

MetService and NIWA

Closure report of investigation under sections 27 and 36 of the Commerce Act 1986 into the price and non-price terms on which competitors can access real-time data collected by Meteorological Service of New Zealand Limited and National Institute of Water and Atmospheric Research Limited

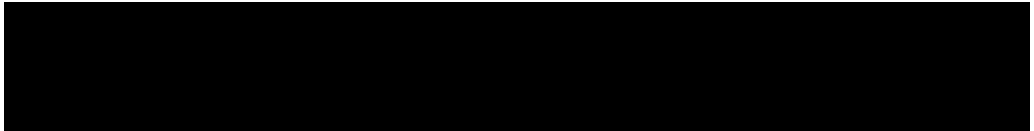
Date: 31 March 2021

Purpose, conclusions and recommendations

Purpose

1. This document is a closure report of an investigation conducted under sections 27 and 36 of the Commerce Act 1986 (the Act) into the price and non-price terms on which competitors in downstream markets can access real time weather data collected by Meteorological Service of New Zealand Limited (MetService) and National Institute of Water and Atmospheric Research Limited (NIWA). This report is for consideration by the Commerce Act Division.

Conclusion

2. We have not reached a conclusion on whether the conduct of MetService and NIWA is in contravention of sections 27 and/or 36 of the Act. However, we recommend that we close, with no further action, our investigation into the price and non-price terms on which competitors can access real time weather data. This is because:
 - 2.1 we do not consider that us taking enforcement action under Part 2 of the Act is the best means by which to solve any issues investigated around the price and non-price terms on which competitors can access real time weather data;
 - 2.2 our preference in this case is to encourage compliance with the Act through the use of non-enforcement options, in particular the provision of guidance (based on the views set out in this report);
 - 2.3 it appears that commercial access arrangements are likely to have been reached between MetService and WeatherWatch Services Limited (WeatherWatch) to access real time weather data ; and
 - 2.4 

Recommendations

3. We recommend that Division:
 - 3.1 note the report;
 - 3.2 agree to close the investigation; and
 - 3.3 note that we will communicate our decision and reasons for closing the investigation to MetService, NIWA, access seekers and the Ministry of Business Innovation and Employment (MBIE), which will provide guidance to parties on the issues.

The parties

MetService

4. MetService is a State-Owned Enterprise established under the State-Owned Enterprises Act 1986.

5. Through a contract with the Ministry of Transport, MetService is New Zealand's National Meteorological Service. It is responsible for delivering a range of weather services, including forecasts and warnings of adverse weather tailored to the needs of the general public, the maritime community and the aviation sector, within New Zealand and in the wider South Pacific region.
6. Relevant to this investigation, the real time (or near real time) weather data that MetService collects includes surface weather observation data (eg, observations of wind, temperature, humidity and rainfall) from a network of over 200 automatic weather stations and rain radar data from a network of 10 weather radars.

NIWA

7. NIWA is a Crown Research Institute established to undertake scientific research and related activities in accordance with the Crown Research Institutes Act 1992.
8. NIWA's purpose is to enhance the economic value and sustainable management of New Zealand's aquatic resources and environments, to provide understanding of climate and the atmosphere, and increase resilience to weather and climate hazards to improve the safety and well-being of New Zealanders.
9. Relevant to this investigation, the real time (or near real time) weather data that NIWA collects includes surface weather observation data from a network of over 140 automatic weather stations.

Our investigation and the issues we have examined

10. We opened our investigation on 4 September 2019. Prior to this, we had received complaints over many years (and as far back as 2011) about the price and non-price terms on which competitors in downstream markets can access real time weather data. These complaints were mostly received from WeatherWatch, but we had also received a complaint from another party in 2013.¹
11. We decided to open an investigation due to:
 - 11.1 the importance of weather data and its impact on a number of economic aspects such as agriculture and viticulture, and safety;
 - 11.2 the potential loss of innovation in the forecasting sector, which could have flow on effects in relevant sectors that would otherwise benefit from that innovation (eg, agriculture). The *Weather Data Review* identified that license restrictions imposed in New Zealand by MetService and NIWA may be limiting innovation and economic opportunities in value-added products and services using weather data;² and
 - 11.3 the amount of commerce involved. MetService's website is within the top ten most visited New Zealand websites which is likely to produce significant

¹ After the investigation was opened, a third party contacted us to raise concerns about access to real time weather data.

² [Weather permitting: Review of open access to weather data in New Zealand](#) (April 2017).

advertising revenue. Commercial contracts with government departments and private companies are also worth a significant amount.

12. Our investigation has gathered information from MetService, NIWA, access seekers and other industry participants through a combination of interviews, information requests and publicly available information. The information gathered includes pricing and cost data that we have analysed from an economic perspective.

