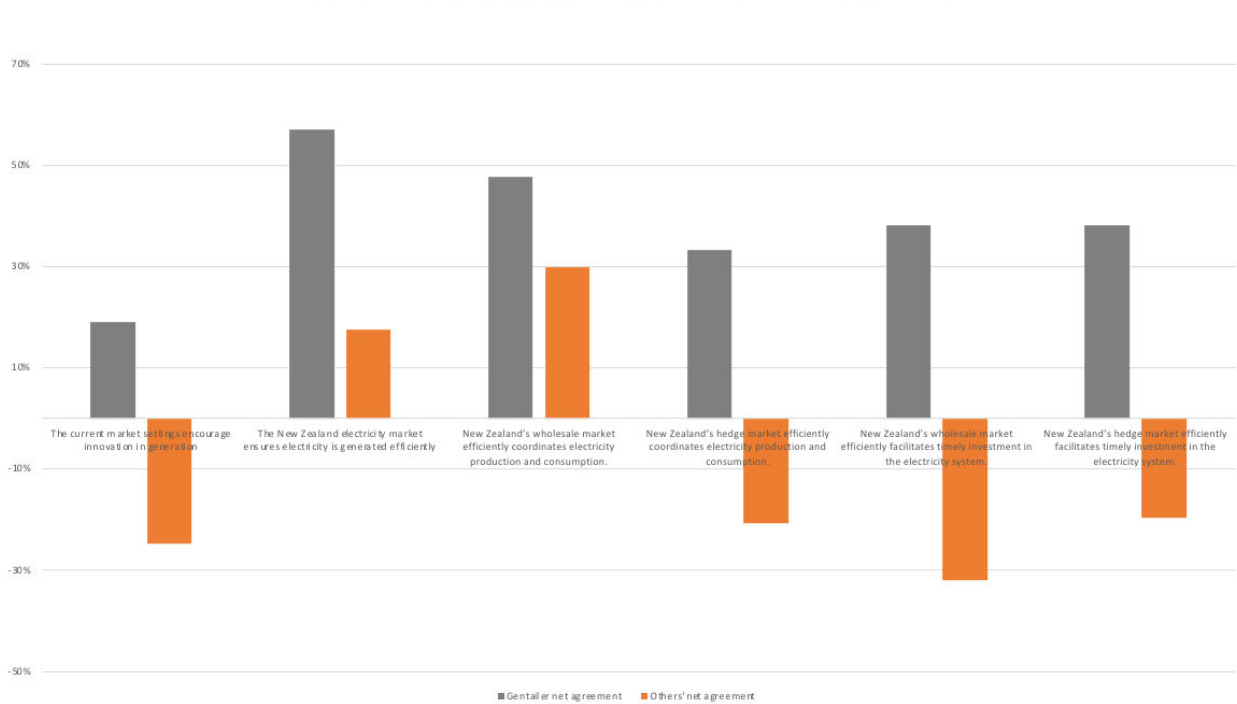


<sup>20</sup> Net agreement = strong agreement + agreement – strong disagreement – disagreement.

Market participants' (excl gentailers) perceptions of generation investment efficiency/timeliness



Gentailers v everybody else's perceptions of generation investment efficiency/timeliness



## Appendix 2: Corporate separation and arm's-length rules

We consider that both separation options and arms'-length/non-discrimination rules should be under active consideration by the Task Force. It could be useful for the Task Force to commission a study into the application of corporate separation and arm's length rules, including the experience in New Zealand.

The OECD has made recommendations and prepared a number of reports regarding structural separation in regulated industries, which provides detailed analysis of the benefits of structural separation.

While no two markets are the same and there will not therefore be an exact comparator, there are many instances where regulation has been used to address distortions in markets arising from market power at one functional level of the market, including in Part 6A of the Electricity Industry Participation Code.

- *Part of the rationale for your proposed Code change, introducing corporate separation and arms'-length rules, is that it will create incentives for generation businesses to expand capacity, and create a liquid market for hedge products. It would helpful if you could provide any specific examples of where similar corporate separation rules have led to these outcomes occurring in practice in other jurisdictions.*

We agree with the Electricity Authority that “Vertical integration may increase costs for new entrants by reducing liquidity in the forward market and reducing the demand for PPAs supporting new-entrant generation.”

As set out in our letter of 7 August 2024, it is consistent with economic theory that corporate separation will address market power concerns (in a market consisting of a vertically-integrated oligopoly) and improve incentives to invest. In that letter we referenced best practice and the levels of separation outlined by Cave.<sup>21</sup>

The history and benefits of structural separation are also outlined by Lina Khan (now head of the FTC) in her article “The Separation of Platforms and Commerce”.<sup>22</sup>

The OECD has made recommendations and prepared a number of reports regarding structural separation in regulated industries, which provides detailed analysis of the benefits of structural separation.<sup>23</sup>

While no two markets are the same and there will not therefore be an exact comparator, there are many instances where regulation has been used to address distortions in markets arising from market power at one functional level of the market:

- Part 6A of the Electricity Industry Participation Code requires corporate separation of generation/retail and distribution businesses and applies arms-length rules.
- In the UK electricity market, standard conditions imposed on industry participants include separation and non-discrimination conditions applying between generation and retail

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<sup>21</sup> See paragraph 86 of our letter and Martin Cave, Six Degrees of Separation: Operational Separation as a Remedy in European Telecommunication Regulation, Communications & Strategies, no 64, 4th quarter 2006, p.89.

<sup>22</sup> [THE SEPARATION OF PLATFORMS AND COMMERCE - Columbia Law Review](#)

<sup>23</sup> [Structural Separation in Regulated Industries | OECD](#)

businesses.<sup>24</sup> These rules came into effect with UK deregulation, so there is no “before and after” comparison that can be made. However, they were deemed necessary to prevent the competition risks and market distortions that could arise from vertical integration of generation and retail businesses.

- In the telecommunications sectors in New Zealand, there was first operational and structural separation of Telecom New Zealand, and then the UFB projects which included obligations around non-discrimination and equivalence of inputs.
- The Commerce Commission prepared detailed guidance in 2020 on the equivalence and non-discrimination provisions for telecommunications regulation.<sup>25</sup>
- The postal deed of understanding between New Zealand Post and the government includes an obligation to provide competitors with access to the NZ Post postal network “on terms and conditions no less favourable than those offered to customers in the same circumstances”.<sup>26</sup>
- The Grocery Industry Competition Act provides for wholesale access.<sup>27</sup>

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<sup>24</sup> See Section 6(2) Electricity Act 1989 (UK) and Conditions 15, 17 and 17A of the Electricity Generation Licence: Standard Conditions, consolidated on 28 March 2024

<sup>25</sup> [Equivalence-and-non-discrimination-guidance-30-September-2020.pdf \(comcom.govt.nz\)](#); and see the Commerce Commission fact sheet: [Equivalence-information-sheet-22-December-2020.pdf \(comcom.govt.nz\)](#)

<sup>26</sup> Clause 16 Deed of Amendment and restatement dated 12 December 2013 (See also [Postal deed of understanding | Ministry of Business, Innovation & Employment \(mbie.govt.nz\)](#))

<sup>27</sup> Part 3 of the Grocery Industry Competition Act 2023