

# **Draft Misuse of Market Power Guidelines**

**Chorus submission to the  
Commerce Commission**

**C H ● R U S**

## Summary

1. We welcome the opportunity to submit on the Commerce Commission's (**Commission**) Draft Misuse of Market Power Guidelines (**the Draft Guidelines**).
2. Chorus' primary interest is legal certainty. We need to clearly understand our legal obligations and assess the lawfulness of conduct in advance. Given the strong influence of Commission guidance on firms' behaviour, we are concerned that the Draft Guidelines could have the effect of deterring pro-competitive or competitively neutral conduct which would be an adverse outcome for New Zealand consumers.
3. We ask that the Commission provides greater clarity as to:
  - 3.1 conduct which is unlikely to fall within the purview of the new section 36; and
  - 3.2 its intended approach to enforcement.

### It is important that the Commission's guidance provides certainty and predictability for businesses

4. As we noted in our submission to the Select Committee on the Commerce Amendment Bill,<sup>1</sup> businesses need to reliably determine in advance the legal consequences of their actions. This is particularly the case where substantial penalties can be imposed for breach of section 36.
5. The Draft Guidelines do not provide businesses with adequate information to inform their commercial decision-making. Rather, the Draft Guidelines restate the general principles relating to misuse of market power, which are equally applicable to the previous formulation of section 36. The case studies provided are a useful indication of the types of conduct that may warrant examination under section 36, but they are incomplete. The facts set out in those examples would not, by themselves, constitute a breach of section 36. The Commission would err if, in future, it treated those case studies as examples of breaches of the law, as opposed to merely a starting point for its analysis.
6. Given the Draft Guidelines note that the amended provision is "likely to capture anti-competitive conduct that was not previously prohibited"<sup>2</sup> and "conduct may be harmful to competition when undertaken by a firm with substantial market power, but not when undertaken by a firm without",<sup>3</sup> they should be clear as to how the Commission sees the enforcement goalposts shifting.

### The Draft Guidelines lack specificity

7. As the Commission is well-aware, the time, cost, and resource required from businesses subject to a Commission investigation is substantial, irrespective of whether the investigation results in enforcement action.
8. To this end, the lack of specificity in the Draft Guidelines poses an issue for New Zealand's larger businesses who cannot avoid the purview of section 36 in their day-to-day activities. It is critical that these businesses, which are the backbone of the New Zealand economy, aren't hamstrung from making efficient business decisions by

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<sup>1</sup> *Chorus Submission on Commerce Amendment Bill*, 30 April 2021, at [7].

<sup>2</sup> *Draft Misuse of Market Power Guidelines*, 18 October 2022, at [4].

<sup>3</sup> *Draft Misuse of Market Power Guidelines*, 18 October 2022, at [21].

fear of Commission enforcement action. To illustrate, a large business who can leverage its scale economies to offer more efficient pricing and service levels than a new entrant should not be deterred from doing so out of concern that the new entrant will complain to the Commission.

9. It is imperative that New Zealand's leading businesses are not deterred from engaging in desirable and vigorous competition which benefits consumers but could be to the detriment of individual competitors; the amended section 36 should not chill procompetitive or competitively neutral conduct. That would be a worse outcome for New Zealand consumers.
10. Paragraph 19 of the Draft Guidelines recognise that firms with substantial market power are not prohibited from 'out-competing' their competitors. The Commission should also acknowledge that, unlike in Europe, a firm with market power in New Zealand is not under a general duty to assist its competitors. It does not have to "hold an umbrella over inefficient competitors".<sup>4</sup>

### **The Draft Guidelines should reflect New Zealand's unique market conditions**

11. We note that the Draft Guidelines draw heavily from the ACCC's guidance on section 46 of the Competition and Consumer Act 2010.<sup>5</sup> While we understand that section 36 of the Act is now aligned with its Australian counterpart, it is not clear whether the Commission has considered how New Zealand's unique market conditions will impact the application of the newly formulated misuse of market power provisions.
12. As a general observation, our markets tend to be highly concentrated, which lends itself to the increased likelihood of businesses having market power. The Commission must be wary of classifying routine business conduct by large firms in highly concentrated markets as anti-competitive when it is more likely to be competitively neutral or pro-competitive.
13. An important differentiator between anticompetitive and procompetitive conduct in concentrated markets is the expected impact on price, output and quality of services. We note that the definition of "workable or effective competition" adopted by the Commission in the Draft Guidelines dates from the 1987 *Mutual Rental Cars* case. That definition, typical for its time, focuses on market participation but excludes reference to the types of economic impacts that are accepted markers of anticompetitive effect. The Commission should also have regard to more modern formulations, such as that in *Wellington International Airport Ltd v Commerce Commission*<sup>6</sup> which discusses the relationship between rivalry and the economic outcomes of workable competition.

### **The Commission's guidance influences firms' behaviour**

14. While the Commission's guidance is not binding on New Zealand courts, the reality is it will have a strong influence on firms' behaviour. Irrespective of a Commission decision to pursue enforcement action, larger businesses still face the risk that their conduct will be subject to an investigation. To help businesses avoid unnecessary cost and disruption, the Commission should provide more practical guidance on conduct that is

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<sup>4</sup> *Telecom v Commerce Commission (Data Tails)* [2012] NZCA 278 at [124]. While this case involved the current formulation of s 36, the Court of Appeal was stating a general principle of competition law in New Zealand, which is equally applicable under the amended s 36.

<sup>5</sup> Available at <https://www.accc.gov.au/publications/guidelines-on-misuse-of-market-power>.

<sup>6</sup> *Wellington International Airport Ltd v Commerce Commission* [2013] NZHC 3289 at [13]-[15], [18] and [22].

unlikely to fall within the purview of section 36 and its intended approach to enforcement.

### Exceptions overlooked

15. In the Appendix to the Draft Guidelines the Commission has set out a guide to exceptions to the Commerce Act found in other legislation. We note that several exceptions to the Commerce Act which appear in the Telecommunications Act have been omitted.<sup>7</sup> The Commission should ensure that this list of exceptions is complete.

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<sup>7</sup> Exemption from Part 2 for standard terms determinations (section 63); Authorisations under the Commerce Act for Ultrafast Broadband, Rural Broadband and Mobile Blackspot initiatives (subparts 6 and 7 of Part 4AA); Exemption from Part 2 for prices of fibre fixed line access services where maximum prices are prescribed in regulation (section 205); Exemption from Part 2 for registered undertakings (clause 9 of Schedule 3A).