The application of Part 2 of the Act to the issues

13. In assessing competition issues around the price and non-price terms on which competitors in downstream markets can access real time weather data, we broadly defined the relevant markets as being national markets for the collection of data, for wholesale access to data and for the provision of downstream weather/meteorological services and/or information. We have not reached any definitive views on the precise boundaries and scope of any markets. However, we note that there may be different collection and wholesale markets for different types of weather data. There are likely to be multiple downstream markets for the provision of different products and services (eg, weather information services provided free to the public).
14. At a high-level, the theory of harm that we have investigated is that MetService and/or NIWA could (through price and non-price terms) restrict access to weather data that is necessary for other parties to compete with them in downstream markets. Restricting access would likely have the effect of weakening competition in downstream markets, including through raising barriers to entry and weaker innovation.
15. We have not reached any definitive views on the extent of market power of each of MetService and NIWA and have not needed to do so, given the outcome of our investigation.
16. Rather than assessing in turn each of the precise elements of a breach of each of sections 27 or 36, the focus of the investigation has been on assessing whether the price and non-price terms offered by MetService and NIWA for access to real time weather data:
 - 16.1 are inconsistent with the price and non-price terms that would be offered in competitive markets;
 - 16.2 are inconsistent with the general principles on which access prices should be determined;
 - 16.3 would not enable an 'equally efficient competitor' to compete in downstream markets; and
 - 16.4 are negatively impacting on the ability of WeatherWatch and other parties to compete and innovate in downstream markets.
17. We consider that access to data in this matter need not be free but have not reached a conclusion on what appropriate price levels or price structures for access to real

time weather data should be. We note that these may vary depending on the how an access seeker intends to use the data. We also consider that it may not be unreasonable to impose some restrictions on the use of data. We consider that the preferred outcome is for access price levels and structures, and any restrictions on access and use of data, to be determined through negotiations conducted in good faith between MetService/NIWA and an access seeker.

18. Because it appears that commercial access arrangements are likely to have been reached between MetService and WeatherWatch, we have not reached a conclusion on whether the conduct of MetService and NIWA is in contravention of sections 27 and/or 36 of the Act (or on the likelihood of the conduct being in contravention of the Act), or on each of the points set out at [16]. However, we set out below our views on:

- 18.1 the suitability of ECPR for determining access prices for weather data;
- 18.2 the general principles on which access prices should be determined (which could also be used to facilitate good faith negotiations);
- 18.3 the non-price terms on which weather data can be accessed; and
- 18.4 the principles on which parties can negotiate access to weather data.

The suitability of ECPR for determining access prices for weather data

19. Courts in New Zealand have previously applied the Baumol-Willig rule, known as the Efficient Component Pricing Rule (ECPR) in section 36 access pricing cases. In *Data Tails*, the High Court concluded that Telecom had priced its services above competitive levels (and contravened section 36) because it priced above ECPR. The High Court found that a company in Telecom's position, but without market power, would not set prices for data tails at above ECPR.³ On appeal, the Court of Appeal went further, finding that ECPR compliant prices may contravene the Act. They endorsed the view, which they found was implicit in the *Telecom v Clear* Privy Council decision,⁴ that an incumbent cannot charge an access price above which a downstream rival is unable to compete.
20. While ECPR is often relevant in access pricing situations for regulated firms, its appropriateness has been questioned when its effect is to exclude efficient competitors, which could be the case here. In the data collection/wholesale data access markets in which MetService and NIWA operate and the downstream markets in which access seekers wish to compete with MetService and NIWA, determining access prices based on ECPR may not result in the best outcome. There are limitations of ECPR in markets where there is not a one to one correlation between providing access and the loss of downstream revenue. In such markets, an ECPR-based access price may require an access seeker (and rival) to pay a high price upfront for access before earning revenues in any downstream markets. This could

³ Commerce Commission v Telecom Corporation of New Zealand (9 October 2009) HC, Auckland, CIV-2004-404-1333 [43].

⁴ Telecom Corporation of New Zealand Limited v Clear Communication Ltd [1995] 1 NZLR 385 (PC).

result in an access seeker having only a narrow margin on which to compete and could create a barrier to entry in downstream markets.

21. We consider that ECPR is not the only methodology that can inform the determination of access prices in this matter. The Court of Appeal in *Data Tails*, applying the Supreme Court's decision in 0867, held that ECPR may result in prices that fail the counterfactual test, in that they permit the recovery of profit that would not be recoverable in a workably competitive market, or exclude competition.⁵ In such circumstances, ECPR is not appropriate.
22. There may be other methods by which access prices can be determined that are more flexible and result in access prices that do not deter competition in relevant markets. Some of these alternative approaches may be more suitable for determining access prices for real time weather data, particularly where the granting of access to data may expand rather than simply reallocate any revenue and value between suppliers in downstream markets.

The general principles on which access prices should be determined

23. In terms of the general principles on which access prices may be determined (which could also be used to facilitate good faith negotiations), we consider that any access prices set by MetService and NIWA should:
 - 23.1 allow MetService and NIWA to recoup the cost of providing access (including any opportunity costs), and some of the fixed costs associated with the collection of the data; and
 - 23.2 at a minimum, enable an 'equally efficient competitor'⁶ to compete in downstream markets.
24. We consider that in both competitive markets and markets that are not competitive, access providers will take opportunity cost into account when determining access prices. Vertically integrated companies like MetService and NIWA (that are not required by sector specific regulations to provide access) will only provide access to upstream inputs, if doing so, will result in a situation that is better or at least as good compared to a situation where access is not provided. Although, we note that any opportunity cost is likely be lower in a competitive market than in a market with a monopoly provider, where monopoly rents or downstream profits have not already been competed away. There is nothing that we can do about this under section 36 of the Act.

The non-price terms on which weather data can be accessed

25. As already noted, we consider that it may not be unreasonable to impose some restrictions on the use of data (particularly in terms on the on-sale of data). This is because:

⁵ *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2012] NZCA 278 at [233]-[248].

⁶ An equally efficient competitor is an access seeker that is apply to downstream supply goods or services as efficiently (or more efficiently) and a vertically integrated access provider.

26. Neither MetService or NIWA is subject to ex ante price or access regulation. Given the difficulties in determining appropriate access prices on an ex post basis, we consider that the best approach is for parties that seek access to the real time weather data collected by MetService and/or NIWA to negotiate the price and non-price terms of access (subject to requirements of the Act).

During the course of our investigation, we encouraged WeatherWatch to enter into negotiations with MetService and NIWA. We encourage other access seekers to do the same. On 10 March 2021,

28. We consider that negotiations around access to real time weather data would be assisted if MetService and NIWA were to approach all access negotiations on the same basis, following a clear set of principles. To be transparent, MetService and NIWA should ideally publish their principles of negotiation on their websites. This would mean that it would be clear to access seekers the information they need to provide MetService and NIWA when requesting access, and the process that will be involved in any negotiation on the terms of access.

29. It is up to MetService and NIWA to each formulate their own principles of negotiation, as long as they are consistent with those that would apply in a workably competitive market. While, we do not consider it is our role to approve any negotiating principles that MetService and NIWA formulate around access to real time weather data, we suggest that any principles should:

29.1 involve both access seekers and access providers negotiating in good faith;

- 29.2 see access being provided to real time weather data on terms that support competition and innovation in downstream markets;
- 29.3 see access being provided to real time weather data on price and non-price terms (including possible data use restrictions) that benefit both access seekers and access providers;
- 29.4 include flexible pricing structures that enable downstream entry (such as volumetric pricing, royalties or profit-sharing); and
- 29.5 minimise the need for access seekers to share commercially sensitive information with MetService and NIWA (and vice versa).

Assessment of enforcement criteria

- 30. In considering what outcome to recommend for this investigation, we have assessed the matter against the Commission's enforcement criteria.⁸ These criteria are the extent of detriment, seriousness of conduct and public interest.
- 31. Having undertaken this assessment, we recommend that we close, with no further action, our investigation into the price and non-price terms on which competitors can access real time weather data. Our preference in this case is to encourage compliance with the Act using non-enforcement options, in particular the provision of guidance (based on the views set out in this report).

Extent of detriment

- 32. Detriment is assessed by applying both quantitative and qualitative measures to determine the impact and consequences of the alleged contravention. The greater the likely level of detriment arising from the conduct in question, the more likely it is that we will take or continue with enforcement action.
- 33. We opened our investigation because of concerns that competition in downstream markets might be affected by the price and non-price terms on which rivals can access real time weather data from MetService and NIWA, and innovation could be stifled. However, given that it appears that commercial access arrangements are likely to have been reached between MetService and WeatherWatch to access real time weather data, [REDACTED]

Seriousness of conduct

- 34. The more serious the conduct, the more likely it is that we will begin or continue enforcement action. Conduct is regarded as being more serious where it is deliberate, repeated, ongoing or industry wide, and/or where there is a serious departure from expected lawful commercial behaviour.
- 35. [REDACTED]

⁸ <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>.

[REDACTED] have exhibited a degree of openness to engaging with the Commission on these matters. The conduct of MetService and NIWA is [REDACTED].

In the public interest

36. We have regard to a number of factors in the wider public interest. The questions we consider, and weigh together, are set out below.

36.1 Is there likely to be widespread public interest in the issue?

36.2 Would a decision not to commence or continue enforcement action likely undermine public confidence in the law?

36.3 Is it more appropriate for the Commission, rather than another agency or an affected party, to address the issue?

36.4 Are there any mitigating or aggravating features involved?

36.5 Do the personal circumstances of the parties involved argue for or against enforcement action?

36.6 Is there a significant need to clarify the law or to reinforce the application of the legislation?

36.7 Are the issues timely?

37. A decision not to take enforcement action in this case is unlikely to undermine public confidence in the law. We do not consider that us taking enforcement action under Part 2 of the Act is the best means by which to solve any issues investigated around the price and non-price terms on which competitors can access real time weather data. We also consider that circumstances argue against us taking enforcement action against MetService and NIWA. This is because:

37.1 it appears that commercial access arrangements are likely to have been reached between MetService and WeatherWatch to access real time weather data ; and

37.2 [REDACTED] We also note that NIWA has currently only provided WeatherWatch with a quote for access and this is not necessarily a take it or leave it position . [REDACTED]